

Cvk. 2102669-85-0258413

THE
AMERICAN JOURNAL
OF
INTERNATIONAL LAW



85

VOLUME 60

1966



PUBLISHED BY

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

(Incorporated by Act of Congress, Sept. 20, 1950)

PUBLICATION OFFICE:
LANCASTER PRESS, INC.
LANCASTER, PA. 17604

EXECUTIVE AND EDITORIAL OFFICE:
2223 MASSACHUSETTS AVE., N.W.
WASHINGTON, D.C. 20008

Copyright © 1966 by The American Society of International Law

BOARD OF EDITORS

Editor-in-Chief

WILLIAM W. BISHOP, JR., University of Michigan Law School

RICHARD R. BAXTER
Harvard Law School

HARDY C. DILLARD
University of Virginia Law School

RICHARD A. FALK
Princeton University

ALWYN V. FREEMAN
Detroit, Michigan

LEO GROSS
Fletcher School of Law and Diplomacy

JOHN N. HAZARD
Columbia University

JAMES NEVINS HYDE
New York, N. Y.

OLIVER J. LISSITZYN
Columbia University

BRUNSON MACCHESNEY
Northwestern University Law School

MYRES S. McDOUGAL
Yale Law School

H. C. L. MERILLAT
Washington, D. C.

STANLEY D. METZGER
Georgetown University Law Center

STEFAN A. RIESENFELD
University of California Law School

OSCAR SCHACHTER
New York, N. Y.

LOUIS B. SOHN
Harvard Law School

ERIC STEIN
University of Michigan Law School

JOHN R. STEVENSON
New York, N. Y.

RICHARD YOUNG
Van Hornesville, N. Y.

Honorary Editors

HERBERT W. BRIGGS
Cornell University

CHARLES G. FENWICK
Washington, D. C.

HANS Kelsen
University of California

JOSEF L. KUNZ
University of Toledo

PITMAN B. POTTER
American University

JOHN B. WHITTON
Princeton University

ROBERT R. WILSON
Duke University

QUINCY WRIGHT
University of Virginia

Secretary of the Board of Editors

ELEANOR H. FINCH

The object of The American Society of International Law is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. For this purpose it co-operates with similar societies in this and other countries.

Membership in the Society is open to all persons of good moral character interested in the objectives of the Society. Membership dues are: Regular, \$15.00 for residents of the United States, \$10.00 for non-residents; professional, \$25.00; intermediate, \$10.00; student, \$5.00. Application forms and further information may be obtained from the Membership Secretary of the Society at the address given below.

The JOURNAL is published quarterly and is supplied to all members of The American Society of International Law without extra charge. The annual subscription to non-members of the Society is \$15.00 and includes subscription to the *Proceedings* of the Society. Available single numbers of the current volume of the JOURNAL will be supplied at \$3.50 per copy; other available back numbers at \$4.50 per copy.

The views expressed in the articles, editorial comments, book reviews and notes, and other contributions which appear in the JOURNAL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

Subscriptions, orders for back numbers, correspondence with reference to the JOURNAL, manuscripts, and books for review should be sent to the Secretary of the Board of Editors, 2223 Massachusetts Avenue, N.W., Washington, D. C. 20008.

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 60

CONTENTS

1966

[No. 1, January, 1966, pp. 1-244; No. 2, April, 1966, pp. 245-474; No. 3, July, 1966, pp. 475-670; No. 4, October, 1966, pp. 671-928]

	PAGE
THE "NEW" COUNTRIES AND THE "NEW" INTERNATIONAL LAW: THE UNITED NATIONS' SPECIAL CONFERENCE ON FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES. <i>Edward McWhinney</i>	1
SAFEGUARDING ATOMS FOR PEACE. <i>Mason Willrich</i>	34
✓ <i>JUS DISPOSITIVUM</i> AND <i>JUS COGENS</i> IN INTERNATIONAL LAW. <i>Alfred Verdross</i> ..	55
COMMUNIST CHINA'S ATTITUDE TOWARD INTERNATIONAL LAW. <i>Hungdah Chiu</i> ..	245
THE LOGAN ACT: PAPER TIGER OR SLEEPING GIANT? <i>Detlev F. Vagts</i>	268
LEGAL ASPECTS OF PIRATE BROADCASTING: A DUTCH APPROACH. <i>H. F. van Panhuys</i> and <i>Menno J. van Emde Boas</i>	303
INTERNATIONAL LAW: THE OLD AND THE NEW. <i>Charles G. Fenwick</i>	475
ARBITRATION AND THE EXHAUSTION OF LOCAL REMEDIES. <i>Stephen M. Schwebel</i> and <i>J. Gillis Wetter</i>	484
INSPECTION EXPERIENCE UNDER THE ANTARCTIC TREATY AND THE INTERNATIONAL ATOMIC ENERGY AGENCY. <i>James Simsarian</i>	502
✓ CHINESE PARTICIPATION IN THE UNITED NATIONS: THE LEGAL IMPERATIVES OF A NEGOTIATED SOLUTION. <i>Myres S. McDougal</i> and <i>Richard M. Goodman</i>	671
• A FRAMEWORK FOR THE LEGAL ANALYSIS OF WAR-PEACE ISSUES. <i>Kenneth S. Carlston</i>	728
• THE PARTITION OF THE NEUTRAL ZONE. <i>Sayed M. Hosni</i>	735
LEGAL ASPECTS OF THE VIET-NAM SITUATION. <i>Quincy Wright</i>	750
EDITORIAL COMMENT:	
The Dominican Republic: Intervention or Collective Self-Defense. <i>C. G. Fenwick</i>	64
Technical Assistance in the New International Law. <i>John N. Hazard</i>	342
<i>Jus Dispositivum</i> and <i>Jus Cogens</i> in International Law: in the Light of a Recent Decision of the German Supreme Constitutional Court. <i>Stefan A. Riesenfeld</i>	511
Philip Marshall Brown. <i>Eleanor H. Finch</i>	515
International Law and the Commonwealth, 1907-1967. <i>Robert R. Wilson</i>	770
On the Quasi-Legislative Competence of the General Assembly. <i>Richard A. Falk</i>	782
NOTES AND COMMENTS:	
The Washington World Conference on World Peace Through the Rule of Law. <i>C. G. Fenwick</i>	68
Law and Developing Countries. <i>H. C. L. Merillat</i>	71
60th Annual Meeting of the Society	79
Inter-American Bar Association. <i>Eleanor H. Finch</i>	80
Inter-American Academy of International and Comparative Law. <i>Eleanor H. Finch</i>	83
Hague Academy of International Law. 1966 Sessions. <i>E.H.F.</i>	86
Student International Law Journals. <i>Eleanor H. Finch</i>	87
Friendly Relations and Co-operation among States. <i>Edward McWhinney</i>	356
Washington World Conference on World Peace through Law. <i>Charles S. Ehyne</i>	361
Seminar on Problems of International Law and Economic Development. <i>Wolfgang Friedmann</i>	367
Tibet's Declarations of Independence. <i>David A. McCabe</i>	369

	PAGE
The 1963/1965 Amendments to the Charter of the United Nations. <i>Egon Schwelb</i>	371
Academy of American and International Law. <i>E.H.F.</i>	378
Regional Meetings of the Society. <i>Eleanor H. Finch</i>	379
60th Annual Meeting of the Society	382
Professor Bishop's Appointment to the Edwin DeWitt Dickinson Professorship of Law. <i>Brunson MacChesney</i>	384
<i>Institut de Droit International</i> : The Warsaw Session, 1965. <i>Herbert W. Briggs</i>	517
United Nations Program of Assistance and Exchange in the Field of International Law	526
Educational and Cultural Agreements and Ententes: France, Canada and Quebec. <i>Gerald F. FitzGerald</i>	529
Regulation of International Trade. Summary Report, Board of Review and Development. <i>Stanley D. Metzger</i>	537
Annual Meeting of the American Society of International Law. <i>Eleanor H. Finch</i>	546
Regional Meetings of the Society. <i>Eleanor H. Finch</i> and <i>C. B. Bourne</i>	551
The Carnegie-Harvard Seminar on International Law for Legal Officers. <i>R.R.B.</i>	554
International Course on European Integration, University of Amsterdam. <i>E.H.F.</i>	555
International Association of Young Lawyers. <i>E.H.F.</i>	556
The Chinese Society of International Law. <i>Hungdah Chiu</i>	557
<i>Erratum</i>	558
The United Nations' Double Standard on Human Rights Complaints. <i>John Carey</i>	792
The Extraordinary Session of the Hague Conference on Private International Law. <i>Kurt H. Nadelmann</i> and <i>Arthur T. von Mehren</i>	803
The New ODECA. <i>Salo Engel</i>	806
The Dominican Case: Unilateral Intervention. <i>B. T. Bohan</i>	809
Tibet's Declarations of Independence? <i>Alfred P. Rubin</i>	812
Freedom of the Sea. <i>Edward W. Allen</i>	814
Scott Prizes in International Law. <i>E.H.F.</i>	816
Procedural Aspects of International Law Institute. <i>E.H.F.</i>	816
East-West Trade Conference, Stanford University. <i>John I. Laun</i>	817
Inter-American Bar Association. <i>Eleanor H. Finch</i>	819
First Annual Summer Conference of the Law of the Sea Institute. <i>Eleanor H. Finch</i>	820
On <i>Festschriften</i> and Book Reviews. <i>Salo Engel</i>	822
U. S. CONTEMPORARY PRACTICE RELATING TO INTERNATIONAL LAW ..	91, 385, 559, 824
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW. <i>John R. Stevenson</i>	107, 400, 586, 838
BOOK REVIEWS AND NOTES. <i>Leo Gross</i>	130, 419, 602, 868
BOOKS RECEIVED	151, 442, 625, 889
OFFICIAL DOCUMENTS:	
UNITED NATIONS. Report of the International Law Commission on the Work of Its Seventeenth Session, <i>May 3-July 9, 1965</i>	155
INTERNATIONAL LEGAL MATERIALS. Contents, Vol. 4, No. 6 (1965); Vol. 5, Nos. 1-5 (1966)	242, 472, 668, 920
SECOND SPECIAL INTER-AMERICAN CONFERENCE. <i>Rio de Janeiro, November 17-30, 1965. Resolutions:</i>	
I. Act of Rio de Janeiro—Amendments of the Charter of Bogotá	445
II. Economic and Social Act of Rio de Janeiro	447
III. Annual Meetings of Ministers of Foreign Affairs	454
IV. Co-ordination of the Activity of International and Inter-American Organizations	455
X. Convocation of a Specialized Conference	456

CONTENTS OF VOLUME 60

V

	PAGE
XIII. Strengthening the Means for Peaceful Settlement	456
XVIII. Inter-American Peace Committee	457
XXI. Asylum for Cuban Political Refugees	457
XXII. Expanded Functions of the Inter-American Commission on Human Rights	458
XXVI. Informal Procedure on the Recognition of <i>De Facto</i> Governments.	460
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW:	
Statute. <i>October 31, 1951</i>	461
Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters. <i>October 23, 1964</i>	464
AGREEMENTS RELATING TO THE SITUATION IN VIET-NAM:	
Agreement between the Commander-in-Chief of the French Union Forces in Indo-China and the Commander-in-Chief of the People's Army of Viet-Nam on the Cessation of Hostilities in Viet-Nam. <i>Geneva, July 20, 1954.</i>	629
Final Declaration of Geneva Conference on the Problem of Restoring Peace in Indo-China. <i>Geneva, July 21, 1954</i>	643
United States Declaration on Indochina. <i>Geneva, July 21, 1954</i>	645
Southeast Asia Collective Defense Treaty and Protocol. <i>Manila, September 8, 1954</i>	646
UNITED NATIONS:	
Convention on the Elimination of All Forms of Racial Discrimination. <i>New York, December 21, 1965</i>	650
Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. <i>December 21, 1965</i>	662
Resolution on Technical Assistance to Promote the Teaching, Study, Dissemination and Wider Appreciation of International Law. <i>December 20, 1965.</i>	664
CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES. <i>Washington, March 18, 1965</i>	892
AGREEMENT BETWEEN THE INTERNATIONAL ATOMIC ENERGY AGENCY, THE GOVERNMENT OF THE KINGDOM OF THAILAND AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA FOR THE APPLICATION OF SAFEGUARDS. <i>Vienna, September 30, 1964</i>	912
SITUATION IN SOUTHERN RHODESIA:	
United Nations General Assembly:	
Resolution 2012 (XX). <i>October 12, 1965</i>	921
Resolution 2022 (XX). <i>November 5, 1965</i>	922
Resolution 2024 (XX). <i>November 11, 1965</i>	924
United Nations Security Council:	
Resolution 216. <i>November 12, 1965</i>	924
Resolution 217. <i>November 20, 1965</i>	924
Resolution 221. <i>April 9, 1966</i>	925
INDEX	929

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 60

January, 1966

NO. 1



CONTENTS

	PAGE
THE "NEW" COUNTRIES AND THE "NEW" INTERNATIONAL LAW: THE UNITED NATIONS' SPECIAL CONFERENCE ON FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES. <i>Edward McWhinney</i>	1
SAFEGUARDING ATOMS FOR PEACE. <i>Mason Willrich</i>	34
JUS DISPOSITIVUM AND JUS COGENS IN INTERNATIONAL LAW. <i>Alfred Verdross</i>	55
EDITORIAL COMMENT:	
✓ The Dominican Republic: Intervention or Collective Self-Defense. <i>C. G. Fenwick</i>	64
NOTES AND COMMENTS:	
The Washington World Conference on World Peace Through the Rule of Law. <i>C. G. Fenwick</i>	68
Law and Developing Countries. <i>H. C. L. Merillat</i>	71
60th Annual Meeting of the Society	79
Inter-American Bar Association. <i>Eleanor H. Finch</i>	80
Inter-American Academy of International and Comparative Law. <i>Eleanor H. Finch</i>	83
Hague Academy of International Law. 1966 Sessions. <i>E. H. F.</i>	86
Student International Law Journals. <i>Eleanor H. Finch</i>	87
U. S. CONTEMPORARY PRACTICE RELATING TO INTERNATIONAL LAW	91
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW. <i>John R. Stevenson</i>	107
BOOK REVIEWS AND NOTES. <i>Leo Gross</i> :	
Friedmann, <i>The Changing Structure of International Law</i> , 130; von Glahn, <i>Law among Nations</i> , 131; Engel and Métall (eds.), <i>Law, State and International Legal Order</i> , 132; Wolfke, <i>Custom in Present International Law</i> , 133; Degan, <i>L'Interprétation des Accords en Droit International</i> , 135; Bernhardt, <i>Die Auslegung völkerrechtlicher Verträge insbesondere in der neueren Rechtsprechung internationaler Gerichte</i> , 137; Currie (ed.), <i>Federalism and the New Nations of Africa</i> , 140; Franek, <i>East African Unity through Law</i> , 140; Smith, <i>Britain's Clandestine Submarines, 1914-1915</i> , 141; <i>Documents on German Foreign Policy</i> , Vol. XIII: <i>The War Years, June 23-December 11, 1941</i> , 143.	
Briefer Notices: Patel, 144; Vasak, 145; Dunshee de Abranches, 146; Rosentiel, 146; Rosenau, 147; Stanger, 148; Gelberg, 149; Oppermann and Yousry, 149; Mysli, 150; Gross, 151.	
Books Received	151

OFFICIAL DOCUMENTS

UNITED NATIONS. Report of the International Law Commission on the Work of Its Seventeenth Session, May 3-July 9, 1965	155
INTERNATIONAL LEGAL MATERIALS. Contents, Vol. IV, No. 6 (November), 1965.	242

BOARD OF EDITORS

Editor-in-Chief

WILLIAM W. BISHOP, JR., University of Michigan Law School

RICHARD R. BAXTER
Harvard Law School

HERBERT W. BRIGGS
Cornell University

HARDY C. DILLARD
University of Virginia Law School

RICHARD A. FALK
Princeton University

ALWYN V. FREEMAN
Detroit, Michigan

LEO GROSS
Fletcher School of Law and Diplomacy

JOHN N. HAZARD
Columbia University

JAMES NEVINS HYDE
New York, N. Y.

OLIVER J. LISSITZYN
Columbia University

BRUNSON MACCHESNEY
Northwestern University Law School

MYRES S. McDOUGAL
Yale Law School

H. C. L. MERRILLAT
Washington, D. C.

STANLEY D. METZGER
Georgetown University Law Center

STEFAN A. RIESENFELD
University of California Law School

OSCAR SCHACHTER
New York, N. Y.

LOUIS B. SOHN
Harvard Law School

ERIC STEIN
University of Michigan Law School

JOHN R. STEVENSON
New York, N. Y.

RICHARD YOUNG
Van Hornesville, N. Y.

Honorary Editors

PHILIP MARSHALL BROWN
Washington, D. C.

CHARLES G. FENWICK
Washington, D. C.

HANS Kelsen
University of California

JOSEF L. KUNZ
University of Toledo

PITMAN B. POTTER
American University

JOHN B. WHITTON
Princeton University

ROBERT R. WILSON
Duke University

QUINCY WRIGHT
University of Virginia

Secretary of the Board of Editors

ELEANOR H. FINCH

The object of The American Society of International Law is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. For this purpose it co-operates with similar societies in this and other countries.

Membership in the Society is open to all persons of good moral character interested in the objectives of the Society. Membership dues are: Regular, \$15.00 for residents of the United States, \$10.00 for non-residents; professional, \$25.00; intermediate, \$10.00; student, \$5.00. Application forms and further information may be obtained from the Membership Secretary of the Society at the address given below.

The JOURNAL is published quarterly and is supplied to all members of The American Society of International Law without extra charge. The annual subscription to non-members of the Society is \$15.00 and includes subscription to the *Proceedings* of the Society. Available single numbers of the current volume of the JOURNAL will be supplied at \$3.50 per copy; other available back numbers at \$4.50 per copy.

The views expressed in the articles, editorial comments, book reviews and notes, and other contributions which appear in the JOURNAL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

Subscriptions, orders for back numbers, correspondence with reference to the JOURNAL, manuscripts, and books for review should be sent to the Secretary of the Board of Editors, 2223 Massachusetts Avenue, N.W., Washington, D. C. 20008.



THE "NEW" COUNTRIES AND THE "NEW" INTERNATIONAL
LAW: THE UNITED NATIONS' SPECIAL CONFERENCE
ON FRIENDLY RELATIONS AND CO-OPERATION
AMONG STATES

BY EDWARD McWHINNEY

University of Toronto

COEXISTENCE (FRIENDLY RELATIONS) AND THE SOVIET-WESTERN
LEGAL DEBATE

A good deal of the creative energy of international lawyers in recent years has been absorbed in the continuing Soviet-Western debate revolving around the special Soviet juridical concept of peaceful coexistence or, in its Western-style and United Nations-endorsed euphemism, the concept of friendly relations and co-operation among states with differing political and social systems.¹ Whether in the United Nations Sixth (Legal) Committee, in the authoritative, if private, International Law Association,² even in the World Federation of United Nations Associations' scientific seminars,³ or at times in the International Law Commission itself, the discussion over coexistence (friendly relations) has tended to be a straight Soviet-Western dialectical contest that has been concerned sometimes with hammering out minimum principles of Soviet-Western accommodation in the Cold War era, and sometimes seemingly with the making of propaganda points that would be helpful in carrying on future Soviet-Western dialogues or even more perhaps in carrying the ideological war to the neutralist, uncommitted countries. The apparent achievement of a reasonably firm or stable Soviet-Western *détente*, with a consequent increasing focus on extension and development of minimum principles of world public order on a basis of reciprocity and mutuality of interest as between the two main competing

¹ The literature concerning peaceful coexistence (friendly relations) as a special juridical concept is already legion. See, for example, J. N. Hazard, "Codifying Peaceful Coexistence," 55 A.J.I.L. 109 (1961); *idem*, "Coexistence Codification Reconsidered," 57 A.J.I.L. 88 (1963); R. D. Crane, "Soviet Attitude toward International Space Law," 56 A.J.I.L. 685, at 710 *et seq.* (1962); O. J. Lissitzyn, *International Law in a Divided World*, at pp. 18-21 (1963); I. Lapenna, "The Legal Aspects and Political Significance of the Soviet Concept of Coexistence," 12 Int. and Comp. Law Q. 737 (1963); L. Lipson, "Peaceful Coexistence," 29 Law and Contemporary Problems 871 (1964); E. McWhinney, "'Peaceful Coexistence' and Soviet-Western International Law," 56 A.J.I.L. 951 (1962); McWhinney, "Peaceful Coexistence" and Soviet-Western International Law (1964); *idem* (ed.), *Law, Foreign Policy, and the East-West Détente* (1964).

² International Law Association, Report of the Fiftieth Conference, Brussels, 1962, pp. 260-374 (1963); Report of the Fifty-First Conference, Tokyo, 1964 (1965).

³ Principles of International Law concerning Friendly Relations and Cooperation among States (World Federation of United Nations Associations Seminar on International Law, held at Smolenice, Bratislava, April, 1965) (to be published in book form, 1966).

legal value systems has been amply commented on already. In a sense, the international law of the *détente*, constructed on a pragmatic basis of inter-systems agreement or consensus, and demonstrated empirically in the actual record of such *de facto* accommodations and give-and-take, represents a species of "new" international law.⁴ At least, it represents a new gloss on the old customary international law, albeit a gloss that is specially concerned, in the special societal conditions of the contemporary world community, with considerations of security, of stability of settled expectations, and of certainty and the avoidance of surprise in inter-group (more accurately inter-systems) relations—the old "Watchman's State" legal virtues.

What is interesting in the present context is the attempt by participants in the world power process other than the two main original protagonists over coexistence, the Soviet bloc and the West, to enter the debate and to make of the concept of coexistence (friendly relations) an intellectual-ideological base for a re-writing or re-ordering, in present-day terms, of old international institutions and old international law doctrine. Where the Soviet bloc, in the past, seemed content to speak of coexistence only at a high level of generality and abstraction, and never to descend to the specifics of its practical application in particular problem-situations, the "new" countries have begun now to try to put flesh on the bare bones of the five primary principles of peaceful coexistence as postulated in the original *Pancha Shila* declaration and similar formulations, and to try to spell out the concrete consequences of those primary principles in terms both of international institutional organization and of detailed substantive law secondary principles that can be immediately utilizable in problem-solving.⁵ This is, of course, in one sense to pick up one of the main doctrinal arguments of Western jurists in their past debate with Soviet jurists over coexistence (friendly relations); namely, that the only fruitful approach to international lawmaking in an era of duality—more strictly, plurality—of world legal value-systems, is to concentrate on the pragmatic, empirically based, problem-oriented, step-by-step approach to conflicts resolutions and the induction of new legal principles, in the face of all the temptations to abstract, *a priori*, natural-law-type exercises in general acts of codification, *uno actu*, of asserted principles of coexistence. Yet, in another sense, the practical application of this particular approach on the part of the "new" countries has meant some new initiatives and new emphases, in terms of both legal institutions and legal doctrine, that may hardly have been anticipated by either of the original protagonists in the great debate—the Soviet bloc and the West. The most notable, and certainly the most sustained, opportunity for vindication of such new initiatives on the part of the "new" countries in recent times has been the special conference, held in Mexico City in the fall of 1964, of the United

⁴ McWhinney, "Changing International Law Method and Objectives in the Era of the Soviet-Western *Détente*," 59 A.J.I.L. 1 (1965).

⁵ Hazard, "New Personalities to Create New Law," 58 A.J.I.L. 952 (1964); and compare *idem*, "Coexistence Law Bows Out," 59 A.J.I.L. 59 (1965).

Nations' Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States.

ESTABLISHMENT OF THE UNITED NATIONS SPECIAL COMMITTEE
ON FRIENDLY RELATIONS

The United Nations Special Committee on Friendly Relations was established pursuant to General Assembly Resolution 1966 (XVIII) of December 16, 1963. Its establishment may be said to be due essentially to a convergence of two main political pressures in the U.N. Sixth (Legal) Committee and the General Assembly as a whole: first, the interest and initiative of the Soviet bloc (and especially, as it seems, of some of the supporting Socialist countries of Eastern Europe), to take advantage of the undoubted public relations elements of the original, as yet undefined and unconcretized Soviet juridical concept of coexistence, and to exploit its obvious potential for political maneuvering in behalf of Soviet-bloc interests while that concept remained, as yet, unpolarized; and second, the impatience and dissatisfaction of the neutralist, uncommitted countries with all the slowness and procedural cumbrousness and simple obstructionism in the U.N. Sixth (Legal) Committee and the General Assembly, and with the seeming unimaginativeness, even timorousness, of the International Law Commission, which too often, perhaps, in the eyes of the "new" countries, has appeared to be preoccupied with the petit-point needlework of international law rather than to be concerned with the imaginative reshaping and rewriting of international law to meet new conditions in international society. It seems clear in this regard that, while Western delegates in the U.N. General Assembly who approved of the creation of the Special Committee on Friendly Relations (the Mexico City Special Committee) may have viewed that committee as concerned with no more than the ascertainment and identification of existing international law—codification in the strict, literal sense, though not codification as it has in fact occurred, as a matter of history, in the main civil law, and even in the common law countries—the representatives of the Socialist bloc and of the "new" countries intended the Mexico City Special Committee to achieve no mere statement of the international law *status quo* but to attempt instead some more affirmative venture in the political rewriting of international law to suit the needs of the contemporary world community as they themselves, in their varying ways, might define those needs.⁶

Pursuant to General Assembly Resolution 1966 (XVIII), the President of the General Assembly was directed to designate Member States of the United Nations to serve on the Special Committee, "taking into consideration the principle of equitable geographical representation and the necessity that the principal legal systems should be represented."⁷ Pursuant to this, the President of the General Assembly designated 27 Member

⁶ Compare Hazard, "The Sixth Committee and New Law," 57 A.J.I.L. 604 (1963).

⁷ Res. 1966 (XVIII), Dec. 16, 1963, par. 1, U.N. General Assembly, 18th Sess., Official Records, Supp. No. 15 (A/1515), p. 70.

States to serve on the Special Committee, a number that was subsequently reduced to 26 when Cameroon, shortly after the opening of the Special Committee's sessions in Mexico City, by letter informed the Secretary General that it would be unable to participate. Another country, Afghanistan, had withdrawn before the opening of the Special Committee sessions and had been replaced by Burma.⁸

The membership of the Special Committee was undoubtedly a little larger than originally intended or than originally hoped for in order to facilitate easy or efficient working: one of the objections to the U.N. Sixth Committee, as a law-codifying body, after all, had been its size. Yet the number finally reached for the Mexico City Special Committee was felt necessary in order to give full representation not merely to the Socialist and Western blocs and to Latin America, Asia, and Africa, as such, but also to sub-groupings within the main geographical regions; for example, in the case of Africa, to both Francophonic and Anglophonic Africa and also to both the Casablanca and Monrovia political-ideological groupings. In the event, the extra numbers do not seem to have been oppressive in the case of the Mexico City Special Committee, insofar as the accidents of varying prestige, intellectual caliber, and sheer personality, as between the different delegates, tended to lead more or less inevitably to the domination by certain national delegations of the actual discussions and debate at Mexico City.

General Assembly Resolution 1966 (XVIII) had "recommended" to the governments of states designated as members of the Special Committee, "in view of the general importance and the technical aspect of the item, to appoint jurists as their representatives on the Special Committee."⁹ Just what "jurists" meant, the resolution did not specify. There is some suggestion that this was intended to mean "Foreign Office lawyers" rather than "professors . . . remote from political reality."¹⁰ However that may be, academic lawyers were a rarity in the final composition of the various national delegations. Most countries called on their Foreign Ministry legal departments for their team. The Socialist bloc and the "new" countries tended to select their Foreign Ministry Principal Legal Adviser as the main delegate, thus in effect viewing the Mexico City Special Committee as a projection, in a more specialist and presumably also a legally more uninhibited and unfettered sense, of the U.N. Sixth Committee.¹¹ On the other hand, some of the Western or Western-leaning

⁸ The final membership of the Mexico City Special Committee (26 countries in all) comprised: Argentina, Australia, Burma, Canada, Czechoslovakia, Dahomey, France, Ghana, Guatemala, India, Italy, Japan, Lebanon, Madagascar, Mexico, Netherlands, Nigeria, Poland, Rumania, Sweden, U.S.S.R., United Arab Republic, United Kingdom, United States, Venezuela, Yugoslavia.

⁹ *Loc. cit.*, par. 2.

¹⁰ See the comment by Hazard, 58 A.J.I.L. 952, 953 (1964).

¹¹ In this regard, familiar names on the Special Committee included Dr. Vratislav Pěchota of Czechoslovakia, who had been one of the prime sponsors of Res. 1966 (XVIII) in the General Assembly; Dr. Krishna Rao of India; and Dr. T. O. Elias of Nigeria.

delegations, perhaps because the expected six-week sojourn of the Special Committee in Mexico City was viewed as too demanding, in terms of time, for busy senior officials, but perhaps also out of a desire to curb the anticipated expansionist, lawmaking ambitions of some of the Socialist and uncommitted countries represented on the Special Committee, sent as their actual delegates to Mexico City relatively junior Foreign Ministry officials, who in certain cases had not previously been associated with the work of the U.N. Sixth Committee, this apparently in the belief that it would downgrade the Special Committee's status and importance.¹² In the event, it seems clear that this was a tactical blunder, for it appears to have resulted in the main intellectual initiatives at the Special Committee sessions, in terms of the making and reshaping of international law doctrine, passing from the West to the Socialist and uncommitted countries.

In defining the agenda of the Special Committee, Resolution 1966 (XVIII) referred to Resolution 1815 (XVII) of December 18, 1962, which had designated four principles as the priority concern, in connection with the

study of the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter with a view to their progressive development and codification, so as to secure their more effective application.¹³

These four subjects, which were taken essentially from a list of 19 asserted principles of friendly relations and co-operation among states, advanced during the debate in the 17th General Assembly in 1962, in a highly comprehensive and ambitious Czechoslovak draft resolution,¹⁴ and which amounted, in fact, to the substance of the Special Committee's agenda and work in Mexico City, were as follows:

(1) The principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations;

(2) The principle that states shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;

(3) The duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter;

(4) The principle of sovereign equality of states.¹⁵

¹² Lack of departmental seniority need not affect intellectual competence or expertise in the particular area of specialization concerned, of course: its most serious consequence is to inhibit the authority to make sudden compromises or to take new initiatives when these seem necessary in the course of debate, without first clearing these with the head of the Foreign Ministry at home. This seems actually to have operated to the embarrassment and political disadvantage of the West in the Mexico City sessions. See the discussions below.

¹³ See General Assembly Res. 1966 (XVIII), Dec. 16, 1963, preamble.

¹⁴ Doc. A/C. 6/L. 505, Oct. 26, 1962.

¹⁵ Res. 1815 (XVII), Dec. 18, 1962, U.N. General Assembly, 17th Sess., Official Records, Supp. No. 17 (A/5217), p. 66.

In addition to these four (if you wish, original) principles of friendly relations, Resolution 1966 (XVIII) of December 16, 1963, specified three other principles for study by the Special Committee, though these subjects were not in fact reached at the Mexico City sessions:

(5) The duty of states to co-operate with one another in accordance with the Charter;

(6) The principle of equal rights and self-determination of peoples;

(7) The principle that states shall fulfil in good faith the obligations assumed by them in accordance with the Charter.¹⁶

In addition to the above subjects, an eighth subject, which was viewed as an important ancillary to the principle that states should settle their international disputes by peaceful means,¹⁷ was prescribed for study by the Special Committee, by means of a separate resolution (General Assembly Resolution 1967 (XVIII) of December 16, 1963) and was in fact considered and reported on by the Special Committee, in its final report: (8) The question of methods of fact-finding.

The Special Committee held its first meeting in Mexico City on August 27, 1964. The forty-third and final meeting was held on October 2, 1964. The detailed debates of the Special Committee;¹⁸ the comprehensive Report of the Special Committee, prepared by its official *rapporteur*, Mr. Hans Blix of Sweden;¹⁹ the supporting documentation submitted by way of detailed comments by the Member States of the United Nations and subsequently prepared and collated by the U.N. Secretariat in terms of Resolution 1966 (XVIII);²⁰ and the systematic summary of U.N. practice as to friendly relations prepared by the U.N. Secretariat as specially directed under Resolution 1966 (XVIII),²¹ were intended to form the scientific source materials for a renewed debate at the Nineteenth Session of the U.N. General Assembly in the fall and winter of 1964-1965 on the principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations. Resolution 1966 (XVIII) in fact directed, in terms, that the subject of "Friendly Relations" be placed on the provisional agenda of the Nineteenth Session²² in order to allow for consideration of the Report of the Special Committee. Due to the dispute over the U.N. Expenses issue and the proposed application of Article 19 of the U.N. Charter at the opening of the Nineteenth Session of the U.N. General Assembly, this subject, like

¹⁶ *Loc. cit.*, par. 5.

¹⁷ Principle (2) above.

¹⁸ Docs. A/AC. 119/SR. 1, Oct. 16, 1964, to A/AC. 119/SR. 43, Oct. 30, 1964.

¹⁹ Doc. A/5746, Nov. 16, 1964.

²⁰ Comments received from governments, Doc. A/5725, July 22, 1964; Addendum, Doc. A/5725/Add. 1, Aug. 11, 1964; Systematic Summary of the Comments, Statements, Proposals and Suggestions of Member States, Doc. A/AC. 119/L. 1, June 24, 1964; Corrigendum, Doc. A/AC. 119/L. 1/Corr. 1, Aug. 7, 1964.

²¹ Summary of the practice of the United Nations and of views expressed in the United Nations by Member States, Doc. A/AC. 119/L. 2, June 10, 1964.

²² *Loc. cit.*, par. 5.

other substantive issues, could not be considered. It seems certain, however, to be a continually recurring issue at subsequent General Assembly sessions, with immediate codification, in terms of actual elements of consensus or even of simple majority proposals at Mexico City, being pressed for by delegations of Soviet-bloc and uncommitted countries. In any case, even without any political pressures for codification in the U.N. General Assembly, the conclusions and indeed the individual comments at Mexico City will undoubtedly be cited and advanced in certain quarters as evidence *de lege ferenda*, and even as *opinio juris* and evidence *de lege lata* in view of the importance that Socialist international law seeks to attach to the resolutions or deliberations of scientific organizations as sources of international law.²³ And beyond this, considered purely from the more traditionalist viewpoint, the Mexico City deliberations are important for the indications that they offer as to the tension points in the "old" international law in terms of the demands and aspirations of the "new" countries, and as to the particular areas in which pressures for change or adjustments of old doctrine and old institutional attitudes can be expected.

It is proposed to examine and analyze *seriatim* the debate and discussions over the four principles actually considered by the Special Committee at its Mexico City sessions, before considering some of the implications of these for purposes of future development of tactical positions and strategy in international arenas like the U.N. General Assembly, and also for purposes of suggesting new intellectual approaches to the problem of creative change in legal doctrine and the progressive development of the "new" international law.

I. THE PRINCIPLE THAT STATES SHALL REFRAIN FROM THE THREAT OR USE OF FORCE AGAINST THE TERRITORIAL INTEGRITY OR POLITICAL INDEPENDENCE OF ANY STATE

The main debate over the meaning and concrete application of this particular principle was focused around two widely differing draft resolutions, which seemed to sum up and represent the polar positions of the Soviet bloc and of the Western countries respectively; that is, the Czech and the United Kingdom proposals.

The Czech proposal,²⁴ after opening with a declaration as to the prohibition of "the threat of force or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations," went on to apply

²³ As to the "new" or "auxiliary" sources of international law, in Soviet-bloc thinking, see McWhinney, "Peaceful Coexistence" and Soviet-Western International Law 61-64 (1964). Specifically, as to General Assembly resolutions as sources of international law, see *ibid.* 106; McWhinney, "Changing International Law Method and Objectives in the Era of the Soviet-Western *Détente*," *loc. cit.* note 4 above, at 14-15; B. Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?" 5 *Indian J.L.L.* 23 (1965); and see the more detailed discussion on this point in the concluding section below.

²⁴ Doc. A/AC. 119/L. 6; Report of Special Committee, Doc. A/5746, p. 19.

this expressly to the threat or use of force "as a means of solution of territorial disputes and problems concerning frontiers between States" (par. 1). The specifics of the Czech proposal included the affirmation that the "planning, preparation, initiation and waging of a war of aggression" constituted "international crimes against peace" (par. 2); the interdiction of "propaganda for war, incitement to or fomenting of war and any propaganda for preventive war and for striking the first nuclear blow" (par. 3); and the general prohibition of "economic, political or any other form of pressure aimed against the political independence or territorial integrity of any State" (par. 4). In an important exception to the prohibition of the use of force, the Czech draft resolution expressly declared that the prohibition of the use of force was not to affect "self-defence of nations against colonial domination in the exercise of the right to self-determination." In the same context, the Czech draft resolution also excepted from the prohibition of the use of force, the use of force "pursuant to a decision of the Security Council made in conformity with the United Nations Charter," and "measures of individual or collective self-defence in accordance with Article 51 of the United Nations Charter" (par. 5). The Czech draft resolution closed with the call for an agreement for "general and complete disarmament under effective international control" in order to "secure full effectiveness of the prohibition of the threat or use of force" (par. 6).

The United Kingdom draft resolution,²⁵ by contrast, was deliberately limited and modest in scope and application. It expressly declared that "force," for purposes of any legal prohibition of the threat or use of force, meant "armed force," thereby necessarily excluding from any such prohibition non-military measures of the nature of economic and political pressures and ideological competition. The draft resolution made a point, however, of declaring that the prohibition of "armed force" included such force exercised by "irregular or volunteer forces," as well as the regular naval, military, or air forces (par. 2); the "organization of armed bands within [a state's] territory or any other territory for incursions into the territory of another State" (par. 3); and also the "indirect use of force" such as "fomenting civil strife or committing terrorist acts in another State, or . . . tolerating organized activities directed towards such ends" (par. 4).

The United Kingdom draft resolution, in a seeming attempt at point-by-point confrontation here with the Czech draft resolution (see paragraph 5 of the Czech draft resolution), declared the use of force to be lawful when "undertaken by or under the authority of a competent United Nations organ, *including in appropriate cases the General Assembly*, acting in accord with the Charter, *or by a regional agency* acting in accordance with the Charter";²⁶ it also declared lawful the use of force "in exercise of the inherent right of individual or collective self-defence"

²⁵ Doc. A/AC. 119/L. 8; Report of Special Committee, Doc. A/5746, p. 20.

²⁶ Par. 5. Italics added.

(without mention of, or restriction to, Article 51 of the Charter as expressly stipulated in the Czech resolution).

Two further draft resolutions should be mentioned here. A Yugoslav proposal,²⁷ after itself seeking to outlaw "exerting pressure, whether by military, political, economic, or any other means, against the political independence or territorial integrity of any other State" (par. 2), and expressly exempting from such outlawry "self-defence against colonial domination in the exercise of the right of self-determination" (par. 4), seemed to try to invoke a Stimson-type non-recognition doctrine by providing that "Any situation brought about by such means shall not be recognized." (Par. 3.)

Another combined Ghana-India-Yugoslavia proposal²⁸ defined "force" to include "irregular or voluntary forces" as well as regular naval, military or air forces, but, in counter to the United Kingdom proposal, defined it to include also "other forms of pressure, which have the effect of threatening the territorial integrity or political independence of any State" (par. 2). It also contained express prohibitions of the violation of existing boundaries of a state (par. 4), and of "acts of reprisal" (par. 5). The draft resolution also picked up from the Yugoslav draft the Stimson principle of non-recognition by declaring that situations brought about in conflict with these asserted principles should not be recognized by other states (pars. 2 and 4).

The most important point of conflict in the whole debate over the prohibition of the threat or use of force was undoubtedly the definition of the term "force" and the establishment of its logical extensivity. The campaign of the Soviet bloc and also the uncommitted countries in behalf of a greatly widened interpretation that would include within the ambit of the term "force" economic, political, and other forms of pressure or coercion falling short of "armed" force, was based on the argument that such non-military forms of pressure—for example the "complete or partial interruption of economic relations"—were often far more potent in their effects than actual armed force; and that for this purpose the Charter, as a constitutional instrument, should be interpreted progressively or generically in the light of current needs and also of developments in the world community since the Charter was first drafted.²⁹

The opposing, more orthodox or traditional interpretation looked first of all to the history of the drafting of the Charter at San Francisco, and to the specific rejection at the time by a large majority of an amendment by Brazil to extend the prohibition contained in Article 2(4) of the Charter so as to cover economic coercion. More substantially, however,

²⁷ Doc. A/AC. 119/L.7; Report of Special Committee, Doc. A/5746, p. 20.

²⁸ Docs. A/AC. 119/L. 15; A/5746, p. 23.

²⁹ See, for example, the addresses by Dr. Pěchota (Czechoslovakia), Docs. A/AC. 119/SR. 4, p. 6, and *ibid.*, SR. 8, pp. 4-6; Dr. Krishna Rao (India), Doc. A/AC. 119/SR. 3, pp. 7-8; Dr. Khalil (United Arab Republic), Doc. A/AC. 119/SR. 8, p. 9; and by Mr. Dadzie (Ghana), Doc. A/AC. 119/SR. 5, p. 17.

the proponents of this viewpoint argued that any extension of the prohibition of "force" beyond "armed force" to include other forms of pressure would be unnecessary and impractical in the light of modern realities; and they pointed out, in this regard, that political and economic pressure were techniques inevitably resorted to by states in their diplomacy every day. In an interdependent world, it was contended, it was inevitable and desirable that states should attempt to influence the actions and policies of other states: to prohibit entirely "any form of pressure" would be to render impossible normal diplomatic relations; while to lay down a general rule in advance would be to interfere with the right of states to regulate their economic relations with other states and thus to increase the danger of international conflicts. It was further suggested that, if certain forms of political and economic pressure violated the principles of international law, they should more properly be considered within the context of the principle of non-intervention (below) and not the principle of the prohibition of force.³⁰

Similar arguments were advanced in relation to the Czech proposal for a prohibition of "war propaganda."³¹ Some delegates pointed to the difficulty of defining the term and to its essential subjectivity, since what might be viewed as a statement of fact in one country might be viewed as war propaganda in another; and these delegates cited here the rather sterile discussions in the United Nations, in earlier years, in the two Special Committees on the Question of Defining Aggression. The Western delegates who raised this particular argument against the Czech proposal, pointed also to the inevitable conflict of the Czech proposal with the principle of the free flow of information and ideas which, in their view, it was an overriding responsibility of the United Nations to protect.³²

On the issue of the prohibition of the use of force in territorial disputes and border claims—a proposal clearly reflecting the inspiration of Premier Khrushchev's celebrated New Year's eve message of December 31, 1963, on the renunciation of force in territorial disputes, Western delegates responded cautiously to the Soviet-bloc initiative, suggesting the need for further study and for careful wording in any case so as not to restrict or limit the more general terms of the prohibition in Article 2(4) of the Charter.³³ The same note of caution was raised in regard to the express prohibition, under the principle of prohibition of force, of wars of aggres-

³⁰ See, for example, the addresses by Mr. Schwabel (U.S.A.), Docs. A/AC. 119/SR. 3, p. 12, and *ibid.*, SR. 15, pp. 17-18; Mr. Sinclair (United Kingdom), Docs. A/AC. 119/SR. 5, pp. 12-13, and *ibid.*, SR. 16, p. 13; M. Monod (France), Doc. A/AC. 119/SR. 6, pp. 5-6; and by Sir Kenneth Bailey (Australia) Docs. A/AC. 119/SR. 10, p. 7, and *ibid.*, SR. 17, p. 12.

³¹ See, for example, Dr. Pěchota (Czechoslovakia), *loc. cit.*; Mr. Khlestov (U.S.S.R.), Doc. A/AC. 119/SR. 5, p. 8.

³² See, for example, Mr. Schwabel (U.S.A.), Docs. A/AC. 119/SR. 3, p. 14, and *ibid.*, SR. 15, pp. 15, 18; Mr. Arancio-Ruiz (Italy), Doc. A/AC. 119/SR. 16, p. 8; Mr. Sinclair (United Kingdom), *ibid.*, p. 13; Mr. Salcedo Delima (Venezuela), *ibid.*, p. 17.

³³ See, for example, Mr. Sinclair (United Kingdom), *loc. cit.*

sion, Western delegates again referring to the abortive United Nations discussions in past years on the attempt at definition of "aggression."³⁴

On the issue of definition of the permissible exceptions to the prohibition of the use of force, the delegates sharply divided. The United Kingdom proposal, which had general Western support, specifically referred to action taken on the authority of the U.N. General Assembly as an example of a lawful use of force; and in this the United Kingdom proposal was also supported by the Yugoslav Delegation.³⁵ The combined Ghana-India-Yugoslavia draft resolution approved somewhat elliptically the use of force "pursuant to a decision by a competent organ of the United Nations made in conformity with the Charter."³⁶ Now while there was general agreement that force pursuant to a decision of the Security Council would constitute a lawful use of force, the Soviet-bloc delegates, understandably and predictably, as it now turns out in the light of the then pending battle at the forthcoming Nineteenth Session of the U.N. General Assembly over the attempted application of Article 19 of the U.N. Charter to the U.N. Expenses issue, insisted that the application of enforcement measures or the use of force could be decided upon and undertaken solely by the Security Council which, in the Soviet-bloc view, had primary responsibility under the Charter for the maintenance of international peace and security. The Soviet-bloc delegates insisted, in this regard, that there was no rôle in these matters for the General Assembly.³⁷

A similar note of caution was sounded by these same delegates over the United Kingdom proposal to legitimate the use of force when undertaken by a "regional agency acting in accordance with the Charter," the contention being advanced that any decision by a regional organization to use coercive measures or force against a Member of the United Nations without the authorization of the Security Council would be a breach of the Charter and illegal.³⁸

As to the exception to the prohibition of the use of force of measures of individual or collective self-defense, the Soviet-bloc delegates in general contended for a highly restrictive interpretation, seeking to limit the right of self-defense to cases where an armed attack had occurred, to the exclusion of every other act, including provocation. The Soviet-bloc delegates, with an eye also to the doctrinal debates in the United States over the legal bases of the United States action in the Soviet-Western confrontation during the Cuban missile crisis of October, 1962, insisted on limiting the opportunities for invocation of the right of self-defense to situations expressly envisaged by Article 51 of the Charter, and also on affirmatively excluding any notion of anticipatory self-defense in terms of Article 51.³⁹

³⁴ See, for example, Mr. Sinclair (United Kingdom), *ibid.*; Mr. Schwebel (U.S.A.), Doc. A/AC. 119/SR. 15, p. 18.

³⁵ See Yugoslav draft resolution, Doc. A/AC. 119/L. 7, *loc. cit.*, par. 4.

³⁶ See Ghana-India-Yugoslavia draft resolution, Doc. A/AC. 119/L. 15, *loc. cit.*, par. 3.

³⁷ See, for example, Mr. Cristescu (Rumania), Docs. A/AC. 119/SR. 7, p. 18, and *ibid.*, SR. 16, p. 6; Mr. Khlestov (U.S.S.R.), Doc. A/AC. 119/SR. 14, p. 12.

³⁸ Mr. Khlestov (U.S.S.R.), *loc. cit.*

³⁹ See, for example, Mr. Khlestov (U.S.S.R.), *loc. cit.*

The issue of colonialism, which had been introduced by the Czech draft resolution into the discussion over the principle of prohibition of the use of force, and which had been continued also in the Yugoslav and the combined Ghana-India-Yugoslavia draft resolutions, was strongly invoked by both the Soviet bloc and the uncommitted countries as basing an exception to the general prohibition of the use of force.⁴⁰ This special exception was justified partly on the ground of documents like the Charter of the Organization of African Unity, which proclaims an "absolute dedication to the total emancipation of the African Territories which are still dependent," and partly upon the Declaration of the Heads of State or Governments of non-aligned countries adopted at Belgrade in 1961; partly on a basis of the United Nations Declaration on the granting of independence to colonial countries and peoples (U.N. General Assembly Resolution 1514 (XV)), which expressly stated that the subjection of peoples to alien subjugation was contrary to the U.N. Charter and to the right of self-determination. There was sharp criticism, in this context, of the United Kingdom draft resolution which, it was contended, would be a serious challenge to the whole de-colonization movement, insofar as it was not only silent on the right of self-determination, but also would have the effect of branding as indirect aggression any meaningful support given by any state to a people acting in self-defense to assert that right of self-determination. It was further contended that the United Kingdom draft resolution might even entitle colonial Powers to invite other states to aid them in suppressing national liberation movements in their colonies.⁴¹

In opposition to these arguments, certain Western and also certain other delegates contended that, while they were opposed to colonialism and while they recognized the right of colonial peoples to self-determination, they considered revolution as a political and not a legal concept. It was further contended by these delegates, in this same vein, that expressly to mention a right of self-defense against colonial domination would be a "move backward" towards the traditional concept of the "just war"; that this would be to encourage a nation to use force, contrary to the principles of the United Nations, with the effect of greatly increasing existing tensions and endangering international peace and security; that it would give a state complete freedom to wage war, provided only that it appropriated the label of the charge of colonial domination when so doing.⁴² It was further suggested that colonial rule, whether by way of

⁴⁰ See, for example, Dr. Pěchoťa (Czechoslovakia), Docs. A/AC. 119/SR. 4, p. 6, and *ibid.*, SR. 8, pp. 6-7; Mr. Sahović (Yugoslavia), Doc. A/AC. 119/SR. 9, p. 22; Mr. Khlestov (U.S.S.R.), Docs. A/AC. 119/SR. 5, p. 9, and *ibid.*, SR. 14, p. 11; Mr. Khalil (United Arab Republic), Doc. A/AC. 119/SR. 8, pp. 8-9; Mr. El-Rædy (U.A.R.), *ibid.*, SR. 17, p. 16; and Mr. Dadzie (Ghana), Doc. A/AC. 119/SR. 10, pp. 14-15.

⁴¹ See, for example, Mr. Khlestov (U.S.S.R.), Doc. A/AC. 119/SR. 14, p. 11.

⁴² See, for example, variously, Mr. Blix (Sweden), Doc. A/AC. 119/SR. 10, p. 9; Mr. Ignacio-Pinto (Dahomey), *ibid.*, p. 12; Mr. Elias (Nigeria), Doc. A/AC. 119/SR. 7, p. 22; Mr. Schwebel (U.S.A.), Docs. A/AC. 119/SR. 15, pp. 15, 19, and *ibid.*, SR. 17, p. 18; Mr. Sinclair (United Kingdom), Doc. A/AC. 119/SR. 16, p. 14.

the administration of a Trust Territory or otherwise, was not contrary to the Charter; and that states administering dependent territories, in accordance with the Charter, were responsible for the maintenance of law and order in those territories.⁴³

A final point of difference concerned the utility of the proposal by Yugoslavia, which was supported in the subsequent combined Ghana-India-Yugoslavia proposal, for the non-recognition of any situation brought about by the illegal threat or use of force. In support of this principle, which was argued to be a "general principle of law" within the meaning of Article 38 of the Statute of the International Court of Justice, reference was made, among other things, to Article 17 of the Charter of the Organization of American States, and also to the Draft Declaration on Rights and Duties of States (Articles 9 and 11) prepared by the International Law Commission.⁴⁴ On the other hand, the opponents of this proposal pointed to the general failure of collective non-recognition as a legal sanction in the past; and they also pointed to certain practical difficulties insofar as many territorial settlements in the past were based upon treaties following upon a resort to force. It was argued, in this context, that there would be no profit in calling such settlements into question. Further, it was suggested that the judgment, in the first place, as to which party had illegally resorted to force, would tend to be somewhat subjective, with individual Members of the United Nations differing on this and thereby hampering the efforts of the United Nations as a collective body to maintain and restore peace.⁴⁵

As a matter of procedure, and in the face of likely differences of opinion and disagreements among the various national delegations represented on it, the Special Committee at Mexico City had set up a fourteen-man drafting committee the function of which was both to formulate points of consensus in the debates within the Special Committee and to itemize the various proposals and views on which there was no consensus in the debates.

In its preliminary informal discussions, the fourteen-man drafting committee reached unanimous agreement on the following draft paper⁴⁶ as to the points of consensus on the principle of the prohibition of the use of force:

1. Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

⁴³ By Sir Kenneth Bailey (Australia), Doc. A/AC. 119/SR. 17, pp. 14-15.

⁴⁴ See, for example, Dr. Krishna Rao (India), Doc. A/AC. 119/SR. 3, p. 8; Mr. Castañeda (Mexico), Doc. A/AC. 119/SR. 9, pp. 15-16; Mr. Cristescu (Rumania), Doc. A/AC. 119/SR. 16, p. 6.

⁴⁵ See, for example, Mr. Ohtaka (Japan), Doc. A/AC. 119/SR. 5, p. 15; Mr. Riphagen (Netherlands), Doc. A/AC. 119/SR. 7, p. 11; Mr. Blix (Sweden), Doc. A/AC. 119/SR. 10, p. 11; Mr. Sinclair (United Kingdom), Doc. A/AC. 119/SR. 16, p. 15.

⁴⁶ Drafting Committee Paper No. 10 and Corr. 1, Report of the Special Committee, Doc. A/5746, Nov. 16, 1964, p. 51.

2. In accordance with the foregoing fundamental principle, and without limiting its generality:

- (a) Wars of aggression constitute international crimes against peace.
- (b) Every State has the duty to refrain from organizing or encouraging the organization of irregular or volunteer forces or armed bands within its territory or any other territory for incursions into the territory of another State.
- (c) Every State has the duty to refrain from instigating, assisting or organizing civil strife or committing terrorist acts in another State, or from conniving at or acquiescing in organized activities directed towards such ends, when such acts involve a threat or use of force.
- (d) Every State has the duty to refrain from the threat or use of force to violate the existing boundaries of another State, or as a means of solving its international disputes, including territorial disputes and problems concerning frontiers between States.

3. Nothing in the foregoing paragraphs affects the provisions of the Charter concerning the lawful use of force.

Now while the consensus so reached might seem to go only part of the way toward meeting the original Czech proposals, nevertheless significant concessions made by the West had included the acceptance of the prohibitions, in terms, both of wars of aggression and of the use of force in territorial disputes and problems concerning frontiers between states. The West also did not press for any statement as to the competence of the U.N. General Assembly (in addition to the Security Council) in respect to the lawful use of force.

Among the points formally listed by the Special Committee,⁴⁷ in terms, as points where no consensus could be reached, were the following:

- 1. As to the use of force in accordance with the the Charter:
 - (a) whether the Security Council is the only U.N. organ competent to authorize the lawful use of force, or whether the General Assembly is also competent;
 - (b) whether mention should be made of the lawful use of force by a regional agency;
 - (c) whether or not the right of individual or collective self-defense should be stated to be in accordance with Article 51 of the Charter;
 - (d) whether or not the legal uses of force include a right of nations or peoples to self-defense against colonial domination in the exercise of their right to self-determination.

2. Whether states have a legal obligation to endeavor to make the United Nations security system more effective and to comply fully and in good faith with their obligations under the Charter with respect to any form of contribution by Member States to the maintenance of international peace and security.

⁴⁷ *Ibid.*, p. 51 *et seq.*

3. Whether states have a legal obligation to act to reach an agreement for general and complete disarmament.

4. Whether to include a prohibition of propaganda for war.

5. Whether states have a legal duty not to recognize situations brought about by the illegal use or threat of force.

6. Whether to include a provision that nothing shall authorize states to undertake acts of reprisal.

7. The definition of the term "force," and in particular whether that term embraces economic, political or other forms of pressure.

Unfortunately, after the preliminary, informal agreement of the fourteen-man drafting committee on the paper as to points of consensus, the head of the United States Delegation suddenly announced that the United States could not formally support the consensus paper, the delegate concerned explaining that while he himself had provisionally approved the text, this had been on the understanding that it was subject to consultation with his government and to further consideration in the drafting committee in the light of instructions received by individual representatives from their governments.⁴⁸ The point of difficulty, apparently, was over paragraph 2(d) of the consensus paper: "Every State has the duty to refrain from the threat or use of force to violate the existing boundaries of another State." This, as the United States delegate stated, was too incautious in its absence of qualification and could be open to the interpretation that it failed to take account of the law of hot pursuit. The United States delegate suggested, instead, the substitution in draft paragraph 2(d) of the consensus paper of the word "change" for "violate," on the score that "change" would be factual, where "violate" was too subjective.⁴⁹

Whatever the reasons for the United States delegate's change of mind—and the suggestion, which he himself partly adverted to, is that he was overridden in his earlier preliminary accord to the consensus paper by State Department fears in Washington as to possible legal prejudice to any future application of the doctrine of hot pursuit in the Viet-Nam struggle—he was bitterly criticized by the Soviet Union's representative for "obstructionism" to a "promising compromise formula"; and the Soviet representative further threatened to take the original consensus paper directly to the U.N. General Assembly for adoption.⁵⁰ The United States delegate's embarrassment must have been added to when not merely Soviet-bloc delegates but also the Indian representative⁵¹ joined in castigating him for his *volte-face* on the consensus paper.

In the face of this dilemma resulting from the American change of position on the drafting committee's consensus paper, the drafting committee had brought forward a second paper⁵² for consideration by the

⁴⁸ *Ibid.*, pp. 71-73.

⁴⁹ *Ibid.*, pp. 71-72.

⁵⁰ Report of the Special Committee, *op. cit.*, pp. 69-70.

⁵¹ *Ibid.*, p. 74.

⁵² *Ibid.*, p. 60.

Special Committee. This second paper stated simply: "The Committee was unable to reach any consensus on the scope or content of this principle." By 13 votes to 10, with 2 abstentions, the Special Committee decided to put this second paper to the vote first; and it was then adopted by 11 votes to 2, with 12 abstentions.⁵³

II. THE PRINCIPLE THAT STATES SHALL SETTLE THEIR INTERNATIONAL DISPUTES BY PEACEFUL MEANS IN SUCH A MANNER THAT INTERNATIONAL PEACE AND SECURITY AND JUSTICE ARE NOT ENDANGERED

The key institutional and doctrinal conflicts involved here were once again established, in their polar extremes, by Czech and United Kingdom draft resolutions.

The Czech proposal, after reciting the obligation of states to settle their international disputes "solely by peaceful means," went on to list the various alternative means of settlement of disputes, clearly establishing at the same time a preferred hierarchy in the priority of recourse to such means:

2. The parties to a dispute shall enter first into direct negotiation, and, having regard to the circumstances and the nature of the dispute, may also use by common agreement other peaceful means of settling disputes, such as enquiry, mediation, conciliation, arbitration or judicial settlement, and resort to regional agencies or arrangements.⁵⁴

The United Kingdom proposal, after itself reciting the obligation of states to settle their disputes by peaceful means (though significantly omitting the prefix "solely" before "peaceful means"), went on to declare:

2. The parties to any such dispute shall first of all seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

3. Unless they are capable of settlement by some other means, legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court. The parties may, however, entrust the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.⁵⁵

Two other proposals are relevant here as indicating the two main opposing positions during the debate over peaceful settlement. The Japanese Delegation, recalling the arguments in favor of the compulsory jurisdiction of the World Court advanced by them at the Fifty-First Biennial Meeting of the International Law Association immediately preceding the Mexico City Special Committee sessions, advanced the following proposition:

⁵³ *Ibid.*, p. 67.

⁵⁴ Doc. A/AC. 119/L. 6; Report of Special Committee, *op. cit.*, p. 77.

⁵⁵ Doc. A/AC. 119/L. 8; Report of Special Committee, *op. cit.*, p. 78.

Every State should accept the compulsory jurisdiction of the International Court of Justice, in accordance with Article 36, paragraph 2, of the Statute of the Court, as soon and with as few reservations as possible.⁵⁶

The countervailing approach to peaceful settlement, with its conscious weighting against judicial forms of settlement, at least as far as that form of settlement presently exists, is reflected in the combined Ghana-India-Yugoslavia draft resolution, which contained the following key paragraphs:

3. (a) If any dispute is not capable of settlement by some other means and if the parties agree that it is *essentially legal in nature* [italics added], such a dispute shall, as a general rule, be referred by all the parties to it to the International Court of Justice in accordance with the provisions of the Statute of the Court. The parties may, however, entrust the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

(b) In accordance with the provisions of Article 9 of the Statute of the International Court of Justice concerning the election of the judges of the Court, the United Nations shall take early steps to assure that in the Court as a whole there are represented more fully and equitably the main forms of civilization and the principal legal systems of the world. At the same time, it is the duty of the United Nations to continue its efforts in the field of the progressive development of international law and its codification in order to strengthen the legal basis of the judicial settlement of international disputes.⁵⁷

For while there was no dispute at all in the Special Committee at Mexico City over the abstract principle of peaceful settlement, which was accepted as being a logical corollary to the principle of the prohibition of the use of force, there was very substantial disagreement as to the various means of peaceful settlement and as to the relative priority with which they ought to be resorted to. The key to this disagreement is perhaps to be found in the much debated, asserted distinction between legal and political disputes, legal disputes on this view being those in which the parties disagreed as to their respective rights and duties on the basis of existing law, and political disputes those in which the parties were trying to change existing law. On this view, therefore, the problem of the establishment and use by states of means of peaceful settlement of disputes would be intimately bound up with the problem of peaceful change of existing international law.

In this regard the advantage of direct negotiations as a means of peaceful settlement, as many delegations saw it, was that, in addition to meeting the need for prompt and flexible settlement, direct negotiations best pro-

⁵⁶ Doc. A/AC. 119/L. 18; Report of Special Committee, *op. cit.*, p. 80.

⁵⁷ Doc. A/AC. 119/L. 19; Report of Special Committee, *op. cit.*, p. 81.

moted compromise of competing interests.⁵⁸ Favorable reference was made here by the Soviet Delegation to the rôle of direct negotiations in the peaceful settlement of the Soviet-Western confrontation over the Cuban missile crisis of October, 1962.⁵⁹ It was argued, on this basis, that direct negotiations should be viewed as the fundamental means of settlement—the principal means, in any case, in priority to all others. The counter-attack against any establishment of a hierarchy of methods of peaceful settlement that would give priority to direct negotiations was mounted in terms of the arguments that direct negotiations did not allow the facts to be established objectively and impartially, nor allow third parties to exercise a moderating influence, nor for that matter even ensure equal terms, since usually one of the parties would be in a weaker position than the other or others. These arguments were buttressed by positive law contentions to the effect that establishment of any hierarchy of modes of peaceful settlement would be counter to the provisions of the Charter, and in particular to Article 33(1), which left parties free to choose the means of settlement they preferred.⁶⁰

On the direct point of judicial means of peaceful settlement, there was discussion, on the one hand, as to whether there should be any reference at all to the rôle of the International Court of Justice, and, on the other hand, as to whether there should not be included an appeal to states to accept the compulsory jurisdiction of the Court under Article 36(2) of the Court Statute.⁶¹ This latter position was strongly attacked, however, on the score that it would not accord with the realities of international life and recent experience; that it would amount to adopting a doctrinaire position contrary to the principle of sovereign equality and independence of states, and contrary also to the principle of free choice by all states

⁵⁸ See, for example, Mr. Prusa (Czechoslovakia), Doc. A/AC. 119/SR. 18, pp. 3-6; Mr. Vilfan (Yugoslavia), *ibid.*, pp. 6-8; Mr. Cristescu (Rumania), Doc. A/AC. 119/SR. 19, p. 11; Mr. Fedorov (U.S.S.R.), Doc. A/AC. 119/SR. 20, pp. 4-7; Mr. Bierzanek (Poland), *ibid.*, p. 10; and see also Dr. Krishna Rao (India), Doc. A/AC. 119/SR. 23, p. 6.

⁵⁹ Mr. Fedorov (U.S.S.R.), Doc. A/AC. 119/SR. 20, pp. 4-5.

⁶⁰ See, for example, Mr. Sinclair (United Kingdom), Doc. A/AC. 119/SR. 19, pp. 5-8; Mr. Colombo (Argentina), *ibid.*, p. 18; Mr. Monod (France), Doc. A/AC. 119/SR. 21, p. 15; Mr. Fattal (Lebanon), *ibid.*, p. 21; Mr. Castañeda (Mexico), Doc. A/AC. 119/SR. 22, p. 14; Mr. Schwabel (U.S.A.), *ibid.*, pp. 19, 23; Mr. Ignacio-Pinto (Dahomey), Doc. A/AC. 119/SR. 23, p. 11; Mr. Khalil (United Arab Republic), Doc. A/AC. 119/SR. 24, pp. 4-5; Sir Kenneth Bailey (Australia), *ibid.*, pp. 16-20.

⁶¹ The main intellectual pressures for general acceptance of the compulsory jurisdiction of the World Court came from Japan, recalling in this regard the strong proposals advanced by Japanese speakers at the 1964 (Tokyo) meeting of the International Law Association. See, for example, Mr. Hatano (Japan), Docs. A/AC. 119/SR. 18, p. 10; SR. 21, p. 17; SR. 24, p. 10. And see also Mr. Elias (Nigeria), Doc. A/AC. 119/SR. 18, p. 10; Mr. Arangio-Ruiz (Italy), Doc. A/AC. 119/SR. 21, p. 9; Mr. Schwabel (U.S.A.), Doc. A/AC. 119/SR. 22, p. 18; Mr. Blix (Sweden), *ibid.*, p. 25; Mr. Sinclair (United Kingdom), Doc. A/AC. 119/SR. 24, p. 8; Sir Kenneth Bailey (Australia), *ibid.*, pp. 19-20.

that were parties to a dispute of the most suitable means of peaceful settlement in the light of their own interests.⁶²

Another forceful argument against any express reference to the issue of acceptance of compulsory jurisdiction was as to the small degree of integration so far achieved by the international community. It was pointed out, in this regard, that very few of the "new" states which had recently achieved independence had accepted the World Court's compulsory jurisdiction. In order for many states to have confidence in the Court's jurisdiction, it was contended, it was essential not to appeal for acceptance of compulsory jurisdiction, but to speed up the process of codification and progressive development of international law and to ensure that the membership of the Court should reflect a more equitable geographical distribution than that which, it was contended, presently existed. It was argued that such attitudes of reserve on the part of the new states vis-à-vis the Court were justified because of the situation in which they found themselves as a result of having formally inherited legal obligations deriving from the colonial régimes to which they had been subjected; and that Article 38(1)(c) of the Court Statute, which provided that the Court should decide in accordance with "the general principles of law recognised by *civilised* nations" was not likely to dispel the new states' lack of confidence in the Court.⁶³

As the debate indicated, those states belonging to geographical areas which had reached a high degree of integration had accepted the obligation to submit a wide range of legal disputes to the International Court of Justice; while states belonging to other areas which had not yet attained the same degree of integration distrusted the procedure of judicial settlement of disputes. In this regard, reference was made again to the suggested dichotomy between legal disputes and political disputes, with the argument that the parties to a dispute should first of all agree that it was essentially legal before referring it to the Court.

Overriding all other considerations, however, in the manifest lack of enthusiasm, even hostility, on the part of the delegations of the Soviet bloc and the "new" countries for recourse to the World Court for settlement of disputes, or *a fortiori* for any acceptance of its compulsory jurisdiction, was the nature of the present geographical representation in the composition of the Court. A revision of the Court's composition, it was argued, would help increase the confidence of states in the Court; and one sug-

⁶² See, for example, Mr. Cristescu (Rumania), Doc. A/AC. 119/SR. 19, p. 13; Mr. Fedorov (U.S.S.R.), Doc. A/AC. 119/SR. 20, p. 6; Mr. Khlestov (U.S.S.R.), Doc. A/AC. 119/SR. 22, p. 28; Mr. Bierzanek (Poland), Doc. A/AC. 119/SR. 20, p. 8; Mr. Fattal (Lebanon), Doc. A/AC. 119/SR. 21, p. 21; Dr. Pěchota (Czechoslovakia), *ibid.*, p. 25; Justice U. San Maung (Burma), *ibid.*, p. 26; Mr. Dadzie (Ghana), Doc. A/AC. 119/SR. 22, pp. 6-8; Dr. Krishna Rao (India), Doc. A/AC. 119/SR. 23, pp. 8-9; Mr. Khalil (United Arab Republic), Doc. A/AC. 119/SR. 24, pp. 5-6.

⁶³ See, for example, Mr. Dadzie (Ghana), *loc. cit.*, p. 6.

gestion was made for an increase in the number of judges on the Court.⁶⁴ However, as against this, it was argued that the best means of improving geographical representation on the Court was not to change the rules for election of the Court's members, but to give due weight to the importance of geographical factors when elections to the Court actually took place. It was suggested that such due weight to geographical factors had, in fact, been given at the last elections to the Court held in 1963, with consequent improvement of the geographical balance on the Court.⁶⁵

As a related problem in connection with the use of arbitration and judicial settlement, some delegations stressed the importance of the codification and progressive development of international law.⁶⁶ It was suggested that the lack of confidence which many states at present displayed in such procedures was due in large measure to the antiquated, inequitable, fragmentary, and uncertain character of many of the rules comprising the body of substantive rules of existing international law. It was argued, in this context, that any decision to accept the compulsory jurisdiction of the Court could not be made in a vacuum, but necessarily carried with it the implicit acceptance of the body of substantive legal rules relevant to the subject matter of the dispute in question—rules in the creation and development of which, for the most part, the "new" countries had played no part. Many of such rules, for example, those rules relating to state responsibility and to the protection of foreign investments, profoundly affected the situation of the new or economically weak states and had been established, in part, contrary to their interests. It followed that many states now considered such rules unjust, even though they might be formally sanctioned by international law, thus creating a dichotomy between international legality and justice, the inevitable result of which was that such states preferred to resort to political action rather than to submit their disputes to arbitration or compulsory judicial settlement.⁶⁷ These same countries considered it essential that the United Nations continue its efforts for the codification and progressive development of international law.⁶⁸

In the light of the profound disagreements reflected in the course of the debate, it is hardly surprising that the Special Committee at Mexico City, on the recommendation of the drafting committee, voted unanimously to resolve that it was unable to reach any consensus on the scope or content of the principle of settlement of international disputes by peaceful means.⁶⁹

⁶⁴ See, generally, Mr. Fattal (Lebanon), *loc. cit.*, p. 23; Justice U. San Maung (Burma), *loc. cit.*; Mr. Dadzie (Ghana), *loc. cit.*, p. 6; Mr. Khalil (United Arab Republic), *loc. cit.*, p. 6.

⁶⁵ See Mr. Schwebel (U.S.A.), Doc. A/AC. 119/SR. 22, p. 17; Mr. Sinclair (United Kingdom), Doc. A/AC. 119/SR. 24, p. 9.

⁶⁶ See, for example, Mr. Dadzie (Ghana), *loc. cit.*, p. 9.

⁶⁷ See Mr. Castañeda (Mexico), Doc. A/AC. 119/SR. 22, pp. 11-12.

⁶⁸ See, for example, Mr. Vilfan (Yugoslavia), Doc. A/AC. 119/SR. 23, p. 12.

⁶⁹ *Op. cit.*, p. 104.

III. THE DUTY NOT TO INTERVENE IN MATTERS WITHIN THE DOMESTIC JURISDICTION OF ANY STATE, IN ACCORDANCE WITH THE CHARTER

The main initiatives in presenting the case for the "new" international law as to the duty of non-intervention were assumed, this time, by Czechoslovakia and by Yugoslavia. The differences between the Czech and Yugoslav draft resolutions are quite interesting.

The Czech draft resolution,⁷⁰ which, as with the Czech drafts on the other principles of friendly relations, presumably bore the imprimatur of the Soviet bloc as a whole and was put forward on a more or less representative group basis, was fairly short. After opening with the declaration that states should "refrain from any direct or indirect intervention under any pretext in the internal or external affairs of any other State . . . [and] [i]n particular, any interference or pressure by one State or group of States for the purpose of changing the social or political order in another State," the Czech draft resolution went on to postulate two very specific examples of prohibited interventions going to the core of Soviet-bloc special interests. These were, first (and recalling Premier Khrushchev's New Year's eve message of December 31, 1963, on the renunciation of force in territorial disputes),⁷¹ the interdiction of "any acts, manifestations or attempts aimed at a violation of the territorial integrity or inviolability of any State"; and second, the interdiction of "exerting pressure by any means, including the threat to sever diplomatic relations, in order to compel one State not to recognize another State," a proposal rooted in the concerted Soviet-bloc objections to West Germany's application of the so-called Hallstein doctrine in its foreign relations.

The Yugoslav proposal⁷² opened similarly to the Czech proposal but then went on in much more detail to spell out the duty of states to refrain from "any form of interference or attempted threat against the independence or right to sovereign equality of any other State and in particular its right to select its political economic and social system and to pursue the development thereof." Among the specific *indicia* of such prohibited interference listed in the Yugoslav resolution were:

3. (a) using or encouraging the use of coercive measures of a political or economic character . . . ;
- (b) attempting to impose a political or social system on another State;
- (c) interfering in civil strife in another State;
- (d) organizing, assisting, fomenting, inviting, or tolerating subversive or terrorist activities against another State;
- (e) interfering with or hindering in any form or manner the free disposition of the natural wealth and resources of another State.

The Yugoslav draft was substantially reproduced in a further combined Ghana-India-Yugoslavia draft resolution,⁷³ which also added to the

⁷⁰ Doc. A/AC. 119/L. 6; Report of Special Committee, *op. cit.*, p. 109.

⁷¹ Published in *Izvestiya*, Jan. 4, 1964, p. 1; 16 Current Digest of the Soviet Press 3 (No. 1, Jan. 29, 1964).

⁷² Doc. A/AC. 119/L. 7; Report of Special Committee, *op. cit.*, p. 109.

⁷³ Doc. A/AC. 119/L. 27; Report of Special Committee, *op. cit.*, p. 114.

notion of the right of any state "to choose and develop its own political, economic and social order" the more rhetorical flourish "in the manner most suited to the genius of its people." It seems clear, from the skillful argument advanced by the Yugoslav Delegation in support of their drafts, that the Yugoslav proposals were formulated, in part at least, with a backward glance to the Soviet-Yugoslav doctrinal conflicts of the Stalinist era, and the extreme forms of political, economic, and ideological pressure then exerted by Stalin in the attempt to eliminate the Titoist deviation. Quite interestingly, too, during the debate on this particular principle, any notion of the monolithic unity of the Socialist countries in legal doctrinal matters was further weakened by the clear tendency of the Rumanian Delegation⁷⁴ to prefer the Yugoslav, rather than the Czech, draft, with the far greater emphasis by the former on the rights of political independence of small states.

The Latin American states, and most notably Mexico, bearing in mind the historical contribution of distinctive Latin American theories to the development of international law doctrine in this area, invoked a number of practices, rooted in historical Latin American relations to the big Powers, as examples of legally impermissible interventions. Thus the Mexican draft,⁷⁵ after prohibiting any form of interference "against the personality of the State or against its political, economic and cultural elements," went on to postulate a list of eight different categories of legally impermissible interventions, among these being "coercive measures of an economic or political nature"; the "permitting, in the areas subject to its jurisdiction, or promoting or financing anywhere" the organization or training of armed forces for purposes of incursions into other states, or the supplying of arms or war materials for aiding rebellions in another state (even though the latter's government be not recognized), or the organization of subversive or terrorist activities against another state; the making of the recognition of governments or the maintenance of diplomatic relations dependent on the receipt of special advantages; the imposing on a state of concessions to foreigners of a privileged situation going beyond the rights, means of redress and safeguards granted under the municipal law to nationals of that state.

By contrast to these *avant-garde*, lawmaking ventures on the part of the Socialist and the uncommitted countries, the United Kingdom draft resolution, reflecting a fairly general Western bias against abstract general propositions or declarations formulated *a priori* and on a non-empirical basis, was determinedly modest in character:

1. Every State has the right to political independence and territorial integrity.

2. Every State has the duty to respect the rights enjoyed by other States in accordance with international law, and to refrain from

⁷⁴ As to Rumania's position, see the address by Mr. Cristescu, Doc. A/AC. 119/SR. 26, pp. 6-9.

⁷⁵ Doc. A/AC. 119/L. 24; Report of Special Committee, *op. cit.*, p. 113; and see also the supporting address by Mr. Castañeda (Mexico), with its valuable review of Latin American historical practice, Doc. A/AC. 119/SR. 30, pp. 4-13.

intervention in matters within the domestic jurisdiction of any other State.⁷⁶

To the United Kingdom draft, the United States sought to add an amendment as to the United Nations and domestic jurisdiction; specifically, that, while reaffirming the Charter principle that the United Nations is not authorized to intervene in matters essentially within the domestic jurisdiction of any state, this principle should be considered as "subject to the authority granted the Security Council under Chapter VII of the Charter concerning action with respect to threats to the peace, breaches of the peace, and acts of aggression."⁷⁷

Western delegations, in defending the basic approach adumbrated in the United Kingdom draft resolution, suggested that, in considering the scope of the principle of non-intervention, it should be recognized that in an interdependent world it is inevitable and desirable that states be concerned with and try to influence the actions and policies of other states; and that the objective of international law is not to prevent such activity but rather to ensure that it be compatible with other principles of international law such as the sovereign equality of states and the self-determination of their peoples.⁷⁸ On this view, not merely would it be undesirable to attempt an exhaustive definition of what constitutes an "intervention,"⁷⁹ but it would also be impossible, insofar as much of the classic conception of non-intervention had already been absorbed by the prohibition of the threat or use of force.⁸⁰ It was further suggested that too rigid a formulation of the rules of non-intervention might lead to serious contradictions when one came to study the principle of equal rights and self-determination.

As against this, it was contended that the principle of non-intervention had a special importance for the smaller countries and particularly those which had emerged from colonial domination, its observance being the guarantee of their sovereignty and of their independent development, the principle of non-intervention thus complementing the principle of self-determination.⁸¹ It was suggested, in this regard, that the principle of non-intervention, insofar as it called for respect for the will of peoples, prohibited the export either of counter-revolution to Socialist countries or of revolution to capitalist countries.⁸²

The antinomies necessarily involved in any attempt at exhaustive definition of the legal scope of the principle of non-intervention were clearly

⁷⁶ Doc. A/AC. 119/L. 8; Report of Special Committee, *op. cit.*, p. 110.

⁷⁷ Doc. A/AC. 119/L. 26; Report of Special Committee, *op. cit.*, p. 112.

⁷⁸ See Mr. Sinclair (United Kingdom), Doc. A/AC. 119/SR. 26, p. 6; Mr. Monod (France), Doc. A/AC. 119/SR. 28, p. 10; Mr. Schwebel (U.S.A.), Doc. A/AC. 119/SR. 29, p. 10; Mr. Riphagen (Netherlands), Doc. A/AC. 119/SR. 30, p. 15.

⁷⁹ Mr. Sinclair (United Kingdom), *loc. cit.*, p. 5.

⁸⁰ *Ibid.*; and see also Mr. Monod (France), *loc. cit.*; Mr. Fattal (Lebanon), Doc. A/AC. 119/SR. 30, p. 16; Mr. Schwebel (U.S.A.), *ibid.*, p. 23.

⁸¹ Mr. El-Reedy (United Arab Republic), Doc. A/AC. 119/SR. 30, p. 20.

⁸² Mr. Kazantsev (U.S.S.R.), Doc. A/AC. 119/SR. 28, p. 12.

indicated in the course of the debate. On the one hand, it was suggested that the term "domestic jurisdiction" implied, among other things, a state's right to choose what should be its own political, social, economic and legal system, and also its right to choose whether to entertain diplomatic relations with other states; whether to enter into agreements; whether to participate in regional and other international organizations. On the other hand, the suggested catalogue of legally impermissible interventions was also very sweeping: for example, the items listed by one delegation covered a gamut of state activities abroad, including "propaganda, espionage, infiltration, bribery, assassination, assistance to guerillas, and peremptory diplomatic demands, and so forth," when directed against another state; and also activities aimed at "destroying its markets, violating its laws, damaging its prestige and reputation, controlling its policy or subverting its government."⁸³

Yet the countries that seemed to be most adamant as to the need for widening the scope of legally *impermissible* interventions and so for restricting the pressures that any one state might exercise on another, were also insistent on establishing a special category of exceptions as to legally *permissible* interventions: the intervention would become lawful, under this special category of exceptions to the general rule, because in defense of a "higher" right. As an example of this latter category of exceptions, it was contended that the principle of non-intervention could not legally be invoked with respect to

such questions as *Apartheid* in the Union of South Africa, the oppression of Africans in Central Africa, the denial of the right of self-determination, and other colonialist and neo-colonialist practices which had been the subject of many resolutions in the General Assembly.⁸⁴

In reply to this, the opponents of any far-reaching, detailed, enumerative definition of the scope of impermissible interventions suggested an inherent contradiction: for, they argued, once you set up a category of "lawful" interventions, the effect must necessarily be to widen the scope of permissible pressures that any one state may try to exert on and apply to other states. The price of legal activism and thus of any interventionism in behalf of an ending of *Apartheid* or of "colonialism" or for that matter, equally, of "totalitarianism" (whether of the Left or of the Right), might therefore have to be a surrender of some of the overly protective, timorous attitudes that many of the Socialist and "uncommitted" delegations seemed to apply in regard to more or less normal and established pressures of ordinary diplomatic relations and of living in an increasingly interdependent world community.⁸⁵

Interesting subsidiary points in the debate here were the concerted attack by Soviet-bloc delegations on the so-called Hallstein doctrine, developed by West Germany in its international relations to compel the

⁸³ Mr. Vanderpuye (Ghana), Doc. A/AC. 119/SR. 29, p. 6.

⁸⁴ Mr. Vanderpuye (Ghana), *loc. cit.*

⁸⁵ See Mr. Sinclair (United Kingdom), Doc. A/AC. 119/SR. 26, p. 5.

non-recognition of East Germany by other countries: it was contended, in this regard, not merely that the threat to sever diplomatic relations as a means of compelling one state not to recognize another was prohibited under the principle of non-intervention,⁸⁶ but also, more generally, that the conditioning of recognition of a government or maintenance of diplomatic relations on receipt of special advantages constituted similarly an *abus de droit*.⁸⁷ It was further contended that the establishment or maintenance of foreign military bases in former colonial territories would violate the principle of non-intervention.⁸⁸ There was an interesting sub-argument, too, on the proposition that a specially privileged legal position for foreigners in comparison to home nationals violated the principle of non-intervention: one delegate suggested that such a proposition would involve an alteration of established international law which, after all, stipulated a minimum standard in the treatment of aliens, insofar as it would substitute for that "pillar of progressive international law" the "flexible standard of national treatment."⁸⁹

In the end, and as it had done in relation to the two preceding principles, the Special Committee, on the recommendation of the drafting committee, voted unanimously to declare that it was unable to reach any consensus on the scope or content of the principle of non-intervention.⁹⁰

IV. THE PRINCIPLE OF SOVEREIGN EQUALITY OF STATES

On the principle of the sovereign equality of states, in contrast to the preceding three principles, it was at least possible to obtain some agreement. On the recommendation of its drafting committee, the Special Committee at Mexico City adopted, by unanimous vote, a consensus paper in the following terms:

I. The Points of Consensus

1. All States enjoy sovereign equality. As subjects of international law they have equal rights and duties.
2. In particular, sovereign equality includes the following elements:
 - (a) States are juridically equal.
 - (b) Each State enjoys the rights inherent in full sovereignty.
 - (c) Each State has the duty to respect the personality of other States.
 - (d) The territorial integrity and political independence of the State are inviolable.

⁸⁶ See Mr. Kubrycht (Czechoslovakia), Doc. A/AC. 119/SR. 25, p. 6; Mr. Bierzanek (Poland), *ibid.*, pp. 10-12, and SR. 31, pp. 9-11; Mr. Olszowka (Poland), Doc. A/AC. 119/SR. 32, p. 28; Mr. Kazantsev (U.S.S.R.), Doc. A/AC. 119/SR. 28, p. 17.

⁸⁷ See the eloquent complaint by the Mexican delegate, listing past abuses from which Mexico had suffered in this context, and invoking also Mexico's own "Estrada doctrine." Address by Mr. Castañeda (Mexico), Doc. A/AC. 119/SR. 30, pp. 10-11.

⁸⁸ Mr. Vanderpuye (Ghana), Doc. A/AC. 119/SR. 29, p. 7.

⁸⁹ See Mr. Schwebel (U.S.A.), *ibid.*, pp. 11-12.

⁹⁰ Report, Doc. A/5746, Nov. 16, 1964, p. 141.

- (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems.
- (f) Each State has the duty to comply fully and in good faith with its international obligations, and to live in peace with other States.⁹¹

That such a consensus could be reached became clear on the filing of the original four draft resolutions: by Czechoslovakia;⁹² by the United Kingdom;⁹³ by Yugoslavia;⁹⁴ and by Ghana, India, Mexico, and Yugoslavia jointly.⁹⁵ Perhaps because of the very self-evidence of the principle, and the absence of too much limiting positive law doctrine from earlier eras, the various texts proved surprisingly similar as to their main points and even as to their actual phrasing. The only real differences as to the meaning and ambit of the principle of sovereign equality centered on the attempt by some delegations to associate the principle also with concepts of de-colonization. Thus the Czech draft resolution,⁹⁶ which had opened in fairly general, non-specific, and non-controversial terms, changed its tone abruptly in the middle of its final paragraph (par. 4), to conclude with the declaration:

. . . territories which, in contravention of the principle of self-determination, are still under colonial domination cannot be considered as integral parts of the territory of the colonial Power.

While this particular Czech proposal, which was supported in terms by the United Arab Republic and vigorously opposed by some Western countries and most notably the United Kingdom, failed to obtain adoption, on the unanimity principle, as a "point of consensus," it nevertheless set the stage for more extended and detailed discussions as to the obligations of the former colonial Powers and, more generally, the economically advanced countries towards less developed countries. This, since tending to reflect the feelings and emotions of the delegates of the "new" countries, is in some respects potentially of great importance as an indication of the likely points of pressure in the future in the development and reshaping of international law doctrine for purposes of achievement of the "new" international law. The range of such proposals is amply indicated in the further paper, again adopted unanimously by the Special Committee at Mexico City, setting out a "List itemizing the various proposals and views on which there is no consensus but for which there is support."⁹⁷ Thus, for example, the Special Committee listed among its "no-consensus" points "The question whether economically advanced countries have the obligation to do what they can to narrow the gap between themselves and the less developed countries" (par. 9). This resulted directly from the con-

⁹¹ *Ibid.*, p. 163.

⁹² Doc. A/AC. 119/L. 6; Report of Special Committee, *op. cit.*, p. 148.

⁹³ Doc. A/AC. 119/L. 8; Report of Special Committee, *op. cit.*, p. 149.

⁹⁴ Doc. A/AC. 119/L. 7; Report of Special Committee, *op. cit.*, p. 148.

⁹⁵ Doc. A/AC. 119/L. 28; Report of Special Committee, *op. cit.*, p. 150.

⁹⁶ Doc. A/AC. 119/L. 6; Report of Special Committee, *op. cit.*, p. 148.

⁹⁷ Doc. A/5746, Nov. 16, 1964, pp. 163-165.

tention, advanced by the Delegation of the United Arab Republic, that there was just such an obligation.⁹⁸

Again, and related to "The question whether territories which, in contravention of the principle of self-determination, are still under colonial domination can be considered as integral parts of the territory of the colonial Power,"⁹⁹ it was strongly contended by the United Arab Republic¹⁰⁰ that a state had the legal right to remove any foreign troops or military bases from its territory.¹⁰¹ This claimed right, it was suggested, was particularly relevant to countries whose accession to independence had been conditioned upon the presence of such troops or bases, reference being made here also to the Belgrade Declaration that the establishment and maintenance of foreign military bases in the territories of other countries was a violation of their sovereignty.

On the further question of the right of states to dispose freely of their natural wealth and resources,¹⁰² the major point of issue was whether this involved the legal right to suspend or terminate any agreement with respect to the disposal of natural wealth and resources. On one view, no provisions of international law or of treaties which might no longer correspond to current requirements could be invoked to justify interference with a nation's right to dispose of its resources. A considerable number of states—Czechoslovakia, Rumania, Yugoslavia, the Soviet Union, Mexico, United Arab Republic, India, Nigeria—expressly favored a rule in these terms.¹⁰³ Ghana also concurred in the existence of such a right of any state to terminate any agreement with respect to disposal of natural wealth and resources, subject only to the liability of such state to make compensation.¹⁰⁴ The opposition to inclusion of such a principle, led by the United Kingdom, the United States, Japan, and Australia, was directed to the asserted disadvantages of enumerating as legal principles concepts which were political or economic in character; and it was also suggested that special provision, as such, in this area, was unnecessary.¹⁰⁵

On two further questions, no agreement again could be reached, and so they were listed simply as points of no consensus: first, the contention by Mexico that aliens could not, under international law, claim rights superior to those of nationals of a state;¹⁰⁶ and second, the contention by the

⁹⁸ See Mr. Khalil (United Arab Republic), Doc. A/AC. 119/SR. 35, pp. 9-10.

⁹⁹ "List . . . on which there is no consensus but for which there is support," par. 4. Doc. A/5746, Nov. 16, 1964, pp. 163-165.

¹⁰⁰ Mr. Khalil (United Arab Republic), *loc. cit.*

¹⁰¹ "List . . . on which there is no consensus but for which there is support," par. 10, *loc. cit.*

¹⁰² *Ibid.*, par. 3.

¹⁰³ Doc. A/AC. 119/SR. 33, p. 5 (Dr. Pěchota, Czechoslovakia); p. 14 (Mr. Cristescu, Rumania), p. 10 (Mr. Sahović, Yugoslavia); SR. 35, pp. 17-18 (Mr. Khlestov, U.S.S.R.); SR. 33, p. 9 (Mr. Moreno, Mexico); SR. 35, p. 10 (Mr. Khalil, United Arab Republic), p. 16 (Dr. Krishna Rao, India), p. 20 (Mr. Agoro, Nigeria).

¹⁰⁴ Mr. Dadzie (Ghana), Doc. A/AC. 119/SR. 35, p. 21.

¹⁰⁵ Mr. Gibbs (United Kingdom), *ibid.*, p. 9; Mr. Schwebel (U.S.A.), *ibid.*, p. 13; Mr. Ohtaka (Japan), *ibid.*, p. 22; Sir Kenneth Bailey (Australia), *ibid.*, p. 24.

¹⁰⁶ "List . . . on which there is no consensus but for which there is support," par. 6, *loc. cit.*; and see Mr. Moreno (Mexico), Doc. A/AC. 119/SR. 33, p. 7.

United Arab Republic and by India that a state has no right to conduct any experiment or resort to any action (for example, weapons-testing) capable of having harmful effects on other states or of endangering their security.¹⁰⁷

The remaining questions of importance on which consensus could not be reached concerned the existence or otherwise of a right to join international organizations and to become parties to multilateral treaties, and the relationship between state sovereignty and international law. On the first point,¹⁰⁸ the Soviet-bloc states generally favored such a right,¹⁰⁹ but Western states pointed to the practical legal difficulties in view of Article 4 of the United Nations Charter which, on this view, expressly reserves to the United Nations the right to determine which states meet the requirements of admission to membership.¹¹⁰ The affirmative arguments had been directed to the need for adaptation of old rules of international law or the creation of new rules to meet the needs of the present-day world community, and to the importance of the newly-established states' playing their part in that process; and to the need for achievement of universality in international life which, it was contended, was impeded by the arbitrary refusal of certain states to recognize new states. All this, it was argued, was incompatible with respect for the principle of sovereignty and also constituted discrimination that was contrary to the principle of equality.

On the question of the relation of state sovereignty and international law,¹¹¹ the principal Western states and also Japan favored a provision to the effect that every state has the duty to conduct its relations with other states in conformity with the principle that the sovereignty of each state is subject to the supremacy of international law.¹¹² There was strong opposition to this proposal, however, from the Soviet bloc and also from a number of uncommitted countries. While claiming that they did not adhere to the old-fashioned theory of absolute state sovereignty, which they viewed as the negation of international law, these latter states also strongly criticized theories of "world law" and a "world government." On this view, the theory of the "super-state" was incompatible with the sovereignty and equality of states, and could lead to violations of the rights of small states and of peoples fighting for their independence, and to interference in the domestic affairs of states. Respect for state sovereignty, on this

¹⁰⁷ *Loc. cit.*, par. 10; and see Mr. Khalil (United Arab Republic), Doc. A/AC.119/SR. 35, p. 11, and Dr. Krishna Rao (India), *ibid.*, p. 16.

¹⁰⁸ "List . . . on which there is no consensus but for which there is support," par. 2, *loc. cit.*

¹⁰⁹ Dr. Pěchota (Czechoslovakia), Doc. A/AC.119/SR. 33, p. 5; Mr. Cristescu (Rumania), *ibid.*, p. 12; Mr. Olszowka (Poland), Doc. A/AC.119/SR. 35, p. 4.

¹¹⁰ See, for example, Mr. Gibbs (United Kingdom), Doc. A/AC.119/SR. 35, p. 8; Sir Kenneth Bailey (Australia), *ibid.*, pp. 23-24.

¹¹¹ "List . . . on which there is no consensus but for which there is support," par. 5, *loc. cit.*

¹¹² Mr. Deleau (France), Doc. A/AC.119/SR. 35, p. 6; Mr. Gibbs (United Kingdom), *ibid.*, p. 7; Mr. Ohtaka (Japan), *ibid.*, p. 22.

basis, was a basic condition for the maintenance of world peace and for co-operation among states. It was the foundation of contemporary international law, which reflected the voluntary agreement of states.¹¹³

CONCLUSIONS¹¹⁴

Looking back on the history of the coexistence (friendly relations) debate over the past few years, and the general Soviet-Western scientific legal confrontation, the conclusion seems to emerge inescapably that the time is ripe for a change in basic Western tactics. Western delegations, both in official inter-governmental arenas, such as those provided by the United Nations specialized commissions and agencies and the General Assembly itself, and also in private, scientific organizations, originally resisted the Soviet campaign for an immediate act of codification, *uno actu*, of postulated principles of peaceful coexistence. Apart from the evident propaganda objectives that Soviet-bloc jurists were seeking to realize in the period prior to the Soviet-Western *détente* arising from the Cuban nuclear missile crisis of October, 1962, it seemed clear at the time that any list of principles arrived at in this way by purely *a priori* methods would be mere exercises in cloudiness and semantic confusion, flowing from the normative ambiguity existing between the different legal systems to be involved in any such grand declaration or code. But the Western insistence, instead, on pragmatic, empirical, problem-oriented, step-by-step methods, involving the induction of any principles of coexistence (friendly relations) from the main tension-issues of current Soviet-Western relations and their concrete resolution, necessarily involved a correlative obligation to be ready and willing actively to apply such methods—in a word, to take part in the dialogue. It would be a pity if the impression were to emerge that an originally legitimate and methodologically valid Western response to an, on the whole, originally rather clumsy and somewhat unscientific Soviet legal campaign in behalf of coexistence, were only a device or stratagem for defeating or delaying the pressures and aspirations of the "new" countries for the progressive rewriting of old international law doctrine to meet the revolutionary changes in the world community since World War II.

¹¹³ See, variously, Mr. Moreno (Mexico), Doc. A/AC. 119/SR. 33, p. 8; Mr. Khalil (United Arab Republic), *ibid.* SR. 35, p. 12; Mr. Dadzie (Ghana), *ibid.*, p. 22, Mr. Cristescu (Rumania), *ibid.* SR. 33, pp. 12-14, and SR. 35, pp. 24-25; Mr. Khlestov (U.S.S.R.), *ibid.* SR. 35, p. 19.

¹¹⁴ Due to the lengthy debate in Mexico City over the first four principles of Friendly Relations, discussed above, the remaining three principles (indicated above) could not be considered at all. The question of Methods of Fact-Finding, which had also been listed for study in Mexico City (see above), was in fact reached as the last item in the agenda; but so little time remained for discussion that it was resolved (by 22 votes to none, with 4 abstentions) merely to recommend that the General Assembly do no more than take note of the matter and bring it to the attention of Member States of the U.N. with a view to their written comments in the future, the resolution reciting the absence of expression of opinion by any more than a few Member States up to date and the lack of time for full consideration at Mexico City.

The fact is, of course, that the larger part of the world, including a majority of the "new" countries, is civil law in legal background, and does not have the same distrust of abstract general formulations or codes that Western common lawyers have. It is right for common lawyers to continue to insist on the empirical, problem-oriented approach to inter-systems accommodations; I do not see how, however, we can avoid taking note of, and cataloguing in detailed listings or codes, any general principles or rules of inter-systems relations induced by these non-abstract, thoroughly empirical, methods. It is a pity, in this regard, that the main Western countries' positions in the Mexico City Special Committee seemed to be so generally defensive, with the main initiatives for "new" international lawmaking coming from the Socialist bloc and the uncommitted countries. Part of the difficulty may have come from the fact, already mentioned, that the Western countries, apparently in an endeavor to downgrade the Mexico City conference, either sent only fairly junior personnel as their representatives or else hamstrung them by denying them *pleins pouvoirs* as to the day-by-day negotiating and by insisting on a continual reference back to head office for instructions and approval. It seems unfortunate, for example, that the United States Delegation was so peremptorily overruled by Washington in their accord to the compromise draft on the prohibition of force, especially where the generality of the legal language concerned would hardly seem to warrant Washington's fears as to the possible exclusion of "hot pursuit." It seems equally unfortunate that the Canadian Delegation, apparently for reasons of lack of affirmative instructions and authority, had to maintain such a sustained silence throughout the Mexico City sessions. All this threw an unfair responsibility on certain Western delegations, most notably the United Kingdom Delegation, to present basic Western positions; and the United Kingdom Delegation in any case had to carry the extra burden of defending itself against "colonialist" charges.

It is clear that, in the light of continuing Soviet-bloc pressure, and also the new interest of the uncommitted Afro-Asian countries and the Latin American countries, there is a fairly general impatience with the slowness and delays of existing bodies concerned with the revision or rewriting of old international law doctrine. In the new mood of international lawmaking and codification, therefore, it behooves the West to take part in the dialogue with *élan* and imagination, and to develop theories in the international law area which will adequately reflect the dynamic relationships between positive law and social change which are regarded in North American law schools as axiomatic for internal law purposes. We need to project affirmatively, in these new international arenas concerned with the "new" international law, our own revolutionary legal tradition and its inherent capacity to continue to adapt traditional, customary international law creatively to meet new conditions in the world community.

As a second point, we have probably been too literalistic in our approach to the traditional "sources" of international law, and in our insistence, in

Austinian positivistic fashion, that only that is law and therefore legally binding which emerges from such pre-existing, recognized sources. Traditional international law is silent, for example, as to the exact status, in terms of lawmaking authority and potential, of U.N. General Assembly resolutions, or the conclusions of United Nations committees, or the opinions or votes of international scientific legal conferences or reunions. Perhaps General Assembly resolutions that have unanimity or at least substantial inter-systems support behind them can be assimilated to traditional sources of international law as, in effect, "instant customary international law"; perhaps they can be taken as evidence of "the general principles of law recognized by civilized nations," recognized as an approved source in Article 38(1)(c) of the Statute of the World Court. Perhaps conclusions of international scientific legal conferences can be accepted as being "teachings of the most highly qualified publicists" and therefore as "subsidiary means for the determination of rules of law," in terms of Article 38(1)(d). However that may be—and the Soviet-bloc literature in favor of expanding the legal significance of these new approaches to international lawmaking is becoming quite substantial by now—it is clear that, as with the principle of the non-orbiting of nuclear weapons in space vehicles, which does not fit easily into any of the traditional categories of "sources," we may in the end accept certain principles as being law simply because they are generally rational and reasonable and rest on a sufficient inter-systems consensus. In this respect, they may be said to become law in the legal realist sense simply because they are generally accepted as such and acted upon, without worrying too much about whether or not they fit into *a priori* categories or definitions of "sources."

As a third point, it seems clear that some traditional Western-based intellectual approaches to world peace and relief of international tensions will either need considerable revision or else are doomed to political failure under present conditions. The "World Rule of Law" campaign, for example, which, as one of its cardinal points, rests on the extension of the compulsory jurisdiction of the World Court, runs counter to a widespread feeling on the part of uncommitted countries as much as of the Soviet bloc that it is a Western-dominated or at least "unrepresentative" body. The most direct remedy for any such feelings, as Western delegations to the Mexico City Special Committee rightly pointed out, is for all countries to take a more active part in the periodic elections to the Court. Yet a basic dilemma remains. The "new" countries are not so much concerned with ascertaining or restating existing international law doctrine as with rewriting it; in effect, with legislating.

A more "representative" World Court, resulting from a far greater politicization of the processes of election than the present rather casual horse-trading methods and exchanges, would inevitably be under pressure from certain quarters to exercise some of the policy-making, "legislative" functions of the United States Supreme Court. Would the cause of relief of international tensions be better served by an "activist" World Court on

the American model, rather than by a more deliberately restricted and restrained final tribunal on the English or French pattern, taking note of the fact that there hardly exists in the world community today a sufficient inter-systems consensus of a range and degree paralleling that national minimum consensus that has made the American court's policy-making politically viable? It seems clear that more thought is needed here before formulating any overly categorical Western institutional positions or preferences as to the arenas for international lawmaking. For, in the light of some of our second thoughts over the merits of political primacy for the General Assembly in U.N. peacekeeping operations, in the wake of the abortive Western-sponsored Article 19 and U.N. Expenses proposals, it is important to remember that the institutional preferences one successfully asserts today may be those that one has to live with tomorrow. Certainly, Western reaction back to the Security Council in the face of an increasing "politicization" of the General Assembly, suggests some caution on the issue of insisting on sponsoring judicial settlement of disputes in priority to all other forms of peaceful settlement. The clear preference of the Soviet bloc and the uncommitted countries, in this regard, for direct negotiation as the prime mode of peaceful settlement, may thus have more relation to the realities of present-day international life and necessary inter-systems accommodations than Western delegates were prepared to concede in Mexico City.

As a fourth point, the opposition of Soviet-bloc countries and also uncommitted countries at Mexico City to any notion of an overriding "world law" or "world government" seems to have been rooted essentially in strict notions of state sovereignty which have traditionally bulked larger in Soviet-bloc legal thinking than in our own; and it is certainly not an opposition to international law as such. In fact, in its necessary opposition also to any notion of postulated, *a priori*, pre-eminent legal principles, this particular position of the Soviet bloc and uncommitted countries seems to tie in with the Western-sponsored emphasis on the *a posteriori*, empirical approach to international law and inter-systems accommodation, and on the avoidance of abstract, holistic formulæ in favor of a general problems-orientation. Within the terms of reference of the Mexico City conference, there is obviously considerable room for further debate and discussion, and, even more obviously, for further intellectual refinement and qualification. Just what, for example, is the relationship *inter se* of the four principles discussed at Mexico City—prohibition of the threat or use of force; peaceful settlement; non-intervention; sovereign equality? Are they all juridically equal, or is there in fact a hierarchy of legal principles, with some principles being juridically superior to the others and thus prevailing in the event of conflict between them? For example, would the principle of prohibition of threat or use of force rank before all others, in a concrete problem-situation, as a sort of super-eminent legal principle or *jus cogens*? As with the earlier Soviet-bloc campaign for an immediate codification of the law of peaceful coexistence, it becomes apparent that the mere iteration

of any such principles could only be a beginning, and not the end, of legal inquiry.

It is already apparent in the Mexico City discussions that, once inquiry proceeds at a level of concrete cases and problems, there is no longer a monolithic unity of Soviet-bloc attitudes. For the smaller Soviet-bloc countries—certainly Yugoslavia and perhaps also Rumania—would clearly rank the principles of non-intervention and sovereign equality before the others. The Soviet Union, perhaps, would favor the principle of the prohibition of the threat or use of force in any conflict with the other principles. Faced with a showdown, for example, between the principle of prohibition of the threat or use of force and the principle of sovereign equality, it is difficult to believe that the Soviet Union, any more than the United States, could concede that deference to sovereign equality involves sanctioning indiscriminate proliferation of nuclear weapons to smaller countries simply because the major Powers may have them. It is not impossible, either, in this nuclear weapons context, to envisage a possible future conflict between the principle of prohibition of threat or use of force and the principle of non-intervention.

And thus, as long as the dialogue continues, the opportunities for fruitful Western scientific legal contributions to the great debate also continue. It is to be hoped that, recognizing that the Soviet bloc itself is saddled with its own defensive attitudes, as revealed in the Mexico City debates, stemming from a certain timorousness in regard to vigorous competition with the West in the field of intellectual ideas and information and communications generally and in the field of trade and commercial intercourse, the West will try to make its own fresh intellectual initiatives, fully capturing the spirit of our own insistence, in our law schools, on the dynamic, revolutionary character of law as a response to rapidly changing societal conditions and social expectations in the community for which it exists.

SAFEGUARDING ATOMS FOR PEACE

By MASON WILLRICH *

Associate Professor of Law, University of Virginia

Since 1945 the number of nations possessing nuclear weapons has increased five times and stockpiles of nuclear weapons have increased thousands of times. The enormity of the build-up of capabilities for nuclear destruction has largely overshadowed the remarkable progress that has been made since 1945 in developing the peaceful applications of nuclear science. The take-off point for the economic use of nuclear fuels for generating electricity appears to have now been reached.¹

Keeping pace with this development, the International Atomic Energy Agency has recently adopted a revised system of "safeguards" designed to ensure that the materials, facilities and equipment utilized in civil nuclear research and power programs are not diverted to any military purpose.² In a world in which pressures to acquire nuclear weapons and

* Formerly Assistant General Counsel, U. S. Arms Control and Disarmament Agency. The views expressed herein are those of the author and do not necessarily reflect those of any government department or agency.

¹ The economics of nuclear power has been the source of many and conflicting predictions, some of which subsequent events have proven to be overly optimistic. For a recent view of where the U. S. stands today, see Joint Committee on Atomic Energy, 88th Cong., 2d Sess., *Nuclear Power Economics—Analysis and Comments—1964* (Comm. Print, 1964). For the world view in a nutshell, see the summary highlights of the papers presented at the Third U.N. International Conference on the Peaceful Uses of Atomic Energy, Sept. 8, 1964, by Dr. Glenn T. Seaborg, Chairman of the U. S. Atomic Energy Commission, reprinted in U.S.A.E.C., *Atoms for Peace Conference, 1964, A Report by the United States Delegation* (1964). A presentation of many of the basic issues underlying the widespread civil use of nuclear energy, reaching less optimistic conclusions on the question of economics is contained in Kramish, *The Peaceful Atom in Foreign Policy* (1963). For a recent general analysis and appraisal, see Hall, "Atoms for Peace or War," 43 *Foreign Affairs* 602 (1965). A mine of both technical and historical information for the period prior to 1960 is contained in Joint Committee on Atomic Energy, 86th Cong., 2d Sess., *Review of the International Atomic Policies and Programs of the United States* (Comm. Print, 1960).

² On Feb. 25, 1965, the IAEA Board of Governors adopted without dissent a resolution which "approved provisionally" the revised safeguards system and submitted it to the General Conference "for its consideration and appropriate action." IAEA, GC (IX)/294(1965); 4 *Int. Legal Materials* 512 (1965). The revised system was noted by the General Conference at its ninth regular session on September 28, 1965, and immediately thereafter put into effect by decision of the Board. In addition, the provisions adopted by the Board relating to the Agency's inspectors should be considered a part of the Agency's safeguards system. IAEA, GC(V)/INF/39(1961). The issues underlying the procedural development of safeguards are discussed by the author in Willrich, "The Development of International Law by the International Atomic Energy Agency," 1965 *Proceedings, American Society of International Law* 153. For convenience, the Agency's revised safeguards system and the provisions relating to the Agency's inspectors will generally be referred to in this article as the "Safeguards Document" and the "Inspectors Document," respectively.

requirements for electrical energy are both rapidly increasing, the new IAEA Safeguards Document deserves close scrutiny from a legal, as well as a diplomatic and scientific point of view.

The burden of this article is to describe and analyze the salient legal aspects of the revised IAEA system of safeguards.³ A brief discussion of the technical need, historical context and rationale of atomic energy safeguards is, however, a necessary preliminary.

I. BACKGROUND

A. *Technical Need*

The need for safeguards is derived from the close relation between the technology and processes involved in the civil uses of nuclear energy and the production of fissionable materials which may be used in nuclear weapons.⁴ "Fertile" material intended for use in a civil research or power reactor can be diverted and thereafter the concentration of fissionable isotopes in the material can be "enriched" to the point where it can be used as a nuclear explosive. Thus far the technology of the enrichment process, although comparatively simple in concept, is so complex and expensive in application that diversion of fertile or slightly enriched material prior to its use in civil reactors is not a serious immediate risk.

However, in the process of "burning" fertile material in a reactor a fissionable material is produced. This fissionable by-product can be chemically separated from the other materials in irradiated nuclear fuels by comparatively straightforward and inexpensive methods. In the near future, the possibility of clandestine use in a nuclear weapons program of the by-product fissionable material produced during the ordinary operation of civil reactors will constitute the greatest risk of military diversion of the civil uses of nuclear energy.

The magnitude of this risk is far from trivial. The amounts of fertile material used and fissionable material produced in most small research reactors are not militarily significant, although the aggregate of several such reactors in one country may be. However, nuclear fuels as a source of electricity are already competitive with conventional fossil fuels in many high-cost fuel areas. The installed nuclear capacity in the world has increased from 5,000 kilowatts electric in 1955 to upwards of 5,000,000 in 1965. If the forecasts are correct, by 1970 the total installed nuclear capacity will have reached roughly 25,000,000 kilowatts, and by the turn

³ See, further, Arangio-Ruiz, "Some International Legal Problems of the Civil Uses of Nuclear Energy," 107 Hague Academy Recueil des Cours 503 (1962, III); Hall, "The Safeguards Role of the International Atomic Energy Agency," 2 Disarmament and Arms Control 170 (1964).

⁴ A standard technical reference work is Glasstone, *Sourcebook on Atomic Energy* (2d ed., 1958). For a comprehensive glossary see Hogerton, *The Atomic Energy Deskbook* (1963).

of the century half the electricity in some industrially advanced countries may be derived from nuclear fuels.⁵

A typical medium-sized power reactor operating at a level of 200,000 kilowatts produces annually upwards of 100 kilograms of the fissionable material, plutonium.⁶ From the unclassified literature this appears to be sufficient for at least 20 crude nuclear weapons.⁷ Therefore, within the 1965-70 time frame, the production rate of plutonium in civil power reactors will increase to the equivalent of thousands of nuclear bombs annually. Viewed from this perspective, the dimensions of the problem of safeguarding the peaceful uses of nuclear energy become substantial, if not staggering.

B. Historical Context

President Eisenhower's famous "Atoms for Peace" address to the United Nations on December 8, 1953,⁸ signaled a departure from previous United States policy of severely limited international co-operation in the peaceful uses of atomic energy.⁹ The decision was taken that the benefits of the benign atom should not be denied widespread dissemination until atomic arms control was achieved. Accordingly, President Eisenhower proposed the establishment of an International Atomic Energy Agency to which "the Governments principally involved" would make "joint contributions from their stockpiles of normal uranium and fissionable materials." The Agency would be responsible for safeguarding the material and devising methods whereby it would be allocated for peaceful uses, and in particular electric power. The Soviet Union responded to this effort to sound a harmonious note in East-West relations with a proposal for "the unconditional prohibition of atomic and hydrogen weapons."¹⁰

⁵ The estimates given are derived from Dr. Seaborg's statement, note 1 above. Somewhat more conservative estimates are contained in IAEA, Annual Report by the Board of Governors to the General Conference, 1 July 1964-30 June 1965, pp. 5-8 (GC (IX)/299, 1965).

⁶ For example, the Yankee Reactor located at Rowe, Mass., which is presently subject to IAEA safeguards, operates at a power level of approximately 185,000 kilowatts electric and is capable of producing more than 100 kilograms of plutonium annually. Statement by Dr. Glenn T. Seaborg, Chairman, U. S. Atomic Energy Commission, before the Joint Committee on Atomic Energy, April 29, 1965 (unpublished).

⁷ U.S.A.E.C., IAEA Safeguards and Their Technical Basis, p. 9 (unpublished).

⁸ U. S. Dept. of State, 1 Documents on Disarmament, 1945-1959, p. 393 (1960).

⁹ The legal antecedents of the IAEA safeguards system, as it presently exists, can be traced to the Joint Declaration by the Heads of Government of the United States, United Kingdom and Canada of Nov. 15, 1945, a few short months after the first atomic explosion. 60 Stat. 1479 (1946), T.I.A.S., No. 1504, 3 U.N. Treaty Series 123; 40 A.J.I.L. Supp. 48 (1946). With respect to civil uses, the parties declared their intention to exchange basic scientific information and research results with other nations and to make such information generally available. However, the decision was taken that the dissemination of information with respect to the industrial applications of nuclear energy must await the development of "... effective enforceable safeguards against its use for destructive purposes. . . ." This decision was enacted into U. S. domestic law in Sec. 10 of the Atomic Energy Act of 1946, 60 Stat. 66-68 (1946).

¹⁰ U. S. Dept. of State, 1 Documents on Disarmament, 1945-1959, p. 401 (1960).

Following this initial Soviet turndown, the United States was faced with the issues of whether to proceed with Atoms for Peace at all, and if so, whether on a bilateral or multilateral basis. The decision announced by President Eisenhower on August 30, 1954, was to continue, with or without the Soviet Union, negotiation toward the establishment of an International Atomic Energy Agency, and in the meantime to initiate a program of civil atomic energy assistance on a bilateral basis.¹¹ There followed a protracted and complex series of multilateral negotiations concerning the establishment of an IAEA, first without and then with the Soviet Union participating.¹² Concurrently, a broad United States program of atomic energy assistance to other countries was speedily implemented on a direct bilateral basis.¹³

Therefore, prior to final agreement on the IAEA Statute in 1956,¹⁴ the Agency's potential as an international instrument for the direct supply of nuclear materials and equipment had already been largely by-passed by the principal trader in the field. When an initial system of safeguards had been finally adopted by the Agency in 1961,¹⁵ the bilateral and regional channels for nuclear trade had become firmly established. As will be seen, this had not foreclosed the possibility that the IAEA may come to play a crucial rôle in safeguarding atomic energy transactions between states to ensure that the nuclear materials, facilities, and equipment involved are utilized for exclusively civil purposes.

C. *Rationale of International Safeguards*

The desirability of assigning the IAEA primary responsibility for safeguarding international nuclear commerce should, however, not be accepted without argument. Neither historical experience nor existing political attitudes justify such an assumption. To date international transactions for civil nuclear purposes have been concluded without any safeguards, with safeguards administered on a bilateral basis by the supplying state, with safeguards administered by a regional authority and with provision made for the application of the IAEA system.

Against the imposition of any external control it may be argued that safeguards infringe the sovereignty of the recipient state and undercut the trust and mutual confidence which are the basis of good relations

¹¹ 3 Joint Committee on Atomic Energy, 86th Cong., 2d Sess., Review of the International Atomic Policies and Programs of the United States 725 (Comm. Print, 1960).

¹² For the history of these negotiations see Bechhoefer, "Negotiating the Statute of the IAEA," 13 Int. Org. 38 (1959); Stoessinger, "Atoms for Peace: The International Atomic Energy Agency," Commission to Study the Organization of Peace, Organizing Peace in the Nuclear Age 117 (1959).

¹³ The bilateral program of co-operation was made possible by the enactment of the Atomic Energy Act of 1954, 68 Stat. 919 (1954), as amended, 42 U.S.C. §2011 *et seq.* (1958), as amended, 42 U.S.C. §2014 *et seq.* (Supp. V, 1964), which superseded by amendment the Act of 1946.

¹⁴ 8 U. S. Treaties 1093, T.I.A.S., No. 3873, 276 U.N. Treaty Series 3, amended 14 U. S. Treaties 135, T.I.A.S., No. 5284 (1961).

¹⁵ IAEA, INFCIRC/26 (1961).

between states. Moreover, safeguards are discriminatory, since they apply to states needing nuclear assistance, the atomic "have nots," while leaving the suppliers, frequently states with nuclear weapons capabilities, free to continue the nuclear arms race. However, in view of the potential military significance of the plutonium which a nuclear reactor produces, some form of accountability and control over the civil uses of atomic energy in countries which do *not* already have nuclear weapons would seem to be desirable. This would remain the case as long as the avoidance of the further proliferation of nuclear weapons is a useful objective, and as long as states receiving nuclear assistance do not generally have large nuclear reactors of their own which are unsafeguarded.

In favor of bilateral safeguards, a supplying state may argue that retention of the right to administer its own system of safeguards will provide it with the most effective assurance against diversion of the nuclear materials and equipment it furnishes. Moreover, certain recipient states may accept safeguards administered by a friendly country with less political complication and greater confidence in sympathetic administration than any multilateral form of control. However, various systems of safeguards administered on a bilateral basis by supplying states would lack inherent uniformity and objectivity, and the credibility of the assurance of peaceful use might not be broadly accepted. Moreover, various bilateral systems could well result in a costly duplication of effort for the suppliers of nuclear assistance, and more inconvenience to the receivers than one centrally and uniformly administered system of control, particularly if several sources of supply are involved.

The pros and cons of the administration of safeguards on a regional and a world-wide basis will be developed during the course of the more detailed analysis of the IAEA system which follows.

II. THE IAEA SAFEGUARDS SYSTEM

A. *Constitutional Basis*

Under its Statute general authority for the IAEA to establish a system of safeguards is derived primarily from Article III, A, which provides:

The Agency is authorized . . . 5. To establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information made available by the Agency or at its request or under its supervision or control are not used in such a way as to further any military purpose; and to apply safeguards, at the request of the parties, to any bilateral or multilateral arrangement, or, at the request of a State, to any of that State's activities in the field of atomic energy.¹⁶

Specific provisions regarding the rights and responsibilities of the Agency and its inspectors regarding safeguards are found in Article XII. The enumerated safeguards include: (1) examination and approval of the

¹⁶ See note 14 above.

design of specialized equipment and facilities, including nuclear reactors; (2) maintenance of production and operating records; (3) submission of progress reports; (4) approval of chemical processing methods, continuing safeguards on fissionable materials recovered or produced, and deposit with the Agency of any excess fissionable materials so recovered or produced; (5) the right of the Agency to send inspectors into the territory of the recipient state to determine compliance with the safeguards; and (6) in the event of non-compliance and failure to take corrective steps, suspension or termination of assistance and withdrawal of any materials or equipment made available.¹⁷ Near plenary power with respect to the safeguards functions of the Agency is vested in its Board of Governors composed of twenty-five members, including the members "most advanced in the technology of atomic energy."¹⁸

¹⁷ Concerning sanctions, the Board of Governors has not ventured beyond references to the relevant statutory provisions in its development of a system of Agency safeguards. Art. XII, par. C, sets forth procedures to be followed in the event of non-compliance. These include: a report by the inspectors to the Director General; the transmittal of the report by the Director General to the Board of Governors; a call upon the state concerned to remedy the situation if non-compliance is found by the Board; a report by the Board to the members of IAEA and to the U.N. Security Council and General Assembly; and the Board's decision to curtail or suspend assistance in event of failure of the state concerned to take "fully corrective action within a reasonable time," or to call for the return of materials and equipment made available. Provision is also made for suspension of the non-complying state from membership in the IAEA. Due to the political sensitivity of the problem of sanctions and considering the unlikelihood that a state would agree to safeguards in the first place without a clear intention to observe the commitment for the facility concerned and for the period of the relevant safeguards agreement, it seems unlikely that resort to these procedures will be required in the foreseeable future.

¹⁸ Complicated provisions in the Statute of the Agency attempt to strike a delicate balance in the composition of the Board between atomic "haves" and "have-nots," and between East and West, with perhaps some bias in favor of the atomic "haves" and the West. Under Art. VI of the Statute, the outgoing Board of Governors, by majority vote, makes the following designations of membership for the succeeding Board: "the five members most advanced in the technology of atomic energy"; the member most advanced in the technology of atomic energy, including the production of source materials, not represented by the original five in each of the following eight geographic regions: (1) North America, (2) Latin America, (3) Western Europe, (4) Eastern Europe, (5) Africa and the Middle East, (6) South Asia, (7) South-east Asia and the Pacific, (8) Far East; two members from among Belgium, Czechoslovakia, Poland, and Portugal as producers of source material; and one additional member as a supplier of technical assistance. Thus, the outgoing Board has power to designate thirteen out of twenty-five successors. The General Conference elects twelve members to the Board "with due regard to equitable representation," and so that the Board includes in this category of membership three from Latin America, three from Africa and the Middle East and one from each of the other areas except North America. The five members most advanced in the technology of atomic energy are Canada, France, U.K., U. S. and U.S.S.R. (from North America, Western Europe and Eastern Europe). These five are thus assured, in fact, permanent seats on the Board. The members most advanced in the technology of atomic energy in each of the eight regions, not represented by the original five, are Argentina, Australia, Brazil, India, Japan, and South Africa. Argentina and Brazil share the seat going to the most advanced country in Latin America and one of the seats going to Latin America

Thus, the Agency's functions with respect to establishing and administering a system of safeguards are set forth in the Statute with unusual specificity for the constitutional document of an international organization. In defining the potential reach of safeguards, the most important statutory provisions are those which outline the types of nuclear projects, arrangements and activities to which safeguards are applicable. Safeguards are a mandatory condition of any atomic energy project assisted by or through the Agency. But safeguards may also be applied, on request of the parties, to any bilateral or multilateral arrangement for the supply of nuclear assistance, and, on request of the state concerned, to any of its own nuclear activities. These latter provisions, added as somewhat of an afterthought to the Agency's Statute,¹⁹ extend the potential jurisdiction of the IAEA in administering its safeguards to all international commerce in nuclear materials, facilities and equipment, and even to a state's indigenous nuclear industry. However, the application of IAEA safeguards to the mainstream of commerce in nuclear materials and equipment depends upon the willingness of the parties concerned to address an appropriate request to the Agency.

Within this constitutional framework the Board of Governors has developed, and, under the Board's general supervision, the Agency staff administers, the system of safeguards which will now be considered.²⁰

B. Safeguards against Safeguards

The Safeguards Document contains at the outset several general admonitions against overzealous administration of safeguards by the Agency inspectorate. These provisions, which might be called "safeguards against safeguards," seem to be largely the result of inherent tension between the development and the control of atomic energy.

International assistance in development which is accompanied by international control may not be viewed as an unmixed blessing by the recipient state. Therefore, among the Agency's "obligations" are requirements that safeguards be implemented "in a manner designed to avoid hampering a State's economic or technological development," and "in a manner designed to be consistent with prudent management practices required for the economic and safe conduct of nuclear activities."²¹ The duties of the Agency in this regard are not absolute. Rather, safeguards

on the basis of equitable representation. Belgium alternates with Czechoslovakia, and Poland alternates with Portugal on the Board as producers of source materials. The seat reserved for the supplier of technical assistance has traditionally rotated among the Scandinavian countries.

¹⁹ See Stoessinger, note 12 above, at 145-146.

²⁰ The General Conference is limited to requesting reports and making recommendations, Art. V, par. F, Sec. 2. The Director General and staff are subject to the control of the Board of Governors, Art. VII, par. B.

²¹ IAEA, GC (IX)/294 (1965), Annex, pars. 9 and 10. A more specific provision dealing with a related question states that the Agency shall not request the state concerned "to stop construction or operation" of any nuclear facility "except by explicit decision of the Board." *Ibid.* at par. 11.

must be implemented "in a manner designed to" achieve the desired results. It would seem, therefore, that the Agency would have to act in a way which would obstruct the economic operation of nuclear activities in a foreseeable and substantial way before it could be reasonably charged with having failed to live up to these "obligations."

Broad protection is also given to commercial and industrial secrets. Members of the Agency staff are prohibited from disclosing, except to authorized Agency officials, commercial secrets "or any other confidential information" coming to their knowledge by reason of safeguards administration. Specific information relating to the implementation of safeguards may be given to the Board of Governors and to staff members "only to the extent necessary for the Agency to fulfill its safeguards responsibilities." Summarized lists of items being safeguarded may be published upon Board decision, but publication of additional information requires the further consent of all states "directly concerned."²²

The fear that implementation of safeguards could result in unwanted disclosure of valuable industrial secrets is probably derived in large measure from the international character of the inspectorate. Western and capitalist countries may be concerned that any Agency inspectors who are nationals of Communist states would have little respect for property rights in information. Moreover, countries engaged in stiff technical competition in developing advanced reactor concepts might well be concerned about inspection by the national of a competitor, regardless of the economic ideology of his government.

Finally, the Safeguards Document lays on the Director General a broad obligation to "hold consultations" with the state or states concerned.²³ This provision, which reinforces other provisions regarding consultations, will be discussed in some detail subsequently in connection with the procedures for designation of inspectors. It should be noted here, however, that ample justification exists for the discreet handling by the Agency staff of any questions of delicacy to the state which accepts safeguards along with the nuclear assistance it receives.

C. Bringing Safeguards into Force

IAEA safeguards become legally binding only upon entry into force of a specific "safeguards agreement" pertaining to the project, arrangement or activity.²⁴ The essential features of such an agreement are: an undertaking that certain specified material and equipment and any fissionable material produced by their use "shall not be used in such a way as to further any military purpose"—the so-called "peaceful uses guarantee"; and a specification of the rights of the Agency to "observe compliance" with the guarantee.²⁵

The provisions of the Safeguards and Inspectors Documents are binding only to the extent that they are explicitly incorporated, by reference or

²² *Ibid.* at par. 14.

²⁴ *Ibid.* at par. 4.

²³ *Ibid.* at par. 12.

²⁵ *Ibid.* at par. 82.

verbatim, into the safeguards agreement.²⁶ This leaves room for some administrative flexibility for the Agency in the negotiation of each agreement in light of circumstances peculiar to the project, arrangement or activity to be safeguarded. In this regard it may be noted that the position of the Agency in negotiating the safeguards provisions in connection with Agency-assisted projects, where the application of safeguards is mandatory, is stronger than its position in relation to assuming responsibility for administering safeguards on member state supply arrangements or activities on request of the states concerned. The bargaining power of member states, on the one hand, and flexibility of the Agency on the other, are, however, limited by a requirement that the procedures actually agreed between the Agency and the state or states concerned must be "essentially consistent" with the Safeguards Document.²⁷

D. Circumstances Requiring Safeguards

As previously noted, the IAEA Statute authorizes the Agency to "administer safeguards" only if certain circumstances exist. Agency safeguards *must* be applied to atomic energy assistance supplied by or through the IAEA, and *may* be applied, on request, to assistance furnished by one state to another and to an activity in a state carried on without outside assistance.

Specifying in detail the nature and amount of nuclear assistance which will require safeguards has been one of the most difficult issues tackled by the Board of Governors in developing a safeguards system. The divergent interests of suppliers of assistance and of receivers, and in addition the diverse points of view of various suppliers specializing in different types of nuclear materials and equipment, have been sharply focused in debate on the concrete circumstances where safeguards should be required.

Broadly speaking, assistance in the civil uses of nuclear energy can range from the supply of fuel for a reactor to the award of a fellowship to support study in high energy physics. Under the provisions of the Safeguards Document the supply of significant quantities of "nuclear materials," including either source or fissionable materials, triggers the application of safeguards to that material and also to any fissionable material produced in or by use of it.²⁸ When the assistance furnished is an entire reactor, safeguards are applied to any nuclear material used, produced, or processed in the facility.²⁹ When the assistance does not involve

²⁶ *Ibid.* at par. 4; and IAEA, GC (V)INF/39 (1961), Memorandum, par. 3.

²⁷ IAEA, GC (IX)/294 (1965), Annex, par. 55.

²⁸ *Ibid.* at par. 19. The Safeguards Document also permits the exemption from safeguards, at the request of the state concerned, of small quantities of nuclear materials. *Ibid.* at pars. 21 and 22. The theory is that quantities below those specified have little, if any, military value and that accounting for every gram of nuclear materials in a state would unduly burden the reporting state and unnecessarily complicate the administration of safeguards for the Agency. However, every gram of nuclear material in the state concerned above the quantitative exemption limits for the particular material involved and otherwise subject to safeguards must be accounted for.

²⁹ *Ibid.*

the supply either of nuclear materials or of an entire reactor, difficulty arises. The materials and equipment that must be imported by a state for a particular atomic energy project may be limited to certain reactor components, such as reactor vessels or mechanisms for positioning reactor control rods, or certain non-nuclear materials, such as heavy water used as a moderator-coolant in certain reactors or zirconium used to clad fuel elements.³⁰ Alternatively, an entire reactor facility may be obtained in bits and pieces from several different foreign sources of supply. Foreign assistance can, of course, also take the form of finance for the purchase of materials or equipment.³¹

The Safeguards Document reflects the fact that the Board of Governors has not been able to agree upon a list of specific items of specialized equipment, non-nuclear materials, and other types of assistance which, if supplied, will trigger safeguards. With respect to nuclear projects materially assisted by or through the Agency the gap that would otherwise result in the system is filled by a general test of whether the nuclear facility involved has been "substantially supplied." The question of substantiality is left to the determination of the Board of Governors on a case-by-case basis.³² With respect to arrangements between states, the parties are left free to decide for themselves, without reference to any objective standard, the nature and amounts of specialized items, other than nuclear fuels and entire reactors, which should be subject to safeguards if exported.

Consensus in the IAEA on a more specific substantive approach may well be impossible for the moment. However, sweeping the problem under a procedural rug in the Safeguards Document results in a critical lack of guidance to states as to when in practice they should request the application of Agency safeguards on their bilateral or multilateral supply arrangements. In terms of the development of a uniform and effective safeguards system for broad application to international commerce in equipment as well as nuclear materials, something more is needed. If this cannot be worked out within the IAEA itself, an understanding on the side among the principal suppliers regarding the items of specialized equipment and non-nuclear materials which would call into operation the

³⁰ The main question in developing a "trigger" list of equipment and non-nuclear materials which should require atomic energy safeguards as a condition of export is whether the item is uniquely for atomic use. Certain items of equipment and non-nuclear materials are of such a specialized nature that they could only be used in a nuclear reactor. A fuel element charge-discharge machine would seem to fall into this category. On the other hand, concrete is used frequently in the building of reactor vessels. Clearly, exports of commodities of such wide industrial application cannot be subject to atomic energy safeguards. There are many small items of equipment as to which the question of atomic uniqueness is more difficult to decide.

³¹ One of the problems in this connection is whether the atomic purpose for which financial assistance is given is known to the lender. It would seem that most foreign aid loans would be sufficiently tied to purchases in the lending state so that the atomic purpose of the loan would be readily ascertainable. The question of how many dollars, or some other currency, in relation to the total cost of the project should trigger safeguards on the project may be more difficult to answer.

³² IAEA, GC(IX)/294 (1965), Annex, par. 20.

IAEA safeguards system would seem to be in order. Otherwise, even a common policy among suppliers in favor of safeguards on nuclear exports would be in danger of becoming a leaky sieve under the pressures of a broadening and increasingly competitive nuclear market.

E. Safeguards Procedures

Assuming the relevant agreement has entered into force and the requisite circumstances triggering the system exist, the Agency's safeguards procedures apply. The Safeguards Document contains "general procedures" applicable to safeguarded nuclear material, wherever in the nuclear fuel cycle it may be located, and "special procedures" for reactor facilities. The general procedures provide for design review,³³ records keeping,³⁴ reports³⁵ and inspections.³⁶ The special procedures are primarily concerned with the maximum frequencies of reporting and inspection of different types and sizes of reactors.³⁷

Reviewing the design of a nuclear facility is an important preliminary step in the implementation of safeguards. A power reactor, although one of a relatively few basic types and having certain items of more or less standard equipment, will contain a number of unique features. Even a smaller research reactor which may be purchased as a unit will be unique in the sense of its location. Particular design features, including the manner of adaptation of a nuclear facility to its site, can either help or hinder the Agency in accounting for the nuclear materials in the facility. Therefore, the purpose, scope and timing of the design review of a reactor or other nuclear facility have an important bearing on the efficacy of the safeguards applied.

The general procedures in the Safeguards Document specify that the "sole purpose" of design review is to permit the Agency to satisfy itself that a reactor or other nuclear facility to which safeguards are applicable will "permit the effective application of safeguards." The Agency design review does not concern itself with reactor economics, nor need it concern itself with reactor safety. Moreover, review of the design of a facility must take place at "as early a stage as possible," require a "minimum amount of information" and be completed "without delay." It would be desirable to have the design review completed before construction of a nuclear facility is commenced. While this is required in the case of an Agency-assisted project, it would frequently be an impossibility in cases where Agency safeguards are to be applied to member state arrangements

³³ *Ibid.* at pars. 30-32.

³⁴ *Ibid.* at pars. 33-36.

³⁵ *Ibid.* at pars. 34-44.

³⁶ *Ibid.* at pars. 45-54.

³⁷ *Ibid.* at pars. 55-58. Special procedures have also been included for safeguarded nuclear material outside principal nuclear facilities. *Ibid.* at pars. 59-68. It is doubtful that these provisions will have a large impact on the implementation of Agency safeguards, in the near future, and discussion has, therefore, been omitted. Distracting footnoting of the ensuing text has been avoided; the reader may simply refer back to the general subject referenced in notes 33-37 for appropriate references to the paragraphs of the Safeguards Document under discussion.

or activities. When member states request the Agency to administer safeguards on operating activities, the best that can be done is to provide that before the Agency actually assumes safeguards responsibilities the design review must have been carried out.

The Safeguards Document requires accounting records covering all safeguarded nuclear material, and operating records with respect to each nuclear facility containing such material. The state concerned and the Agency must agree on a system of records on the basis of proposals submitted by the state.

Due to the value of the materials and equipment and the complexity and dangers of the processes involved, the effective internal management of any significant nuclear energy project would seem to require the maintenance of detailed records. Moreover, the utilization of nuclear energy within a state, if not a state-owned monopoly, would generally be subject to some form of licensing and regulation. Therefore, the state should be able to base its proposal to the Agency for a records system for international safeguards purposes largely on the records it requires as a matter of internal management and domestic control of the nuclear activity concerned. Any Agency requirements for additional records exclusively for implementing safeguards should not be unduly burdensome.

Agreement must also be reached and implemented between the IAEA and the state concerned on a system of reports to the Agency. These are derived in large part from the records. Two main types of reports are specified. Routine reports are required to account for the receipt, transfer out and inventory of all safeguarded nuclear material, and to show the use of such material and the facility involved. In addition, a special report is required "without delay" covering any "unusual" incident involving damage to, or potential or actual loss of, nuclear material in excess of normal operating losses characteristic of the facility involved. Furthermore, the Agency has the right to request the state to amplify or clarify any report.

These general accounting and reporting procedures in the Safeguards Document appear sufficiently flexible to permit the Agency to conform its international safeguards requirements to a large extent to the systems of nuclear materials management and control required by domestic atomic energy legislation in many instances. At the same time the procedures are broad enough to insure that the Agency will have ample information, assuming it is accurate, to ascertain the continuing peaceful use of the safeguarded nuclear activity.

In order to perfect the assurance of peaceful use which safeguards are intended to provide, the right to check on the accuracy of reported information must be an integral part of the safeguards system. With regard to inspection, the IAEA Statute grants to the Agency a broad right of "access at all times to all places and data and to any person . . . as necessary" to determine whether there is compliance with the relevant peaceful uses guarantee. The reach of this general right has been further defined in the Safeguards and Inspectors Documents.

The general inspection procedures in the Safeguards Document provide that the "number, duration and intensity of inspections actually carried out shall be kept to the minimum consistent with the effective implementation of safeguards. . . ." Both routine and special inspections are provided. The rights of Agency inspectors in a routine inspection are both detailed and broad. They may include: audit of records and reports; verification of amounts by "physical inspection, measurement and sampling"; and checking instruments, operating characteristics, and actual operations of the facility. The Agency has the right to carry out a special inspection if the study of a report indicates it "is desirable," or if "any unforeseen circumstances require immediate action." Reinforcing the Agency's access rights is an obligation on the part of the state concerned to direct all persons "under its control" who deal with safeguarded materials, equipment and facilities to "co-operate fully" with the Agency's inspectors. Presumably, full co-operation would include a requirement that persons employed in safeguarded projects answer any questions asked by Agency inspectors relevant to the verification process.

These broad inspection rights are tempered by certain important procedural and administrative requirements laid on the Agency. Perhaps the most important are procedures for the designation of Agency inspectors. In common with many international organizations, the IAEA is enjoined by its Statute to recruit its international staff primarily on the basis of competence and integrity, with due regard to the contributions of its members and the importance of as wide a geographical representation as possible. The geographical criterion, of course, insures political diversity as well.

For the foreseeable future the nationality of "international" inspectors will be a delicate political question for most receiving states. Nationals of Communist states would be unacceptable as inspectors in many Western countries as a matter of general principle, or, more specifically, because of lack of reciprocity as long as the Communist-bloc countries refuse to accept safeguards on any of their civil atomic energy arrangements or activities. Fears may also exist that a Communist inspector would pirate commercial secrets. Moreover, nationals of certain non-aligned nations might not be welcome in certain other countries. For example, an Egyptian inspector would in all probability not be admitted to Israel.

The procedures relating to the designation of inspectors in the Inspectors Document are intended to take account of these political sensitivities.³⁸ Prior to designation, the Director General is required to inform the state concerned of the identity and qualifications of the proposed inspector. The state has thirty days within which to consider the proposed designation. If the proposed inspector is objected to, the Director General must come up with alternative designations. Moreover, the acceptance of a particular inspector may be revoked "at any time" by the receiving state. The receiving state may find further comfort in the fact that it may, on

³⁸ IAEA, GC(V)/INF/39 (1961), Annex, pars. 1-3.

request, have its own representatives accompany the IAEA inspectors and may prescribe points of entry and departure and routes of travel of the inspectors within its territory. These procedures should go far toward defeating an argument that, by acceptance of IAEA safeguards, a state would lay itself open to inspection by anyone.

There is no simple answer to the question whether such procedures are sufficiently objective to preserve over the long term the integrity of the inspection process. However, Agency inspection is inspection by an external authority *and* by foreign nationals. This is a bitter pill for countries deeply conscious of their sovereignty to swallow. The present Agency system appears to be a sensible adjustment to existing political realities.

As previously noted, the "special procedures" for reactors which are contained in the Safeguards Document deal primarily with the maximum frequency of reports and inspections for this type of nuclear facility. The prescribed frequency of both is related to the potential military significance of the facility. The formula used as a basis for determining the maximum frequency of routine inspections gives the Agency the right to inspect a reactor once per year for every 5 kilograms of plutonium that it is capable of producing annually up to 12 inspections in case of a production potential of 60 kilograms.³⁹ At least one week's advance notice is required for each such routine inspection.⁴⁰

If the reactor is capable of producing more than 60 kilograms of plutonium per year, the Agency has the right to inspect it at any time. If this "right of access at all times" exists, the right to any advance notice is dispensed with. However, "if the Agency considers that the authorized inspections are not all required, fewer shall be carried out."⁴¹ Therefore, in determining the actual frequency of inspection, the Agency staff seems to have plenty of leeway for administrative self-restraint.

Most civil power reactors planned for the future, as well as many of those in existence already have an annual plutonium production rate in excess of 60 kilograms. Therefore, the widespread application of IAEA

³⁹ IAEA, GC(IX)/294 (1965), Annex, par. 57. The maximum frequency of routine inspections is actually determined against whichever is the largest of: (a) facility inventory, including fuel loading; (b) annual throughput; or (c) maximum potential annual production of fissionable material. Thus, if a reactor has a large inventory although its production potential is low, the Agency may have the right of access at all times. The number of routine reports is tied to the frequency established by formula for routine inspections, with a maximum of 12 per year. *Ibid.* at par. 59.

⁴⁰ IAEA, GC(V)/INF/39 (1961), Annex, par. 4.

⁴¹ IAEA, GC(IX)/294 (1965), Annex, par. 47. The Safeguards Document leaves open the question of whether the Agency would have the right to designate a resident inspector for a facility if it had the right of access at all times. Under the safeguards agreement between the U. S. and the IAEA covering the application of Agency safeguards to four U. S. reactor facilities, the Agency has the right of access at all times to two of the reactors involved. The agreement provides that the Agency has the right to "designate one or more inspectors to be stationed in the United States of America for the purpose of continuous inspection of such facilities or for the purpose of performing an indefinite number of discrete inspections, including the right to inspect such facilities without advance notice." IAEA, INFCIRC/57 (1964), Sec. 14.

safeguards to civil nuclear power programs in various countries would constitute a significant step toward not only the well-regulated development of Atoms for Peace but also a more open international community.

F. *Termination of Safeguards*

Safeguards on nuclear material may terminate for several different reasons. Of primary importance to effective administration are provisions for the termination of IAEA safeguards upon substitution of previously unsafeguarded nuclear material, upon substitution of other safeguards generally consistent with those of the Agency, and upon termination of the applicable safeguards agreement.⁴² These three ways for bringing the Agency's safeguards responsibilities to an end merit separate discussion.

The Safeguards Document provides that safeguards terminate on nuclear material after a comparable amount of previously unsafeguarded nuclear material has been placed by the state or states concerned under safeguards "as a substitute." With certain limited exceptions, substituted material must be the same element as, and have fissionable qualities comparable to, the nuclear material originally under safeguards. To insure that this is the case, substitution can only take place with the prior agreement of the Agency.⁴³

These provisions are intended primarily to facilitate the chemical processing of irradiated fuel elements. At present there is only a limited number of plants available for chemically separating unburned fertile material and produced plutonium contained in irradiated nuclear fuels from burned material and waste. Facilities for this purpose are, for the most part, located in countries which also have nuclear weapons programs. In these countries the same plants are generally used to process irradiated elements both from military plutonium production reactors and from civil reactors containing plutonium produced as a by-product. The substitution provisions of the safeguards system may permit nuclear material that has once been dedicated to exclusively peaceful uses to be fabricated into nuclear weapons. However, a state's stockpile of nuclear materials available for weapons is not thereby increased, since the substituted material must be comparable in quantity and quality to the material withdrawn and it must have been previously unsafeguarded. In this way, the IAEA safeguards system preserves the principle that safeguarded atomic energy

⁴² IAEA, GC(IX)/294 (1965), Annex, pars. 26-28. Other provisions provide for the termination of safeguards in certain contingencies primarily of a technical nature. These include return of safeguarded nuclear material to the supplying state if it was not improved from the point of view of its fissionable qualities, or if, prior to return, any produced fissionable material has already been separated out and has remained subjected to safeguards.

⁴³ *Ibid.* at par. 26 (d). One exception permits the substitution of 90% enriched uranium for plutonium with respect to irradiated fuel which is transferred for the purpose of chemical reprocessing. This right of substitution of one nuclear material for another is, however, limited to a period of not to exceed six months. *Ibid.* at par. 25.

activities should not increase any state's military potential, while enabling the Agency to function in a world where no clear separation between civil and military nuclear programs exists in countries having both. This has been done, however, at the cost of considerable administrative complication.

Agency safeguards may also be terminated on nuclear material transferred out of the state where it is being safeguarded to another state in which it will be subject to safeguards "other than those of the Agency but generally consistent with such safeguards and accepted by the Agency."⁴⁴ This rather obscure phraseology is the only reference in the Safeguards Document to the existence, and possible acceptability, of other systems of multilateral safeguards. At present these are: the "safety control" administered by the European Atomic Energy Commission, and applicable to all peaceful uses of atomic energy in the territory of the EURATOM Community;⁴⁵ and the "security control" administered by the European Nuclear Energy Agency (ENEA), and applicable to certain joint nuclear undertakings of O.E.C.D. members.⁴⁶

- The possibility of the Agency in this way abdicating its safeguards responsibilities in favor of regional organizations cuts into some of the basic principles upon which the IAEA system is posited. In theory, IAEA safeguards should provide a universally accepted assurance of peaceful use. An argument can be made that safeguards may be more effectively developed and efficiently administered on a regional basis. Moreover, safeguards administered by a regional authority may well be a more acceptable form of international control to the states within the region than safeguards administered by an Agency embracing interests cool or even hostile to the interests shared in the regional grouping. Nevertheless, inspection on a regional basis may appear to be self-inspection to those outside the region. The more closely knit and integrated the regional organization is, or becomes, the less credible its safeguards system would be to the outsider.

At the present stage of development of the peaceful uses of nuclear energy, and of international commerce in nuclear materials and equipment, some provision permitting Agency safeguards to terminate on material transferred into the jurisdiction of another safeguarding authority may be desirable in order to promote acceptance of the IAEA system. However, as trade expands and the complexity of international nuclear transactions increases, a multiplicity of international safeguards systems would come

⁴⁴ *Ibid.* at par. 28 (d).

⁴⁵ Treaty Establishing the European Atomic Energy Community (EURATOM), March 25, 1957, 298 U.N. Treaty Series 167; 51 A.J.I.L. 955 (1957).

⁴⁶ Convention on the Establishment of a Security Control in the Field of Nuclear Energy, Protocol on the Tribunal Established by the Convention, and Decision of the Council Establishing a European Nuclear Energy Agency, Dec. 20, 1957, IAEA, Legal Series No. 1: Multilateral Agreements 87 (1959); 53 A.J.I.L. 1018 (1959). For a brief comparative analysis of the statutory provisions regarding safeguards see Wolf, "The Legal and Factual Problems of International Security Control in the Field of Nuclear Energy," 4 *Diritto ed Economia Nucleare* 179 (1962). For an extended treatment see Arangio-Ruiz, note 3 above.

increasingly to overlap and probably collide.⁴⁷ It would be well, therefore, if further inroads on a universal and uniform approach to international safeguards could be avoided.

In this connection, it is noteworthy that in the Safeguards Document the question of whether, as a practical matter, Agency safeguards could be terminated upon substitution of EURATOM or ENEA safeguards is left very much in the air. Not only must the safeguards to be substituted be determined to be "generally consistent" with IAEA safeguards, but also the system must be "accepted by the Agency." Presumably any such determination and acceptance would require a favorable decision of the Board of Governors which, in view of the expressed attitudes of several of its members, may not be easy to obtain.

Finally, IAEA safeguards terminate upon expiration of the applicable "safeguards agreement."⁴⁸ Where nuclear materials have been supplied by or through the Agency the pertinent project agreements have not been for an expressly limited duration. However, where bilateral arrangements and domestic activities of member states have been submitted to safeguards, the pertinent agreements have been for fixed terms, coupled generally with the right of any party to terminate on six months' notice.⁴⁹ Since Agency safeguards can be applied to the arrangements and activities of states only on their request, it is reasonable that any such request could specify a fixed term. However, a provision permitting termination on six months' notice would seem to make the commitment to safeguards at best a tentative legal arrangement.

One argument against such a limited acceptance of safeguards is that it might be used by a country to hide its true intentions regarding its nuclear program. The credibility of an assurance of peaceful intentions with respect to a particular safeguarded power reactor would be less if the reactor might be legally withdrawn from the safeguards system and converted to the production of nuclear weapons material simply by giving six months' notice. On the other hand, in the present political environment a limited commitment to safeguards may be all that can be achieved on a widespread basis, and it would seem more important as an immediate objective to have acceptance widespread rather than unconditional.

Furthermore, a state which is an important supplier of nuclear materials

⁴⁷ Some areas of overlap exist already. For example, the Eurochemic chemical processing plant in Belgium, being constructed as an ENEA undertaking, is apparently within the safeguards competence of both ENEA and EURATOM. The Halden Project in Norway, also an ENEA undertaking, will soon be subject to ENEA and IAEA safeguards.

⁴⁸ IAEA, GC(IX)/294 (1965), Annex, par. 26 (f).

⁴⁹ See, for example, Agreement Between the International Atomic Energy Agency, the Government of Japan and the Government of the United States for the Application of Safeguards by the Agency to the Bilateral Agreement Between Those Governments Concerning Civil Uses of Atomic Energy, Sept. 23, 1963, Sec. 26, 4 U. S. Treaties 1265, T.I.A.S., No. 5429. This trilateral safeguards agreement transfers to the Agency the administration of safeguards under the U. S.-Japan agreement for co-operation.

and equipment may have a strong national interest in seeing that the assistance it furnishes to other countries is not diverted to military purposes. Some states, including the United States, have incorporated bilateral safeguards rights into their supply arrangements with other countries.⁵⁰ These states could reassert their bilateral safeguards rights on termination of Agency safeguards. Therefore, a revocable turnover of safeguards administration to the Agency can act as a hedge for a supplying state which is concerned about the continuing effectiveness of the Agency's system.

Any application of safeguards to a project, arrangement or activity pursuant to an agreement for a fixed term also creates problems regarding the treatment of fissionable material produced during the specified period. If safeguards on produced fissionable material terminate at the same time as safeguards on the nuclear materials used in the project, a state could end up with a larger stockpile of unsafeguarded fissionable material than it had before submitting to safeguards. The acceptance of IAEA safeguards in order to disguise the stockpiling of fissionable material intended five years hence for weapons fabrication would be a clear perversion of safeguards. Article XII of the Statute seems to prohibit this by requiring "continuing Agency safeguards" on any fissionable materials produced under safeguards. A step in this direction has been taken in the Safeguards Document, which now recognizes that the continuation of safeguards on such material "is desirable."⁵¹ It is to be hoped that future safeguards agreements covering member state arrangements and activities will, in light of this development, reverse past practice and expressly provide for an indefinite commitment to peaceful uses of produced fissionable material and for the application of safeguards to such material without limitation as to time.⁵²

⁵⁰ For a review of the U. S. program of bilateral safeguards, see Seaborg, "Existing Arrangements for International Control of War-like Material-5: The United States Program of Bilateral Safeguards," 2 *Disarmament and Arms Control* 422 (1964). For an account of the practice of the Soviet Union in its bilateral atomic energy assistance, see Ginsburgs, "The Soviet Union and International Cooperation in the Peaceful Use of Atomic Energy: Bilateral Agreements," 54 *A.J.I.L.* 605 (1960). The Soviet Union has in the past made a point of not requiring explicit safeguards in its bilateral assistance agreements, ostensibly in deference to the sovereignty of the recipient and confidence in Soviet relations with the recipient. However, since 1963 the Soviet Union has actively supported the development of safeguards by the IAEA, although it has not placed any of its bilateral agreements or its own civil atomic activities under Agency safeguards.

⁵¹ IAEA, GC(IX)/294 (1965), Annex, par. 16.

⁵² Such a provision for continuing safeguards on produced fissionable materials was for the first time included in the Danish-U.K. Safeguards Transfer Agreement approved by the IAEA Board of Governors in June, 1965. IAEA, INFCIRC/63, sec. 32.

Safeguards undertakings of unlimited duration have interesting financial implications for the Agency. Costs of implementing safeguards are included among "administrative expenses" as a general rule. Statute of the International Atomic Energy Agency, Art. XIV, par. B, sec. 1 (b). Such expenses are apportioned among the members by the Board of Governors in accordance with a scale of assessments fixed by the General Conference using the U.N. scale as a guide. Art. XIV, par. D. However, with respect to expenses incurred in the application of safeguards to member state

III. SAFEGUARDS IMPLEMENTATION

As previously indicated, a system of IAEA safeguards was not formally adopted until 1961, almost four years after the Agency was established. Recently, however, along with increasing support in the Board of Governors for the development of safeguards, including the affirmative support of the Soviet Union,⁵³ rapid progress has been achieved in obtaining the acceptance by states of IAEA safeguards on at least some of their civil nuclear energy projects. As of June 30, 1965, the IAEA had approved a total of 24 safeguards agreements with 21 of its 92 member states. These agreements covered 40 reactors in operation, while 6 more will be covered as soon as they are completed. Seven of the agreements covered Agency-assisted projects, 15 provided for the application of Agency safeguards to bilateral arrangements of member states, and one provided for the application of Agency safeguards to nuclear reactors unilaterally submitted by a member state.⁵⁴

In implementing safeguards during the year ended June 30, 1965, Agency inspectors carried out 15 inspections of 11 reactors in 3 member states. This included inspections without advance notice of a privately owned power reactor in the United States. As a preliminary to actual inspection, pre-operational visits were made to 23 facilities in 13 member states.⁵⁵

Of the 15 bilateral arrangements which the Agency had been requested arrangements submitted to the Agency, as distinguished from Agency projects, the Board of Governors "shall deduct such amounts as are recoverable" under the terms of the pertinent agreements among the Agency and the states concerned. Art. XIV, par. C. Thus far the costs of administering safeguards have been born entirely by the Agency under all types of arrangements. However, the possibility of reimbursement of some portion of the Agency's costs of administration in connection with member state submissions exists. The method of handling this question over the long run has been a continuing source of controversy in the Board of Governors. Considering the negligible costs involved in relation to the benefits potentially available, it would be unfortunate indeed if the method of financing safeguards with respect to member state arrangements were to become a question on which the political prestige of the contending Board members was committed to such an extent that the wide acceptance of the IAEA system would be endangered.

⁵³ For reference to an account of the procedural side of the development of IAEA safeguards, see note 2 above.

⁵⁴ IAEA, Annual Report of the Board of Governors to the General Conference, 1 July 1964-30 June 1965, pp. 40-41 (GC(IX)/299, 1965). As of June 30, 1965, 8 project agreements had been signed with 7 members: Argentina, Congo (Leopoldville), Finland (2), Mexico, Norway, Pakistan, and Yugoslavia. Trilateral agreements for the transfer to the IAEA of safeguards administration under bilateral arrangements had been signed among the IAEA, the U. S. and 13 members: Argentina, Austria, China, Greece, Iran, Israel, Japan, Norway, Philippines, Portugal, South Africa, Thailand and Vietnam; and among the IAEA, the U.K. and 2 members: Denmark and Japan. A safeguards agreement covering the unilateral submission by a member state of certain of its nuclear activities had been signed by one member: the U. S. In addition, in September, 1965, the Board approved a trilateral transfer agreement among the IAEA, Canada and Japan.

⁵⁵ *Ibid.* at p. 42. The Board has authorized the use of 14 Agency officials as Agency inspectors.

by the parties to safeguard, the United States was the supplying state in 13 instances, while the United Kingdom was the supplier in two. The United States action has been taken pursuant to a firm policy of transferring to the IAEA responsibility for the administration of safeguards on its bilateral agreements for co-operation in the peaceful uses of atomic energy.⁵⁶ Moreover, the United States was the first state to have unilaterally submitted any nuclear facilities to Agency inspection.⁵⁷ This action was in furtherance of a United States policy of encouraging all countries to accept "IAEA or similar international safeguards" on their peaceful nuclear activities. These are integral parts of a broad United States policy to prevent the further spread of nuclear weapons.⁵⁸

Clearly, if IAEA safeguards are to provide an effective means for ensuring that the widespread use of nuclear power does not contribute to the further proliferation of nuclear weapons capabilities, acceptance of the system must be broadened beyond what may result from the insistence of a very few countries. The United States, by virtue of its position as the principal supplier of nuclear fuels, reactors, and equipment for the civil uses of nuclear energy, has been able to exert a shaping influence on the development and application of safeguards.⁵⁹ However, other countries have been aggressively entering the market as sellers of nuclear fuels, equipment, or both. In the future, although United States nuclear exports will increase, its share of the total world market might well decrease. Moreover, nuclear consumers will be able to do more and more on their own without foreign assistance. The trend, therefore, will probably be away from "turn key" contracts for the purchase of entire reactor facilities and toward shopping for "bits and pieces."

In these circumstances a common front among major suppliers of nuclear materials and equipment to require IAEA safeguards on their ex-

⁵⁶ This policy was the result of decisions taken largely on the basis of a review in 1962. See U. S. Dept. of State, Report of the Advisory Committee on U. S. Policy toward the International Atomic Energy Agency, pp. 11-13 (1962). See also Hearing on United States Policy Toward the International Atomic Energy Agency Before the Joint Committee on Atomic Energy, 87th Cong., 2d Sess., p. 14 (Comm. Print, 1962).

⁵⁷ See note 54 above. IAEA, INFCIRC/57 (1964). An original U. S. submission covering 4 reactors entered into force June 1, 1962. IAEA, INFCIRC/36 (1962). The express purpose of this agreement was to assist the Agency in the development of safeguards "by providing it with a field laboratory." One of the reactors under the old agreement has been dropped and a large privately owned power reactor, the Yankee reactor, has for the first time been submitted to Agency safeguards under the terms of the 1964 safeguards agreement. The latter agreement is a full safeguards agreement rather than one more in the nature of a training exercise.

⁵⁸ See Message of President Johnson to the Conference of the Eighteen Nation Committee on Disarmament, Jan. 21, 1964 (ENDC/120); and statements of the U. S. Representative on Feb. 6, 1964 (ENDC/PV. 164, pp. 5-10), March 5, 1964 (ENDC/PV. 172, pp. 14-18), and July 27, 1965 (ENDC/PV. 218, pp. 11-12).

⁵⁹ Through 1964, the AEC had distributed abroad nuclear materials of an approximate total value of \$117,500,000. Thirty-nine civil agreements for co-operation with other countries, EURATOM and the IAEA were in effect. Annual Report to Congress of the Atomic Energy Commission for 1964, S. Doc. No. 8, 89th Cong., 1st Sess., p. 201 (1965).

ports would seem essential to prevent the system from being bargained away. Moreover, as nuclear self-sufficiency increases, resistance to the acceptance of IAEA safeguards on nuclear facilities built exclusively or substantially out of domestic resources will have to give way if the system is to be effective. Unfortunately, an international political environment in which safeguards are generally perceived to be "good for you" is not presently foreseeable.

CONCLUSION

The IAEA has achieved a measure of interim success in providing assurance of the exclusively peaceful use of the nuclear activities to which Agency safeguards are applied. The revised system recently adopted seems to have ample teeth to be effective and yet sufficient flexibility in its "safeguards against safeguards" to be acceptable and workable.

From the point of view of international law and organization, IAEA safeguards have significance as a novel system of international inspection and control of certain activities of states. Moreover, the activities which are subject to international regulation by the acceptance of safeguards have economic, scientific, political and potential military importance to the state concerned.

The immediate prospect of wider acceptance of IAEA safeguards appears rather bright.⁶⁰ However, there are plenty of pressures in the opposite direction. If nuclear weapons capabilities are achieved by more and more countries, any barrier between the civil and military uses of nuclear energy will rapidly become unimportant. IAEA safeguards may be an essential feature of the orderly development and widespread use of Atoms for Peace. But the system could also become an interesting bit of ancient history in a world where many countries are able to tip the nuclear balance of terror. The future of the IAEA, therefore, seems inextricably linked to the success of efforts to deal with much broader issues of international security.

⁶⁰ In short-term extensions of their respective bilateral agreements for co-operation with the U. S., Brazil and Turkey have agreed to accept IAEA-administered safeguards no later than the termination dates of those short-term extensions. India has agreed to accept IAEA safeguards on the U. S.-assisted Tarapur reactor at a suitable time after construction is completed and the reactor is operational. Sweden has informed the Agency of its readiness to enter into consultations with the Agency and the U.K. and the U. S. with a view to transferring to the Agency the safeguards under its bilateral agreements with those countries. On June 3, 1965, the Government of Canada announced that, in the future, export permits covering sales of uranium will be issued only if the uranium is to be used for peaceful purposes, and that an agreement with the government of the importing state to this effect will be required together with "appropriate verification and control." Statement by Foreign Minister Martin in the Parliament of Canada, June 3, 1965. On June 16, 1965, the United Kingdom announced its intention to invite the IAEA to apply safeguards to two identical civil nuclear power reactors at Bradwell, Essex. This will be the largest nuclear power station yet submitted to safeguards. Statement by Lord Chalfont in the House of Lords, June 16, 1965.

JUS DISPOSITIVUM AND JUS COGENS IN INTERNATIONAL LAW

BY ALFRED VERDROSS

*Professor emeritus of the University of Vienna, Member of the
International Law Commission, the European Court of Human
Rights and the Institute of International Law*

Nearly three decades ago I published in this JOURNAL an article¹ in which I tried to prove that even in international law there exist rules having the character of *jus cogens*; i.e., norms with which treaties must not conflict. Since my eminent colleague in the International Law Commission, Ambassador Tabibi, mentioned in a meeting of this Commission that the view expressed in my article "foreshadowed the solution" embodied in Article 37 of the Commission's draft Convention on the Law of Treaties concerning the problem of *jus cogens* in international law,² I feel obliged to defend this draft against the criticism directed against it by the eminent English lawyer, Professor Georg Schwarzenberger.³

For this purpose it seems to me necessary to point out that, according to the general opinion of writers and jurists of international law, the power of states to conclude international treaties is in principle unlimited. They are in principle competent to enter into international agreements on any subject whatever. The problem arises, however, if under general international law there are exceptions to this principle. Hence the question is whether all norms of general international law may be repealed by treaty provisions in relations among the contracting parties, or whether there are norms of general international law restricting the freedom of states to conclude treaties. In other words the question is whether all norms of international law have the character of *jus dispositivum* or if there exist some norms having the character of *jus cogens* too, from which no derogation is permitted by an agreement *inter partes*.

In the modern positivist doctrine of international law no settled opinion can be found on this question. Only a few writers deal with it. In the indexes of most systems, textbooks and digests of international law, the

¹ "Forbidden Treaties in International Law," 31 A.J.I.L. 571-577 (1937). See, further, on this topic before the second world war, von der Heydte, "Die Erscheinungsformen des zwischenstaatlichen Rechts: *jus cogens* und *jus dispositivum* im Völkerrecht," in 16 Zeitschrift für Völkerrecht 461 *et seq.* (1932); and Jurt, Zwingendes Völkerrecht (1933).

² See 1 I.L.C. Yearbook (1963) 63. As the Commission was informed by this communication of my point of view in this question, I abstained from speaking about the substance of Art. 37, inasmuch as I was in complete agreement with the draft proposed by the Special Reporter, Sir Humphrey Waldock.

³ "International *jus cogens*?" in 43 Texas Law Review (1965), and "The Problem of International Public Policy," in Current Legal Problems (1965), pp. 191-214.

terms *jus dispositivum* and *jus cogens* are lacking. I found them only in the works of Kelsen,⁴ Bin Cheng,⁵ Schwarzenberger,⁶ Dahm,⁷ Quadri,⁸ and Tunkin.⁹

The situation was quite different in the natural law school of international law. It starts from the idea of a necessary law which all states are obliged to observe. Christian Wolff and Emeric Vattel declare, for instance, that nations cannot alter the law by agreement.¹⁰ They distinguish this necessary law from the voluntary law created by the presumed, express or tacit will of states.¹¹ A. W. Heffter says that all treaties are void whose object is physically or morally impossible. By moral impossibility he understands that the object of the treaty is contrary to the ethics of the world. As examples of such treaties he mentions agreements defending slavery or preventing the development of individual liberty or encroaching upon the rights of third states.¹²

In the present-day theory of international law some writers of recognized competence maintain that general international law consists exclusively of non-compulsory norms, because states are always free to conclude treaties which may deviate *inter partes* from general international law. So the eminent Professor Charles Rousseau says that in international law the principle of public order is nearly non-existent in consequence of the individualistic structure of international law. He adds that the hypothesis of an illegal object of an international treaty is in practice without any interest.¹³ The eminent former professor, now Judge of the International Court, Gaetano Morelli, maintains that the norm regulating the creation of international law does not restrict the liberty of states in regard to the object of a treaty.¹⁴ Similarly the leading Swiss professor of international law, Paul Guggenheim, asserts in his treatise on international law that treaties may have any object whatever. Particularly he rejects, just as Morelli does, the idea that all treaties *contra bonos mores*, i.e., against the public order of the international community, are null and void.¹⁵

On the contrary, other modern writers of international law defend the thesis that in general international law some rules having the character of *jus cogens* exist, and that all treaties which are at variance with such rules are null and void. This principle was recognized after the second world

⁴ Principles of International Law 89, 323, 344 (1952).

⁵ General Principles of Law 5, 393-394 (1953).

⁶ 1 International Law 352-353, 425-427 (1957).

⁷ 1 Völkerrecht 16, 443; 3 *ibid.* 60, 140 (1957).

⁸ Diritto Internazionale Pubblico 94-95 (3rd ed., 1960).

⁹ Das Völkerrecht der Gegenwart 95-96 (1953).

¹⁰ Wolff, *Jus Gentium*, par. 5 (1764); Vattel, *Le Droit des Gens*, Introduction, par. 9 (1758).

¹¹ Wolff, *op. cit.*, par. 25; Vattel, *op. cit.*, par. 27.

¹² Das Europäische Völkerrecht der Gegenwart 156 (4th ed., 1861).

¹³ 1 Principes du Droit International Public 340-341 (1944).

¹⁴ Nozioni di Diritto Internazionale 37 (3rd ed., 1951).

¹⁵ 1 Traité de Droit International Public 57 (1953). He later changed his opinion, however, as we will see in the text of this article.

war, especially by the eminent authors, Lord McNair,¹⁶ Balladore Palieri,¹⁷ Kelsen and G. Tunkin.¹⁸ It is now also accepted by P. Guggenheim.¹⁹

The International Law Commission tried to codify this principle in Article 37 of its draft Convention on the Law of Treaties. It reads as follows:

Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.²⁰

This article was unanimously accepted by the Commission.²¹ It found it, however, difficult to indicate any criterion by which rules of jus cogens may be distinguished from other rules of general international law. Some members of the Commission suggested that mention be made, as examples of treaties in violation of a rule of *jus cogens*, of treaties contemplating an unlawful use of force contrary to the principles of the Charter, or the performance of any other act criminal under international law, or treaties contemplating or conniving at the commission of acts, such as slave trade, piracy or genocide, in the suppression of which every state is called upon to co-operate. The Commission decided, however, against including any examples of *jus cogens* for two reasons: first, because it may lead to misunderstanding as to the position of other possible cases; secondly, because a complete list of such cases was impossible without a prolonged study of this matter.²²

In the discussion in the Commission some members made an effort to find the criterion by which the rules of *jus cogens* may be recognized. Mr. Ago, Mr. Amado, Mr. Castrén and Mr. Tsuruoka, it is true, were of the opinion that no definition is necessary, because the idea of jus cogens is clear in itself.²³ But Mr. Bartoš, Mr. Lachs, Mr. de Luna, Mr. Pal, Mr. Rosenne and Mr. Tunkin expressed the idea that rules of *jus cogens* are such as exist in the interest of the whole international community. Mr. Yasseen said that to have the character of *jus cogens* a rule must be "found necessary to international life and deeply rooted in the international conscience."²⁴ According to Mr. Pal, the rules of *jus cogens* are those which constitute the "international public order."²⁵ Mr. Lachs underlined the idea that such rules exist in the "interest of the interna-

¹⁶ Law of Treaties 213-214 (1961).

¹⁷ Diritto Internazionale Pubblico 282 (8th ed., 1962).

¹⁸ *Op. cit.*

¹⁹ 3 Strupp-Schlochauer, Wörterbuch des Völkerrechts 531 (1962).

²⁰ 1963 I.L.C. Yearbook 291. It is also published in 58 A.J.I.L. 264 (1964).

²¹ In the meeting of July 9, 1963, 1963 I.L.C. Yearbook 292.

²² I.L.C. Report on the Work of Its Fifteenth Session, U.N. General Assembly, 18th Sess., Official Records, Supp. No. 9 (A/5509), pp. 11-12; also in 58 A.J.I.L. 245, 264 (1964).

²³ 1 I.L.C. Yearbook (1963) 66, 67.

²⁴ *Ibid.* 63.

²⁵ *Ibid.* 65.

tional community as a whole."²⁶ Mr. Tunkin stressed that certain international relations "had become an interest to all."²⁷ Mr. Bartoš and Mr. de Luna said that the rules of *jus cogens* constitute "the minimum of rules of conduct necessary to make orderly international relations possible."²⁸ Mr. Rosenne maintained that "the concept of *jus cogens* expressed some higher social needs."²⁹ The Special Reporter, Sir Humphrey Waldock, opposed, however, the idea of identifying the rules of *jus cogens* with the Principles of the Charter, "because they were not all imperative in character."³⁰

There was clearly a consensus in the Commission that the majority of the norms of general international law do not have the character of *jus cogens*. The general law of diplomatic intercourse, for example, does not, according to the Commentary to Article 37, "preclude individual States from agreeing between themselves to modify the treatment to be accorded reciprocally to each other's representatives."³¹ It is so because normally the rules of general international law have the character of *jus dispositivum*. This means that they are not imperative but of a yielding nature. They must be applied only if the individual states have not agreed otherwise *inter se*. Therefore individual states may, e.g., contract out *inter se* some diplomatic rights created by general international law.

However, in the field of general international law there are rules having the character of *jus cogens*. The criterion for these rules consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community. Hence these rules are absolute. The others are relative, because the rights and obligations created by them concern only individual states *inter se*.³²

These two categories of general international law were also recognized by the International Court of Justice in its Advisory Opinion concerning Reservations to the Genocide Convention.³³ There the Court says:

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. . . . In such a convention the contracting States *do not have any interest of their own*; they merely have, one and all, a *common interest*, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages of States, or of the maintenance of a perfect contractual balance between rights and duties.³⁴

The rules of general international law having the character of *jus cogens* may be divided into the following groups:

1. At first glance all treaties encroaching upon the rights of third states seem to be contrary to *jus cogens*. In fact such treaties are illegal if the third states do not give their consent, but not all of them are prohibited

²⁶ *Ibid.* 68.

²⁷ *Ibid.* 69.

²⁸ *Ibid.* 72, 76-77.

²⁹ *Ibid.* 73.

³⁰ *Ibid.* 62.

³¹ Report 11.

³² See the writer's *Völkerrecht* 126 (5th ed., 1964).

³³ [1951] I.C.J. Rep. 23.

³⁴ Italics added.

by a rule of *jus cogens*. Such a treaty is, however, void if the means envisaged by it are forbidden by a rule of *jus cogens* (see under 3). Further, a treaty is void if the restriction of liberty imposed on a state goes so far that it is impossible for it to accomplish its international duties. All states, it is true, can in principle renounce their rights. But there is one exception, for a state cannot waive the rights necessary for it to fulfill its international obligations. So, for instance, all states are obliged under general international law to protect foreigners and to maintain, therefore, public order in their territories. Hence they cannot obligate themselves to reduce their police or their tribunals in such a way as to prevent them from maintaining public order.³⁵ As this rule exists in the interest of the whole international community, it has the character of *jus cogens*.

2. A very important group of norms having the character of *jus cogens* are all rules of general international law created for a humanitarian purpose. As it was stated in the above-mentioned advisory opinion of the International Court, such conventions are not created in the interest of individual states, but in the higher interest of humanity as a whole.³⁶ Hence all treaties concluded in violation of the conventions concerning slavery, traffic in women and children, or the rights of prisoners of war are void. Never would the International Court or an arbitral tribunal apply such a treaty, concluded "in contradiction to *bonos mores*," as it was stated by the former international Judge, Professor Walter Schücking, in his dissenting opinion in the *Chinn* case.³⁷ Such treaties are void even if the parties to them did not ratify the humanitarian conventions, because the humanitarian principles underlying these conventions are basic principles of general international law with the character of *jus cogens*. In its judgment in the *Corfu Channel* case, the International Court says that "elementary considerations of humanity" are "even more exacting in peace than in war." In the original French text they are said to be "*absolues*."³⁸

International humanitarian principles already existing before the second world war were augmented by the Charter of the United Nations by reaffirming "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women,"³⁹ and by its purpose to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."⁴⁰ Not all human rights, proclaimed in the Declaration of Human Rights and accepted by the General Assembly, are recognized by general international law. It cannot be denied, however, that an open and permanent violation of fundamental human rights is a violation of the Charter, because the Member States are obliged under its Article 56 to co-operate with the United Nations Organization for the achievement

³⁵ Cf. Strisower, *Der Krieg und die Völkerrechtsordnung* 114 (1919).

³⁶ See note 31.

³⁷ P.C.I.J., Series A/B, No. 63, p. 149.

³⁸ [1949] I.C.J. Rep. 22.

³⁹ U.N. Charter, preamble, second paragraph.

⁴⁰ *Ibid.*, Art. 1, par. 3.

of the purposes set forth in Article 55. Among the purposes indicated there we find "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."⁴¹

3. Another group of rules having the character of *jus cogens* was introduced by the Charter. It deals with the use of force, and is composed of three inter-connected rules. The first obliges the Member States to refrain in their international relations from the threat or use of force other than in individual or collective self-defense (Article 2, par. 4, and Article 51). The second rule obliges the Member States to settle their international disputes by peaceful means (Article 2, par. 3). The third rule obliges the Member States to give the United Nations every assistance in any action taken in accordance with the Charter and to refrain from giving assistance to any state against which a preventive or enforcement action has been taken (Article 2, par. 5).

It is clear that these rules exist in the common interest of all humanity. Therefore bilateral or multilateral treaties concluded in violation of these norms are void. The contracting parties are not bound *inter se* by such treaties. Never could the International Court or an arbitral tribunal consider them as valid.

It seems, however, unnecessary to mention separately treaties contemplating the performance of a criminal act. Such treaties are either treaties concluded in violation of humanitarian principles or treaties against peace. The third group of criminal acts under international law, namely, war crimes, are only then violations of a rule having the character of *jus cogens* when they are simultaneously violations of humanitarian principles which are also recognized in war. Only such violations shock all humanity. Hence the rules forbidding these acts are norms with the character of *jus cogens*.

The criticism of Professor G. Schwarzenberger, mentioned in the beginning of this article, may be summarized in the following words:

Professor Schwarzenberger recognizes and has always recognized that through bilateral or multilateral consensus a rule having the character of *jus cogens* can be created *inter partes*. Its legal effect is therefore "limited to the contracting parties."⁴² He denies, however, the existence of such rules on the level of unorganized international society as it existed before the United Nations Organization. Expressly he says that "international law on the level of unorganized international society does not know of any rules of public policy."⁴³ He admits only "*de facto* and common-sense limits for the freedom of action of the subject of international law."⁴⁴ On the other hand, he says the "question whether an international tribunal or court could be expected to apply an agreement

⁴¹ Cf. General Assembly Resolution 616 B (VII).

⁴² Current Legal Problems 194 (1965); The Inductive Approach to International Law 100 (1965); 1 International Law 213-214 (1957).

⁴³ Current Legal Problems 212 (1965).

⁴⁴ The Inductive Approach to International Law 100 (1965).

contra bonos mores . . . can be answered with a firm negative." But he adds: This is only possible "on the consensual level on which international judicial institutions operate."⁴⁵

In considering this first part of the criticism of Professor Schwarzenberger, I cannot understand how, by "bilateral" agreement, a rule having the character of *jus cogens* can be created. Even if we admit the very improbable consensus of two states to the creation of such a norm, there is no doubt that its abrogation by the same parties is always possible. Consequently there is no room for its application at all. Therefore a norm having the character of *jus cogens* can practically be created only by a norm of general customary law or by a general or multilateral convention. Indeed, the customary law of the former unorganized international society had already accepted certain limits on the liberty of states to conclude treaties by its recognition of the "general principles of law recognized by civilized nations" as a subsidiary source of general international law. Article 38, paragraph 3, of the Statute of the Permanent Court only codified an old practice of international arbitration in this field.⁴⁶ Among these "general principles of law" we find the principle forbidding contracts *contra bonos mores*, because no juridical order can recognize the validity of contracts obviously in contradiction to the fundamental ethics of a certain society or community. It may be said that no other general principle of law is so universally accepted as this one. It follows that its validity in international law is also recognized, since no contrary norms of customary or conventional international law exist.⁴⁷ It does not matter that the ethics of the international community are not identical with those of the individual states, since their ethics have also many differences.

If Professor Schwarzenberger asserts that this principle can only be applied by an international tribunal on a consensual basis, it may be objected that arbitration agreements normally do not indicate the rules to be applied by the tribunal. Also Article 38 of the Statute of the International Court of Justice does not say what norms have the character of *jus cogens*. Nevertheless the Court has to apply them, if it is competent to decide a conflict concerning a treaty *contra bonos mores*, i.e., against the international public order.

Professor Schwarzenberger admits that in organized world society the principles of the United Nations "present attempts at the creation of consensual rules of international public policy."⁴⁸ Yet he adds, "this 'peremptory' law is not opposable to third parties, unless, like the Federal Republic of Germany, they have undertaken special obligations in this

⁴⁵ Current Legal Problems 208 (1965).

⁴⁶ See my lectures, "Les principes généraux du droit dans la jurisprudence internationale," in 52 Hague Academy Recueil des Cours 195-249 (1935, II); and my article, "Les principes généraux du droit applicables aux rapports internationaux," 45 Revue générale de droit international public 33 *et seq.* (1938).

⁴⁷ Cf. 1 Guggenheim, *Traité de droit international public* 150-151 (1953); Sir H. Lauterpacht, *The Development of International Law by the International Court* 165 (1957).

⁴⁸ Current Legal Problems 213 (1965).

respect."⁴⁹ It seems to me, however, that the fundamental principles of the Charter, indicated in this article, are valid for the entire international community for the following reasons: Article 39 of the Charter authorizes the Security Council to "determine the existence of *any*"⁵⁰ threat to the peace, breach of the peace or act of aggression" and to take all necessary measures to maintain or restore peace. Such measures are also possible against non-members of the United Nations. As no state outside the organization opposed this rule, we may conclude that all states acquiesced in the principles of the Charter governing the use of force. They were also approved by the Encyclical, "Pacem in Terris," of April 11, 1963. It seems to me, therefore, that these principles became a universal customary rule of international law.

Professor Schwarzenberger asserts further that the *jus cogens* created by the Charter "remains too precarious to amount to more than an international quasi-order."⁵¹ It is true that the United Nations Organization is still imperfect. Nevertheless the fundamental principles of the Charter are the most important part of the constitutional law of the present international community. Everybody who emphasizes its importance strengthens its force. Everybody who decreases its value weakens it.

Finally Professor Schwarzenberger thinks that Article 37 of the draft Convention on the Law of Treaties opens the door to misuse. "It leaves everybody absolutely free to argue for or against the *jus cogens* character of any particular rule of international law."⁵² Any unilateral invocation of *jus cogens* seems to him especially dangerous, because many states refused to accept the compulsory jurisdiction of the International Court of Justice or any arbitral tribunal.

I agree with Professor Schwarzenberger that a misuse of Article 37 is possible. But this is true for every norm and every institution. The great number of dissenting and individual opinions annexed to the judgments of the International Court prove still more clearly that even in good faith different interpretations of a legal text very often are possible.

I agree with him that the acceptance of compulsory jurisdiction would be of great advantage to respect for international law. I proposed, therefore, to include in the Report on the Law of Treaties, prepared before the second world war by the Harvard Research in International Law, a rule stating that all disputes concerning the interpretation and application of a norm having the character of *jus cogens* must be submitted to arbitration.⁵³ I proposed this to exclude any political misuse of unilateral invocation of *jus cogens*.⁵⁴

But the lack of compulsory jurisdiction in the international community could not prevent the International Law Commission from dealing with

⁴⁹ The Inductive Approach to International Law 112-113 (1965). There he refers to Art. 3(1) of the Convention on Relations between the Three Powers and the Federal Republic of Germany, May 26, 1952. ⁵⁰ Italics added.

⁵¹ The Inductive Approach to International Law 113 (1965).

⁵² Current Legal Problems 213 (1965).

⁵³ See 29 A.J.I.L. Supp. 655-1226 (1935). ⁵⁴ In 31 A.J.I.L. 577 (1937).

the problem of *jus cogens*. I cannot see how it would have been possible for the Commission, charged with the codification of the law of treaties, to omit this very important problem or to settle it in a different manner than it did.

Like all other organs competent to prepare the codification of law, the International Law Commission can only hope that its drafts, if they are accepted by the states, will be interpreted and executed in good faith.⁵⁵ For this principle governs all international agreements. So long as the international community is composed of sovereign states the classical words of Cornelius van Bynkershoek will always remain true:

*Pacta privatorum tuetur jus civile, pacta principum bona fides. Hanc si tollas, tollis mutua inter principes commercia . . . quin et tollis ipsum jus gentium.*⁵⁶

⁵⁵ I would like to emphasize that I am alone responsible for this article. It was written without any contact with the other members of the International Law Commission.

⁵⁶ *Quaestiones juris publici libri duo* (1737) II, Cap. 10. [The passage may be translated roughly as: "The civil law protects the contracts of individuals; good faith the contracts of princes. If you destroy good faith, you destroy the mutual intercourse of princes . . . and you destroy even international law itself."—Ed.]

EDITORIAL COMMENT

THE DOMINICAN REPUBLIC: INTERVENTION OR COLLECTIVE SELF-DEFENSE

In the good old days when it was the privilege of a country to govern itself as badly as it chose, and when constitutional restraints seemed an unreasonable burden upon elements of the people seeking more immediate reform, it was accepted that civil war was a purely domestic problem with which third states had no right to interfere.¹ Not only had third states no right to interfere, but they had a duty to see to it that their territory did not become a base for a military expedition in favor of the rebels or a source of supply for arms and munitions of war. Neither the Havana Convention on the Duties and Rights of States in the Event of Civil Strife of 1928 nor the Protocol of 1957 contained any provision looking to collective interference in the civil strife itself. Now and then the United States, acting unilaterally under the Monroe Doctrine, took sides; but that met with the general condemnation of "intervention." Treaties and conventions in favor of mediation and conciliation might apply to controversies between states, but they had no application to the factions engaged in a civil war. Let them fight it out, and whoever won and whatever his principles, third states recognized him as the *de jure* government as soon as his control of the situation appeared to be stable.

But the world of 1965 is not the world of 1928 when the Havana Convention was adopted. New principles of regional security have been adopted and new procedures established for putting them into effect. We have the Rio Treaty of Reciprocal Assistance; we have the Charter of the Organization of American States; we have the Declaration of the Rights and Duties of Man; we have the Caracas Resolution of 1954; and we have the Punta del Este Resolution of 1962. How far do the new principles and procedures challenge the old right of a state to fight out its own domestic situations that may arise between one faction and another from time to time?

Had the United States the right of self-defense in going to the rescue of American citizens when word came from the American Ambassador on April 24, 1965, that shots were being fired freely in the center of Santo Domingo and were endangering the lives of foreigners in that area? Assuming that the danger was as great as believed by the Ambassador, there is no question but that the right of self-defense was at issue, not under Article 51 of the United Nations Charter nor under Article 3 of the Rio Treaty, since the provisions of those treaties were not at issue, but under the old law of self-defense that is still the law. Were there other motives than the one alleged? That is of no consequence at the first stage of the intervention when the protection of citizens was the objective.

¹ Compare, "Can Civil Wars Be Brought under the Control of International Law?" 32 A.J.I.L. 538 (1938).

By April 28 a new phase of the intervention had developed. Evidence appeared to be mounting that Communist elements were involved in the rebel, pro-Bosch ranks; and the United States sent additional troops to the country. Assuming that Communists and Castroites were actually involved, with the possibility of their taking over the government later, using the restoration of Bosch as a front, had the United States any right to extend its intervention and send additional troops in excess of the number required to evacuate its citizens? Was the intervention justified without far greater evidence of Communist control, without waiting to see if Communists had actually obtained control of the situation? Should the intervention in self-defense have been taken by the United States unilaterally without awaiting the approval of the other American governments? The answer must be found in the neighboring state of Cuba, which in the course of six years has demonstrated what may be expected of a Communist-controlled government, every principle of inter-American law being defied, apart from the act of making itself a base of operations for the Soviet Union. Self-defense must be judged in the light of the experience of a country in a parallel situation. "One Cuba is enough." As the President put it, on May 2:

What began as a popular democratic revolution that was committed to democracy and social justice moved into the hands of a band of Communist conspirators.

What justification can be found for the intervention of the Organization of American States, acting through its Meeting of Consultation of Foreign Ministers? No objection can be taken to the meeting of April 30, at which the Council of the Organization did no more than adopt a resolution calling for a cease-fire and the establishment of an international neutral zone of refuge and summoning a Meeting of Consultation of Ministers of Foreign Affairs under Article 39 of the Charter. Nor can objection be taken to the resolution taken by the Organ of Consultation on May 1, which repeated the appeal for a cease-fire and the orderly evacuation of foreign citizens, and created a five-man committee to go to the Dominican Republic and carry out an investigation of all aspects of the situation, for this was clearly within the terms of the Rio Treaty and of the Charter. On May 5 the Act of Santo Domingo was signed by the so-called "Constitutional Government" (pro-Bosch) and the Military Junta, ratifying the informal cease-fire of April 30 and accepting the establishment of a safety zone and undertaking to provide measures of evacuation of the asylees in foreign embassies.

More difficult is it to find justification for the action taken by the Organization on May 6 when, after accepting collective responsibility for interpreting "the democratic will of its members," a resolution was adopted creating an Inter-American Armed Force² under a Unified Command, and incorporating in it the United States forces already in the Dominican Re-

² Reprinted in 59 A.J.I.L. 987 (1965).

public and such other forces as the member states might contribute. The Force was described as having "as its sole purpose" that of

cooperating in the restoration of normal conditions in the Dominican Republic, in maintaining the security of its inhabitants and the inviolability of human rights, and in the establishment of an atmosphere of peace and conciliation that will permit the functioning of democratic institutions.

Had the Meeting of Consultation been willing to justify its action on the ground of a possible take-over of the pro-Bosch rebels by Communist elements, there would have been no legal basis of criticism, assuming, as in the case of the United States, that there was reasonable evidence of the fact. For the resolution taken at Caracas in 1954 clearly covered such a situation. At the 10th Inter-American Conference of that year a resolution was adopted (XCIII) to the effect that the domination or control of the government of an American state by the "international Communist movement" would constitute a threat to the peace and call for the adoption of appropriate action in accordance with existing treaties.³ The wide competence of the Organ of Consultation under Article 8 of the Rio Treaty would easily have justified the occupation of the island by an "Inter-American Armed Force," in spite of the strong terms of Article 17 of the Charter.

But the necessary two-thirds vote of the Meeting of Consultation was not available for a statement to that effect; and the terms of the resolution of May 6, described as being the "sole purpose" of the action taken, raise the question whether the occupation of Dominican territory can be justified on the grounds declared. To come under the Rio Treaty, Article 6, the justification offered by the resolution must come within the provision "any other fact or situation that might endanger the peace." The Meeting of Ministers might well think that there was a threat to the peace, and a grave threat at that, in the extreme measures taken by both sides, involving the destruction of public buildings and the indiscriminate arming of civilians. A dictatorship would in all probability have been established by the dominant faction, raising the question of the "inviolability of human rights." Some of the representatives of the governments were fearful that action by the Meeting of Consultation might form a precedent for intervention in other possible civil wars; but the majority felt that the case before them was of such an urgent character that it should be judged on its own merits and not as a possible precedent for future action.

Can civil wars, or "civil strife" as the Havana Convention of 1928 preferred to describe them, be brought under the control of inter-American regional law? Obviously only insofar as in one way or another the civil strife may involve a threat to the general peace, as determined by the circumstances of the particular case. A mere change of government contrary to constitutional procedures but without substantial violence would not constitute ground for intervention. Important as are the provisions

³ 48 A.J.I.L. Supp. 123 (1954).

of inter-American law with respect to fundamental human rights, there is no specific sanction attached to their violation, and a sanction could only be inferred when the gravity of the situation constituted a threat to the general peace. Must the threat be physical or merely moral, such as the torture of prisoners or the vindictive prohibition of freedom of speech, of the press and of assembly, such as exists in Cuba today? Can the conception of "threat to the peace" grow with the growth of continental solidarity and take on new connotations as the economic and social relations between states become more and more dependent upon normal political relations?

Has the action of the Meeting of Consultation and the establishment of an Inter-American Armed Force set a precedent for future action? Undoubtedly it has done so, whatever disclaimers may have been made at the Inter-American Conference at Rio de Janeiro. Each resort to violence within the individual state weakens the fabric of international as well as of national law. Revolution may indeed be justified when fundamental human rights are systematically denied, not for the mere transfer of political power from one party to another—a decision that might properly be made by the collective action of the regional group and enforced by collective measures. The problem confronting us is to make justice move fast enough to anticipate revolution. Can the ideal of higher standards of living be made effective without undermining the basis of law and order upon which the stability and permanence of progress depend?

C. G. FENWICK

NOTES AND COMMENTS

THE WASHINGTON WORLD CONFERENCE ON WORLD PEACE THROUGH THE RULE OF LAW

All students of international law must react with exceptional interest to the meeting in Washington on September 12-18, 1965, of the Second World Conference on World Peace through the Rule of Law. It was not, indeed, a conference of international lawyers in the technical sense, not a meeting of technical experts such as the Institute of International Law or the International Law Association might assemble; but rather a meeting of the legal profession from the different nations whose concern with world peace is obviously as great as that of the technical scholar, although their immediate task is with the problems of national law. Some 3,000 met in Washington, including a large number of High Court Judges and Attorneys General, representing in all over 115 nations.

What could be hoped from such a gathering, meeting for such a relatively brief time? Much of what was accomplished was due to the organization of the conference. An elaborate Working Paper, drafted at the earlier continental conferences and revised at the Athens Conference, was distributed in advance of the conference, summarizing the development of international law and pointing out the problems confronting the legal community in its task of expanding the law and making it an effective instrument of peace. It is in itself an excellent text and should form the background for the more technical studies planned at the Athens Conference, described as the Athens Work Program.¹ These studies formed the basis of the Washington program, each topic being introduced by a work paper summary, followed by comments from a number of panelists, whose comments were in turn summarized by a rapporteur.

The broad topic, "Existing and Proposed International Courts" (No. 1) commanded perhaps the chief interest of the conference, since it made the strongest appeal to the legal profession, and the settlement of international controversies by peaceful means formed obviously the primary objective of the establishment of a rule of law. A recommendation was adopted to continue studies of both regional and specialized courts, including an International Court of Human Rights. An additional topic (No. 6), "Arbitral Tribunals," with work papers by Martin Domke and Lionel Summers, dealt with the improvement of the procedure of arbitration and its extension to commercial transactions. Topic 3, "International Law in Domestic Courts," with work paper by Richard A. Falk, dealt with the fundamental principles of international law as part of the law of the land and emphasized the contribution that domestic courts might make to inter-

¹ For an account of the Athens Conference, see note by Charles S. Rhyne in 58 A.J.I.L. 138 (1964); the text of the Work Program adopted at Athens is printed *ibid.*, p. 143.

national law. Here was a topic of first importance, but too technical for more than general observations.

The topic "Space Law" (No. 2) supplemented the Athens Work Program with a recommendation for a five-point study of the adoption of rules elaborating existing space law to meet current needs. "International Communications," (Topic 4) dealt with the need of a global satellite communications system expanding the agreements signed in 1964. "Transnational Trade and Investment" (Topic 5), dealt with procedures for the impartial resolution of international investment disputes, calling for "a model international investment code" and endorsing the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The topic "International Judicial Cooperation" (No. 8), with work paper by Hans Smit, recognized the differences in the policies of judicial co-operation of the different states and recommended studies of the laws and practices of the states of the world and the revision of their practices to promote more expeditious procedures. The topic "Industrial and Intellectual Property" (No. 10) was content to call upon the new states to endorse the Paris Convention of 1883.

The controversial topic "Disarmament" (No. 9), for which Louis Sohn prepared an admirable work paper summary, could get no further than to set forth general principles and call for the study, "while time is running out," of new agreements to ensure the non-proliferation of nuclear weapons and strategic delivery vehicles, together with the promotion of measures to strengthen the peacemaking machinery of the United Nations. A special topic was assigned to "Human Rights" (No. 7), leading to the recommendation that human rights cannot be protected by substantive declarations alone, but require also effective procedural machinery, such as recourse to a World Court of Human Rights.

The last two topics, "Creative Research and Education in International Law" (No. 11) and "Expanding Structure of International Law: Peacekeeping, General Principles and International Organizations" (No. 12), for which Clive Parry and Wolfgang Friedmann prepared the work papers, look to the future, the first to the encouragement of the study of international law "on a fundamental, universal basis rather than from a strictly national or parochial viewpoint," and the encouragement and support of organizations engaged in the development of international law; and the second to the strengthening of the United Nations and the development of international law. Critical problems were raised when the Conference went on to recommend research which would clarify the law of intervention by one nation within the borders of another at the latter's request, or for the purpose of supporting an insurgent movement; the definition and limitations of self-defense; the distinction between civil war and international war; and the limitations upon the right to "export revolution"—all highly controversial issues upon which the law needs to be clarified.

It is not surprising that the conference was unable to find a solution for the critical problem underlying the conflict of ideologies that still threatens the peace. The "Declaration of General Principles for a World

Rule of Law," adopted at Athens in 1963, included as its sixth item: "A fundamental principle of the international rule of law is the right of self-determination of the peoples of the world, as proclaimed in the Charter of the United Nations";² and this was reaffirmed in the Declaration of Faith in World Order under Law adopted at the close of the Washington Conference. But it proved to be impossible to reduce the general principle to concrete terms; and at the closing session the President of the Conference, Charles S. Rhyne, regretted that the committee in charge had been unable to present a report, leaving the principle of self-determination in its abstract form. In like manner it was impossible to reduce the fundamental rights of the individual to a specific rule of freedom of speech, of the press, and of assembly in countries now held as satellites of the Soviet system.

Taking the Conference as a whole, it was not to be expected that delegates from so many countries, lawyers indeed, but not technical specialists, should be able in so short a time to draft proposals of a specific and constructive character. It was sufficient that questions should be raised upon the wide number of topics on the program, and recommendations be made for continued study along the lines set forth. The educational value of the discussions was far in excess of the technical work accomplished. European, Latin American, Asian and African delegates learned personally at first hand how much agreement there was between them. The underlying current of the Conference was perhaps the realization that the common interests of the delegates were greater than their mutual differences; that the need of a rule of law as a basis of peace was of commanding appeal; and that there was a personal responsibility on the part of each delegate to work in his own country for the advancement of the principles set forth in the recommendations of the Conference. Part of every educational movement is the encouragement that comes from the contacts that are made at formal receptions and informal discussions in the corridors of the lobby. The rule of law takes on a new and more personal meaning when delegates from all over the world witness a formal procession of High Court Justices and find themselves in the company of the highest legal officials whose task is the practical application of principles to specific cases in their own respective countries.

The formal Declaration of Faith in World Order, with which the Conference closed, is an inspiring document, proclaiming the ties of each nation with every other, the individual concern of each nation with the creation of an effective procedure for the settlement of international disputes; the responsibility of the delegates to strive for mutual understanding of their different peoples; and the critical nature of many of the current disputes and the recognition that they can only be solved by the application of the rule of law, since "only under law can there be order and justice." This was followed by a pledge of continuing and devoted effort to strengthen and expand world law, and a declaration of faith that

² 58 A.J.I.L. 143 (1964).

"whatever transient disputes there may be, a just world order under law can be achieved."

The Athens Conference of 1963 created a "Center," which was intended to be a sort of secretariat for the co-ordination of the global work program. All those who feel that the best hope of a world of law and order lies in the development of an enlightened public opinion in every country that will bring pressure upon governments to support the rule of law cannot but be responsive to the appeal of the new movement. Contributing undoubtedly to the success of the Conference was the sponsorship by the Center of the first World Law Day, marking the conception of a world of law and order by ceremonies held in cities all over the world. An additional educational feature, directed to the delegates themselves, was the exhibit at the Conference of historic documents and law codes to enable the delegates to envision the progress of law through the centuries. The project contemplated by the Center of a World Law Code, making international law materials and documents available to the law libraries of the world, is a challenging problem of research, but of great value if the scholarship of the scientific associations can be enlisted in its behalf.

C. G. FENWICK

LAW AND DEVELOPING COUNTRIES

To identify more sharply the distinctive legal problems involved in the efforts of the less developed countries to improve their position and to suggest possible lines of future inquiry and related activity, the Society's Board of Review and Development sponsored a small conference in Washington July 16 and 17, 1965.¹ The discussion fell into three related parts: the rôle of internal national law in development; the rôle of law in the

¹ Those attending the conference were: Elting Arnold, General Counsel, Inter-American Development Bank; Robert E. Asher, Brookings Institution; Francis Deak, Carnegie Endowment for International Peace; David R. Deener, Tulane University; Wolfgang Friedmann, Columbia University Law School; Philip M. Glick, General Counsel, Society for International Development; William Burnett Harvey, University of Michigan Law School; John B. Howard, Ford Foundation; Edmond Janssens, Organization for Economic Co-operation and Development; Kenneth L. Karst, University of California School of Law, Los Angeles; John A. King, Jr., International Bank for Reconstruction and Development; Robert E. Knowlton, Rutgers University School of Law, Newark; Matthew J. Kust, in practice in Washington, D.C.; Brunson MacChesney, Northwestern University School of Law, President, American Society of International Law; Mark S. Massel, Brookings Institution; H. C. L. Merillat, Executive Vice President, American Society of International Law; J. D. Nyhart, Massachusetts Institute of Technology; Andrew E. Rice, Society for International Development; Seymour J. Rubin, in practice in Washington, D.C., formerly with Agency for International Development and O.E.C.D.; Charles Runyon, Assistant Legal Adviser for African Affairs, Department of State; Oscar Schachter, Director, General Legal Division, United Nations; Stephen M. Schwebel, Assistant Legal Adviser for International Organization Affairs, Department of State.

For a description of the establishment and functions of the Board of Review, see note in 59 A.J.I.L. 574 (1965).

international activities of developing countries; and programs of legal training and research to help make law and lawyers more effective in their contributions to development. The following is a summary report of the three sessions.

I. NATIONAL LAW AND DEVELOPMENT

The conferees did not try to reach agreement as to the scope of the term "development." As commonly happens in discussions of development, economic growth was the main focus of attention. Other aspects of nation-building, however, were assumed to be implicit in the term, and the discussion frequently turned explicitly to the needs for a political and legal framework that would provide a measure of stability and yet accommodate—indeed, facilitate—the social change that in most developing lands must accompany economic growth.

The "Multibiquitous" Lawyer?

Lawyers, it was agreed, have not played a conspicuous rôle in planning and executing development programs. Economists, engineers, public administrators, agronomists, doctors, educators, and a variety of other specialists outside the field of law have, quite rightly, been looked upon as the main architects of development in Latin America, Africa, and Asia. The stenographic reporter of the proceedings, whose ear understandably was not attuned to all the special vocabulary in use around the table, transcribed one speaker's remarks as follows: "the function of the lawyer is a very 'multibiquitous' one." The unintended neologism evokes thoughts of a many-faceted, all-pervading legal profession. The participants did not, in fact, suggest that the lawyer's rôle is "multibiquitous" in developing countries. They did suggest some specific ways in which the proper use of lawyers could assist the development process and some lawyerly functions that are essential in any society. The experience of the group related mainly to the countries that were formerly British territories and to Latin America, less to the former French territories of Africa and Asia.

In many former British territories lawyers have typically played an important rôle in independence movements and, in the post-independence period, have continued to occupy positions of prestige and power in the government and civil service. Typically also, the lawyer's rôle is regarded as a technical one, not at the center of the policy-making process. Thus, a law is often drafted in the ministry concerned (agriculture or industry, for example) and sent to the Law Ministry for a final formal "vetting" after substantive decisions have been made. The practice (familiar in the United States) of official lawyers taking part in all phases of negotiating a trade agreement or planning a new development bank would be quite alien to the practice of most developing countries. Similarly, in the private sector, lawyers tend to regard advocacy in court as their principal and most prestigious function. Again, unlike the practice commonly found in the United States, lawyers are seldom the general advisers of business firms in all aspects of their business.

In most of Latin America the situation is somewhat different in that there is a long tradition of legal education (not, however, related to development activities) and there are more "business lawyers" than in other underdeveloped areas. As elsewhere, in the popular image at least, lawyers in Latin America as a profession tend to be identified as opponents of social change. "The law" is commonly regarded as fixed and static, rather than as a flexible instrument for shaping and ordering new economic and social developments. As with all such generalizations, there are notable exceptions, but the general trend seems evident.

If lawyers have done little to assist development in Africa, Asia, and Latin America, are there real needs for lawyers (that is, for adequately and properly trained lawyers) as an economy moves into more advanced stages of development? Even at the most retarded levels, unrecognized needs for legal services may exist. It is not uncommon, for example, for a project financed by foreign aid, such as building a dam or an irrigation system, to be regarded as an isolated event, whole in itself, without creating a general system of water law and institutions to administer it that would greatly multiply the benefits of the "project." Before a country gets very far along the road of development it must convert "projects" into programs, and build enduring institutions as well as dams and fertilizer plants.

But then, it may be asked (and was asked at the conference), why are lawyers needed to build these institutions? In newly independent countries, where planning of economic development is a major governmental activity, the civil service and economists (often enjoying more prestige than the legal profession) supply the skills and energies needed to build the essential institutions of the new nation. The administrator may or may not have some legal training, but he often does an essentially "legal" job. Must lawyers' work be done by lawyers?

In this connection it was brought out that legal education in almost all developing countries—in Africa, Asia, and Latin America—tends to be of a highly formal nature, with little to relate it to the distinctive needs of a developing society and with little effort to train lawyers to think in terms of processes rather than formal rules. Would it not be more promising to train those now prominent in the development process to deal with the legal tasks that are part of their work; for example, to prepare a code of water law or a land reform scheme?

To this line of thought it was countered that the "infrastructure of law"—the body of civil, criminal, and commercial law, the processes by which it is administered, and the public law of the constitution and administrative system—is as important to nation-building as those tasks more specially identified with economic development. Moreover, one cannot expect adequate performance in the legal aspects of economic development when the legal system as a whole is weak and the legal profession inadequately trained. A brief exposure to the law for the non-lawyers who happen to be the ones effectively engaged in development activities is hardly the answer.

Specific Legal Needs in the Development Process

The agenda had suggested several areas in which legal institutions directly affect economic growth: the adequacy of legal processes (including integrity of the courts) for business transactions; land reform; water law; forms of doing business; institutions for capital formation, including development banks, savings institutions, and stock exchanges; tax policy and administration; and laws regulating industrial development and corporate activity, including conditions for foreign investment.

The discussion brought out that in many matters where one would assume that competent legal specialists are wanted and needed (credit transactions, general mining law, corporation law, water law, and the like), few requests are actually addressed to technical assistance agencies. It was suggested that international lending institutions are in a better position than national foreign assistance programs to suggest to developing countries the kinds of legal technical assistance they should request. In connection with an application for a loan to build an irrigation project, for example, an international lending agency might suggest that a technical assistance team, including a qualified lawyer, work with a task force of the country concerned in developing a national water law, a comprehensive policy and continuing institutional framework for dealing with water problems, reaching beyond the single irrigation project.

In connection with land reform and agricultural improvement it was suggested that lawyers in Latin America have a challenging task, which they have not really tackled, of somehow reconciling the pressing demands for redistribution of land, in conditions where full compensation cannot be paid, with the maintenance of a property system protected by law, and of planning the "post-reform" institutions that must fulfill functions now performed by large estate-owners, such as marketing and credit arrangements.

II. LAW IN THE INTERNATIONAL ACTIVITIES OF DEVELOPING COUNTRIES

Discussions of need for an internal legal framework to promote economic growth and social change in conditions of orderliness almost always led into the international legal aspects of these activities. Whether the law involved in international activities is municipal law, international law, or the laws and policies of international organizations, it is an important component of the development process.

Law, Investment, and Trade

In private business activity the lack of "business lawyers" in developing countries, already noted in the discussion of internal legal needs, is even more striking in the international aspects. It is difficult, even in relatively advanced countries like India, to find private counsel competent to advise the prospective foreign investor on the range of legal questions

that arise in the course of planning a new venture and of carrying it on once it is established—questions involving company law, laws regulating investment, tax law, land law, patent law, labor law, and the like.

In the dealings of developing countries with international financial institutions other needs for competent local legal advice arise, on the authority of various organs of government, for example, to enter into binding commitments. The international institutions also may want to be confident that the government with which they are dealing fully realizes the legal implications of all commitments it is making. Yet the national delegations negotiating loans and other forms of financing do not usually include lawyers.

As to the relevant rules of public international law, several commented on the need for lawyers in developed countries to reach beyond the questions of compensation for expropriated investments, which understandably preoccupy them, and seek for techniques and rules that will assist the transfers of funds and technology needed by developing countries. The suggestion that specific codes of behavior could be worked out met with little positive response, given the divergence in interests and attitudes between capital-exporting and capital-importing countries. Nevertheless, the numerous new investment codes and similar laws in developing countries and the terms of recent settlements of investment disputes may suggest some guidelines acceptable to both the industrial and the less developed countries. These show a widespread demand in the less developed countries for assurances that some part of earnings will be reinvested in the "host" country and for a greater share in management than has been characteristic in the past. On the other side of the coin, there have been moves to give private parties, which will usually be corporate entities, access to impartial tribunals in investment disputes with states, as in the new I.B.R.D. Convention on Settlement of Investment Disputes between States and Nationals of Other States.

Law, Human Rights and Welfare

Discussion of development should not be limited to economic matters. A few years ago health and labor problems were not looked upon as having international dimensions. But now intergovernmental organizations like F.A.O., W.H.O., and I.L.O. are working in these areas. Human rights and population control were mentioned as examples of matters deserving attention where satisfactory international machinery does not now exist. The beginnings of international institutional procedure for protection of human rights can be seen in the activities of the European Commission on Human Rights of the Council of Europe and the O.A.S. Inter-American Committee on Human Rights.

The relationship of international law to population control was considered. Some participants felt that international law could not contribute substantially to solving population problems, which are essentially sociological and political. Perhaps technical assistance is appropriate, but

at least in present circumstances legal rules and institutions can contribute little to the control of world population. Others noted that some aspects of population control had been dealt with through international machinery. The work of the Intergovernmental Committee on European Migration in moving people from European to other countries was mentioned. The European Communities have adopted regulations on social security, welfare, and other matters relating to migrant workers. It was also noted that governmental regulation of birth control relates to human rights. There are already United Nations conventions, for example, on subjects such as age of consent to marriage.

III. LEGAL TRAINING AND RESEARCH IN RELATION TO DEVELOPING COUNTRIES

The discussions touched on at least four possible ways to raise the level of legal competence to deal with developmental programs: improvement of basic training of the legal profession in the developing countries; training of lawyers at institutions in the industrialized countries; specialized training in law needed for effective international dealings for officials and administrators who are not lawyers; and the use of lawyers in technical assistance teams to help establish new legal rules and build new institutions.

Basic Legal Training in Developing Countries

It is in connection with the "infrastructure" of law in a given society that basic legal training and improvement of the quality of the Bench and Bar are particularly important. To many the improvement of legal training is a desirable and even necessary aim quite apart from the developmental tasks of the lawyer in relation to economic growth.

Adequate legal training, from the viewpoint of most American lawyers at any rate, will stress the skills of the lawyer and his rôle in the processes of shaping policies and institutions, finding accommodations among divergent views and settling disputes, rather than concern itself primarily with imparting knowledge of rules. The question was raised whether the American approach to legal education can really be adapted to serve the needs of developing societies. So far as substantive bodies of law are concerned, American law may have limited relevance. Probably the most valuable contribution to legal education in developing countries that can be made by the American system is a stress on legal process and skills of analysis as distinct from rule-learning, and a readiness (at least greater than commonly found in other national systems of legal education) to recognize the need of working with the materials and the experts from other bodies of thought in order to deal adequately with real problems.

Legal Education in the United States and Other Developed Countries

Nevertheless there was little disposition on the part of participants to be smugly satisfied with American legal education. In the view of many,

American law schools on the whole have quite inadequately trained their own students in methods of analysis and process, as distinct from substantive rules. Nevertheless, at the level of basic legal training, American law schools have something uniquely valuable to offer students from developing countries. Most foreign law students, however, come to American law schools, not for basic training, but for "advanced" work at the post-LL.B. level.

It is precisely in the area of specialized training adapted to the needs of developing countries that the American law school is at present likely to offer least. The discussion brought out that very few schools provide training in what might be called "development law," relating the relevant legal institutions to development activities. Suggestions were made that the best contributions American law schools could make on the legal aspects of development would be to help build strong law faculties and government legal services in developing countries by seconding good teachers to them, and to establish specialized training centers in this country and abroad, building on the experience of such special seminars as those at Columbia, with lawyers as part of a team of development experts—administrators, economists, sociologists, engineers, and the like—that considers the development process as a whole. In these special training programs law should be related to practical problems of planning and administration, and not treated as a technical specialty to be imparted separately.

Specialized Training for Development Officials

In connection with this last suggestion, it was pointed out that there are some 72 development training institutes or programs scattered about the world, under the auspices of the United Nations, other international organizations, national governments, and universities. Few of these now make any effort to cover the legal component of development. They are mainly designed to assist administrators, economists, and others directly responsible for development activities, who may or may not have had some legal training. There seems to be a growing recognition on the part of those managing some of these training institutions that the legal element should be brought in in a much more sharply focused way.

Other training programs were referred to, such as those of the Carnegie Endowment for training diplomats from developing countries, which incidentally have some legal content, and Professor Friedmann's seminars in East Africa on development law. The O.E.C.D. training seminars on development have not so far included a legal component, but expansion in this direction has been considered.

Technical Assistance by Lawyers from Developed Countries

A closely related way of helping raise the level of legal competence in relation to development problems is the provision of legal experts to assist developing countries. Some recruitment of legal experts now goes on through government agencies, private foundations, universities, and various

U.N. offices. On the whole, however, there is not a strongly perceived need—or “felt need”—within the developing countries for outside legal assistance, with the possible exception of African states formerly under British rule. In many countries there is a surplus of lawyers, poorly trained and narrow in outlook, perhaps, but nevertheless locally regarded as qualified. A country that might readily request technical assistance in economics or engineering is much less likely to request assistance in the development of legal institutions. Moreover, it is difficult to find even in the developed countries people really well qualified in various fields of law in which developing countries want assistance, who are willing to take on long-term assignments in Africa and Asia.

Since the early 1950's “development economics” has become an interesting career opening, research and training programs have multiplied, and professional associations have helped with placement. A similar growth of the specialized “development lawyer” is perhaps possible. A pool of available experts may be built up. The success of the SAILER program in finding competent teachers for African law faculties illustrates what can be done.

ACTION SUGGESTIONS

The following suggestions, reported here without any attempt to assess them in terms of priority needs or feasibility, emerged from the discussion of Law and Developing Countries on July 16–17, 1965. The suggestions may be useful in the future planning of the Society or other interested organizations.

1. A survey should be made of the existing development training institutes and programs, or at least a selected number of such institutions, with a view to suggesting ways in which the legal component of development activities could most effectively be added to their programs.

2. In several developing countries the needs for legal competence, as felt locally and as they appear to an outside observer, should be surveyed.

3. A qualified group should work out plans for the scope and content of a training program, based on the specific development problems of selected countries, that would help train people to analyze basic problems of relationships between government and industry, and between public and private sectors. In such a planning group and in any training programs that emerge, lawyers should work with public administrators, economists, sociologists, and experts from other relevant disciplines.

4. There should be additional studies (along the lines, among others, of Columbia's studies of joint ventures and the Society's studies of the legal environment for foreign investment in selected countries) of the legal aspects of enterprise in the private sector of developing countries, and training programs designed to help create a larger corps of competent “business lawyers” in developing countries.

5. There should be analyses of the investment codes and similar legislation in developing countries, the terms of settlements of recent investment

disputes, and similar materials, with a view to ascertaining whether there is emerging any core of principles, generally acceptable to both capital-exporting and capital-importing states, that would facilitate private foreign investment.

6. The creation of a more nearly adequate corps of "development lawyers," available for technical assistance on a broad range of subjects involved in development, might be assisted by initiating training programs of the kind outlined in 2 and 3 above, encouraging the various area economic commissions of the United Nations and other appropriate organizations to invite requests for technical assistance in law, and setting up a register of names of qualified persons and a clearing house for requests for their services.

7. Future meetings under the Society's auspices should explore more deeply than was possible in this first meeting the rôle of law and lawyers in relation to the international political interests and attitudes of developing countries; for example, problems associated with continuing dependence on industrial countries; demands for the end of colonialism; and numerical majorities in international organizations, with relatively meager resources.

H. C. L. MERRILLAT

60TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

THE STATLER-HILTON HOTEL, WASHINGTON, D. C., APRIL 28-30, 1966

PROGRAM

INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES

First Session—Thursday afternoon, April 28

Relevance of International Law to the Development Process

(What are the central issues between the developing and the developed countries as to the international legal system? In what respects is modernization thought to require, and does in fact require, changes in international law?)

Second Session—Thursday evening, April 28

Panel A.—*Role of International Business in the Transfer of Technology to Developing Countries* (with the Section on International and Comparative Law, American Bar Association)

Panel B.—*International Regulation of Internal Conflict in Developing Countries*

Third Session—Friday morning, April 29

Panel A.—*Preferential Treatment for Developing Countries in International Trade*

Panel B.—*State Succession in New Countries* (with the American Branch, International Law Association)

Fourth Session—Friday afternoon, April 29

Panel A—*International Monetary Reform and the Developing Countries*

Panel B—*Problems of Self-Determination and Political Rights in Developing Countries*

Annual Dinner—Friday evening, April 29

Business Meeting—Saturday morning, April 30

Election of officers and transaction of other business.

Finals in Student International Moot Competition—Saturday afternoon, April 30

Oscar Schachter is Chairman, and Seymour J. Rubin Vice Chairman, of the Committee on the Annual Meeting.

Out-of-town members are urged to make hotel reservations as soon as possible. A block of rooms has been reserved for members of the Society attending the meeting. Those desiring to stay at the Statler-Hilton Hotel should write to Room Reservations, Statler-Hilton Hotel, Washington, D. C. 20006. Reservation cards will be distributed with the February *Letter to Members*.

E. H. F.

INTER-AMERICAN BAR ASSOCIATION

The Inter-American Bar Association held its 14th Conference in San Juan, Puerto Rico, from May 22 to 29, 1965,¹ with approximately 1,000 lawyers and judges from the United States and Latin America present. Dr. Manuel Abreu Castillo, President of the Association, was in charge of the proceedings and was assisted by Dr. Luis Negrón Fernández, Chief Justice of Puerto Rico; Dr. Antonio J. Bennazar, Chairman of the Committee on Arrangements; Dr. Noel Cólón Martínez, President of the Puerto Rican Bar Association; and many other officials and lawyers of Puerto Rico. During its conference the Association met jointly with the American Bar Association, which held its regional meeting in San Juan from May 22 to 25. The First Judicial Conference of the Americas, composed of Chief Justices and Justices of Supreme Courts of most of the countries of the Americas, took place from May 24 to May 26 and adopted a Declaration of Principles on an independent judiciary.

Dr. Fernando Fournier, well-known Costa Rican scholar and diplomat, was elected President of the Association, and Dr. Manuel Abreu Castillo, Honorary President. Other officers elected were: Mr. William Roy Vallance, Secretary General; Mr. John O. Dahlgren, Secretary; Dr. Carlos A. Dunshee de Abranches, Treasurer; Mr. Charles R. Norberg, Assistant Treasurer; and Mrs. Carolyn Royall Just, Reporter General. The members of the Executive Committee are: Dr. Máximo Cisneros Sánchez (Peru), Chairman; Dr. Antonio J. Bennazar (Puerto Rico); Mr. John O. Dahlgren (U. S. A.); Dr. Carlos A. Dunshee de Abranches (Brazil); Mr. Victor C.

¹ See 59 A.J.I.L. 373 (1965). For notes concerning previous conferences see 57 A.J.I.L. 394 (1963) and footnote 1 thereto.

Folsom (U. S. A.); Dr. Fernando Fournier (Costa Rica); Dr. Mauricio A. Ottolenghi (Argentina); Dr. Osvaldo Rengifo (Chile); and Mr. William Roy Vallance (U. S. A.).

The work of the conference was carried out by sixteen committees and their sections. Upon the recommendation of the committees and the Executive Council, the Association adopted 55 resolutions, recommendations, and declarations encompassing subjects of public and private international law, municipal and comparative law. Among these may be mentioned a declaration that the Organization of American States has original jurisdiction over the situation in the Dominican Republic and no other international organization has competence to interfere in the case until the O.A.S. submits it to the U.N. Security Council. A recommendation was adopted that there be presented to the Organization of American States a doctrine of recognition of governments of American states which holds that recognition is not a political matter; that changes of government which do not interrupt the constitutional order of the republican system of government are not a matter of collective action of recognition nor of rupture of diplomatic relations; that any American state which in its internal political organization disrupts this juridical structure in violation of the American Constitutions and departs from the uniform system of representative democracy is out of the continental structure and the American community; and that it is the duty of the Organization of American States, in accordance with a strict juridical and non-political point of view, to determine whether a change of government in an American state has departed from the obligatory standard of the American Constitutions.

The Inter-American Bar Association also resolved to support the preparation of an Inter-American Agreement taking into account the general rules for the uses of the waters of international rivers and lakes that shall assure their utilization for the common welfare of the people of the Americas, without prejudice to bilateral or regional solutions with respect to specific and special conditions of riparian states; to suggest to the Organization of American States that it charge the Inter-American Commission on Human Rights with the task of revising in the light of present advances the Draft Convention on Human Rights approved by the Inter-American Council of Jurists in 1959, with a view to convening an Inter-American Specialized Conference for approval of the convention, providing for a Commission and a Court of Human Rights; and to recommend to the Committee on Creation of a Court of Human Rights that it proceed with studies on human rights and present its observations to the Inter-American Commission on Human Rights and to the 15th Conference of the Association.

It recommended that the 15th Conference, to be held in San José, Costa Rica, in 1967, consider the question of the juridical aspects of an Inter-American Economic Community along the lines of the European Community or Common Market as far as they may be applicable to the conditions of the American Hemisphere countries; and resolved to support

appropriate measures at national and international levels leading to the regional integration of the Central American countries. It also recommended approval of a proposal for establishment of Arbitration Commissions in civil and commercial matters, such commissions to be composed of lawyers designated by regional Chambers of Commerce; and resolved that awards made in accordance with standards established in any of the American Republics should be enforced in all of them.

The Association by resolution also expressed its view of the necessity for an Inter-American Convention on Civil Liability for Peaceful Uses of Nuclear Energy and its hope that the American states would become parties to the Brussels Convention of May 25, 1962, on Liability of Operators of Nuclear Ships. It also recommended that its Permanent Committee on International Judicial Procedure be requested to draft for presentation to the 15th Conference a model bilateral treaty establishing procedural norms in all forms of judicial proceedings for adherence by a common law and civil law country.

The Association adopted a resolution establishing a Permanent Committee of Deans of Law Schools of the Western Hemisphere to study ways and means of promoting the exchange of professors and students of law of the region, as well as all aspects of legal education related thereto, the committee, until the 15th Conference, to consist of the Deans of the Law Schools of the University of Puerto Rico, New York University, University of Buenos Aires, and the University of Brazil (Rio de Janeiro). The resolution also provided that all future conferences of the Association should include on the program a Symposium of Deans and Professors of the Law Schools of the Western Hemisphere to exchange information and to study specific subjects of common concern.

The Inter-American Bar Association appointed a special Committee on the Future of the Association to report to its Council not later than October 31, 1966, a description and evaluation of the programs, projects, and activities which have been or should be undertaken by the Association in furtherance of its constitutional purposes and in support of the legal aspects of objectives of the Alliance for Progress, including the strengthening of the rule of law and viable, democratic legal institutions in the Americas on a sound legal and constitutional basis. The special committee is directed also to review and survey the present organizational structure, executive responsibility, administrative control, procedures and operations of the Association from the point of view of their adequacy and efficiency in carrying out the programs of the organization and to make recommendations of any changes considered necessary.

In a commemorative resolution the Association paid tribute to the memory of the distinguished Cuban jurist, teacher, and publicist, Antonio Sánchez de Bustamante y Sirvén, on the hundredth anniversary of his birth April 13, 1865, in Havana, Cuba. Dr. Bustamante was Professor of Public and Private International Law, Dean of the Law School of the University of Havana and Judge of the Permanent Court of International Justice. He was founder and director of the *Revista de Derecho*

Internacional and author of the Code of Private International Law which has been adopted in sixteen Latin American countries.

During the closing banquet of the Conference Mr. William Roy Vallance, Secretary General of the Association and one of its organizers in 1940, was presented with the Association's gold medal in recognition of his 25 years of service to the Association as well as his outstanding service to the legal profession as a whole. Mr. Vallance has played a major part in making the Association the large and active organization it is today.

The 1965 Conference marked the 25th anniversary of the Association, which includes in its membership 90 national and local Bar Associations and nearly 2500 individual members. The Association, which was organized while the European war was threatening the Western Hemisphere, is to be congratulated upon the successful attainment of its majority, so to speak, among international organizations, and upon its contributions to international understanding and co-operation among the lawyers of this Hemisphere.

ELEANOR H. FINCH

INTER-AMERICAN ACADEMY OF INTERNATIONAL AND COMPARATIVE LAW

The members of the American Society of International Law will be pleased to learn of the resumption in Lima, Peru, of the activities of the Inter-American Academy of Comparative and International Law, which, since 1945, had had its headquarters and carried out its functions in Havana, Cuba. The Academy was established as the result of action taken by the Inter-American Bar Association at its first meeting in Havana, Cuba, in 1941, when it adopted a resolution creating the Academy in the City of Havana for the purpose of promoting and developing studies of juridical problems of specific concern to the Americas, of encouraging co-operation in legislative matters and of achieving mutual understanding. The Academy was designed to hold annual sessions at which courses of lectures on subjects of comparative and international law would be given by professors from American countries for students from the countries of the Hemisphere, and to publish books and monographs on these subjects.

The Organizing Committee provided in the resolution was composed of Dr. Victor A. Belaúnde of the University of San Marcos, Lima, Peru; Mr. Frederic R. Coudert of New York, then President of the American Society of International Law; Dr. Ernesto Dihigo of the University of Havana Law School; Dr. Manuel Fernández Supervielle, then Minister of the Treasury of Cuba; Dr. Victor M. Lascano, then Ambassador of the Argentine to Cuba; Dr. Haroldo Valladão of the University of Brazil, Rio de Janeiro; and Dr. Juan Clemente Zamora of the University of Havana. The Committee drew up by-laws of the Academy and made arrangements for its financing and functioning. The Executive Board of the Committee, consisting of Dr. Dihigo, President, Dr. Zamora, Secretary General, and Dr. Supervielle, Treasurer, executed the plans for establishing the Academy and for holding its first meeting in January, 1945, at which the Academy was formally organized and its officers elected. The late George A. Finch

was elected President, Dr. Dihigo, Director, the late Dr. Zamora, Secretary General, and the late Dr. Supervielle, Treasurer, of the Academy.

The auspicious start of the Inter-American Academy was due primarily to the devoted efforts of the Cuban members of the Organizing Committee, through which the Academy received the very effective co-operation of the University of Havana and the Ministry of State of Cuba, and the financial support of the Cuban Government, which by decree made the Academy an official institution.¹ The Academy was supported primarily by initial contributions of \$5,000 from the Cuban Government and \$10,000 from the Carnegie Endowment for International Peace. Thereafter an annual subsidy of \$10,000 was provided by the Government of Cuba. The Carnegie Endowment also provided financial support for the 2nd Session in 1947. At its Third Conference in Mexico City in August, 1944, the Inter-American Bar Association, upon receipt of the report of the Organizing Committee of the Academy regarding the fruition of its plans, adopted a resolution to send a cable to the Cuban Government through its Minister of State "expressing a warm congratulatory message in recognition of its valuable contribution to the Inter-American Academy of Comparative and International Law, which, because it permits its future operation, thus contributes to make closer the ties in the field of law that unite the nations of America . . ."

After its first meeting in 1945, the Academy, under the excellent direction of Dr. Dihigo, held ten sessions from 1947 to 1959, the session in 1959 having been arranged with the co-operation of UNESCO.² The lectures delivered at the annual sessions were printed in a series of monographs.

Events in Cuba subsequent to 1959 prevented any further activities of the Academy in Havana, and as a result of action taken in November, 1963, and April, 1964, by the Executive Council of the Inter-American Bar Association, pursuant to resolutions of the Association adopted at Bogotá in 1961 and Panama in 1963, new by-laws were adopted, the seat of the Academy was transferred to Lima, Peru, and its name changed to Inter-American Academy of International and Comparative Law. Dr. Andrés A. Aramburu-Menchaca, Principal Professor of International Law at the University of San Marcos, Lima, was elected President.

With the collaboration of the Inter-American Institute of International Legal Studies, established in 1964 to replace the former American Institute of International Law,³ and the Faculty of Law of the University of San Marcos, as well as the co-operation of the Peruvian Government and the Organization of American States, a special session of the reorganized Academy was held in the Law School of the University of San Marcos in Lima from December 4 to 11, 1964. Under the general theme of "Inter-

¹ See notes in 38 A.J.I.L. 684, 688 (1944) and 40 *ibid.* 819 (1946).

² See preface, dated December, 1959, by Enrique Dolz, President of the Administrative Council of the Academy, to the Academy's publication: *Relaciones entre las Administraciones Nacionales y las Organizaciones Internacionales. Documentos para un Seminario* (Havana, 1960), comprising the papers submitted for the 1959 meeting.

³ See 58 A.J.I.L. 122 (1964).

national Organizations for Economic Cooperation and Development" a series of lectures was presented by distinguished officials of various international economic organizations, which will appear in a printed volume. Among those who delivered addresses were Ing. Edgardo Seoane, First Vice President of Peru, Chairman of the Inter-American Economic and Social Council; Dr. Rodrigo Llorente, former Minister of Development of Colombia, Assistant Director of the Legal Department of the Inter-American Development Bank; Dr. José A. Mayobre, Executive Secretary of the Economic Commission for Latin America; Dr. Carlos Sanz de Santamaria, Chairman of the Inter-American Committee on the Alliance for Progress, former Minister of Foreign Affairs of Colombia; Professor Albert Coppé, Vice President of the European Coal and Steel Community; Dr. Pedro Abelardo Delgado, Secretary General of the Permanent Secretariat of the General Treaty for the Economic Integration of Central America; Dr. Orvis A. Schmidt, Special Adviser to the President of the International Bank for Reconstruction and Development; Dr. Luis Alvarado Garrido, former Minister of Foreign Affairs of Peru, Representative of the International Labor Organization; Dr. Yves Gibert, Director of the Commission of the European Economic Community; and Dr. Luciano Giretti, Assistant Secretary General of the Organization for Economic Co-operation and Development.

The Organizing Committee for the special session consisted of Dr. Aramburu-Menchaca, President of the Academy; Dr. Francisco V. García Amador, Secretary General of the Inter-American Institute of International Legal Studies; Dr. Guillermo García Montufar, Dean of the Faculty of Law of the University of San Marcos; Mr. William Roy Vallance, Secretary General of the Inter-American Bar Association; Dr. Raúl Ferrero, charter member of the Inter-American Institute of International Legal Studies; Dr. Máximo Cisneros Sánchez, Chairman of the Executive Committee of Inter-American Bar Association; Dr. Manuel Antonio Zarate Polo, member of the Council of the Inter-American Bar Association; Dr. Enrique Ferrer Vieyra, Assistant Secretary General of the Inter-American Institute of International Legal Studies; Mr. Charles R. Norberg, Assistant Treasurer of the Inter-American Bar Association; and Mr. John Dahlgren, Secretary of the Inter-American Bar Association.

While retaining substantially the same form of organization and primary purpose, the revised by-laws of the Academy have somewhat broadened the scope of its activities. In addition to promoting studies on juridical problems of special interest to the Americas both in the form of the annual lectures and of publications, the Academy will serve as a technical organization for consultation, arbitration and conciliation between public or private persons requesting it, and as a center of information on foreign law, particularly the laws of the American Continent.

The Curatorium of the Academy, which is the supreme governing body, is composed of the Council of the Inter-American Bar Association and the Academic members of the Academy. The Board of Directors, the administrative body, is composed of four *ex officio* members consisting of the

President of the Academy, the President and the Secretary General of the Inter-American Bar Association, and the Chairman of the Executive Committee of the Association, and five members elected from the Curatorium. The present Board is composed of Dr. Andrés A. Aramburu-Menchaca, President of the Academy, and the following officers of the Inter-American Bar Association: Dr. Hernando De Lavalle, Honorary President; Dr. Fernando Fournier, President; Dr. Máximo Cisneros, Chairman of the Executive Committee; Mr. William Roy Vallance, Secretary General; Dr. Manuel Escobedo, President of the Mexican Bar Association, Vice President; Dr. Carlos Alberto Dunshee de Abranches, Treasurer; Mr. Charles R. Norberg, Assistant Treasurer. Delegates to the Board are: Dr. Victor Andrés Belaunde, Professor at the Academy; Dr. Javier Vargas, Dean of the Lima Bar Association; Dr. Guillermo García Montufar, Dean of the Faculty of Law of San Marcos University; Dr. Jorge Avendaño, Dean of the Faculty of Law of the Catholic University of Peru; and Dr. Juan Lino Castillo of Peru.

All those devoted to the study and the application of law in the Americas are gratified to see the renewal of an American institution which in past years has made such a valuable contribution to mutual understanding and knowledge among Americans of North and South. Their best wishes go to the Academy for every success in the renewal of its functions.

ELEANOR H. FINCH

HAGUE ACADEMY OF INTERNATIONAL LAW—1966 SESSIONS

LECTURES, JULY—AUGUST, 1966

Two sessions of lectures at The Hague Academy of International Law will take place in 1966. The first session, from July 4 to 21, will consist of the following courses: General Course by Professor Rodolfo de Nova (Italy); Contemporary Doctrinal Trends in Private International Law, by Professor D. Evrigenis (Greece); Private International Air Law, by Professor Ludovico M. Bentivoglio (Italy); Change of Connecting Factors in Private International Law, by Professor F. Rigaux (Belgium); The Recognition of Divorce in Private International Law, by Professor Fritz Schwind (Austria); The Principles of International Law in the Light of Islamic Doctrine, by Mr. S. Mahmassani (Lebanon); The Principles of International Law in the Light of Hindu Doctrine, by Mr. K. R. R. Sastri (India); Legal Problems of Private International Business Enterprises, by Professor Florentino Feliciano (Philippines).

The second session, from July 25 to August 11, will consist of the following courses: General Course by Mrs. Paul Bastid (France); The New States and International Legal Order, by Professor Richard A. Falk (U.S.A.); The Impact of Science on International Law, by Mr. M. W. Mouton (Netherlands); The Legal Nature of the United Nations, by Professor Gregory I. Tunkin (U.S.S.R.); Liability for Ultra-Hazardous Activities in International Law, by Mr. C. Wilfred Jenks (Great Britain); From the Rebus Sic Stantibus Clause to the Revision Clause, by Professor

A. Poch de Caviedes (Spain); *The Principles and Standards of International Economic Law*, by Professor Georg Schwarzenberger (Great Britain).

Application forms, as well as information about scholarships, may be obtained from the Secretariat of the Hague Academy of International Law, Peace Palace, The Hague.

RESEARCH CENTER, AUGUST-SEPTEMBER, 1966

The tenth annual session of the Research Center of the Academy will be held at The Hague between August 16 and September 23, 1966.

The subject for research will be: "The Problems of Private International Law Arising from the Cession of Territories and the Accession of Territories to Independence." The Directors of Research will be Mr. Ph. Francescakis, Director of Research at the French National Center of Scientific Research (C.N.R.S.) (French-speaking section), and Professor F. Riad of the University of Cairo (English-speaking section).

The purpose of the Center is to enable persons who have already reached an advanced stage of study or who are engaged in research or teaching in the field of international law to spend six weeks in research and seminar discussion at the Academy. The extensive facilities of the Peace Palace Library are at the disposal of participants.

Most of the expenses of attendance are borne by the Academy out of a special grant made by the Rockefeller Foundation. Participants will receive a contribution towards their traveling expenses and a living allowance of 25 guilders per day during their stay.

There are no age limits to participants, but the general level ranges between 25 and 40 years of age.

Requests for application forms should be made to the Secretariat, Hague Academy of International Law, Peace Palace, The Hague, and completed forms should reach the Academy not later than March 1, 1966.

E. H. F.

[STUDENT INTERNATIONAL LAW JOURNALS

As a result of increasing interest by law students in the subject of international law, there were organized some years ago a small number of student societies of international law for the purpose of promoting interest in the subject among students and of bringing them into close contact with the professional experts in the field. This initiative on the part of the students was of course of great interest to the American Society of International Law, which, since 1939, had offered students membership in the Society at reduced annual dues with the privileges of receiving the *AMERICAN JOURNAL OF INTERNATIONAL LAW* and of participating in the annual meetings. The formation of the student clubs at the leading universities lead not only to increased student membership in the Society but also to increased student activities in the promotion of knowledge of international law in its various ramifications. Among these activities have been the holding of regional conferences on subjects of current interest and the

Philip C. Jessup Moot Competition. The proceedings of these conferences have been noted in this JOURNAL,¹ and information on the activities of the student organizations has appeared in the annual *Proceedings* of the Society² in the form of Reports by the President of the Association of Student International Law Societies, which was formed in 1962 under the aegis of the Society. The final competition of the Jessup Moot Court has been a part of the program of the Society's annual meetings.³ The Student Association now comprises 16 member societies and one affiliate member, and promises to grow both in membership and activity.

Among the most significant and substantial contributions which the students are making to the promotion of international law is the publication of student periodicals on the subject. Four such publications are now in circulation and another one is about to appear. They are the *Harvard International Law Club Journal*, the *Journal of Transnational Law* of Columbia University,⁴ the *Virginia Journal of International Law* (University of Virginia), and the *Texas International Law Forum* (University of Texas). It is understood that the George Washington University International Law Society expects to begin publishing a semi-annual *Journal of Inter-American Law* in February.

The Harvard International Law Club, which was established in 1957 and now has close to 400 members, began publishing in 1959 a semi-annual *Bulletin* which was the first international law club periodical in the United States. The *Bulletin* contained contributions from students, alumni, and faculty members. After publication was suspended for the academic year 1960-1961, the *Bulletin* made its reappearance in 1961-1962, and in 1962-1963 changed its title to *Harvard International Law Club Journal*. In announcing the reappearance of the *Journal*, the editors stated that it would be devoted mainly to the publication of work submitted by students to the faculty of Harvard Law School. Its aim was to publish those papers "considered to make an effective contribution to legal research, and to be of interest and value to students and scholars of international law." The *Journal*, which is now in its seventh volume, contains articles, editorial comments, notes, book reviews, and bibliographies in the fields of inter-

¹ See notes on conferences arranged by the World Community Association, Yale Law School, 55 A.J.I.L. 471 (1961), 56 *ibid.* 784 (1962); by the Columbia Society of International Law, 57 A.J.I.L. 395 (1963); by the Texas University International Law Society, 58 *ibid.* 743 (1964); by the Duke University International Law Society in conjunction with the Association of Student International Law Societies, *ibid.* 744; by the Syracuse University International Law Club, *ibid.* 746; and by the International Law Societies of the University of Texas and of Southern Methodist University, 59 A.J.I.L. 604 (1965). See also 1956 Proceedings, American Society of International Law 265, Report on Regional Meetings held in conjunction with the Society's 50th anniversary. A regional meeting at the University of Virginia Law School in April, 1956, was sponsored by the John Bassett Moore Society of International Law of that school.

² See 1963 Proceedings, American Society of International Law 323; 1964 *ibid.* 256; 1965 *ibid.* 277.

³ See 1962 Proceedings, American Society of International Law 158; 1963 *ibid.* 268; 1964 *ibid.* 218; 1965 *ibid.* 220.

⁴ See note at 59 A.J.I.L. 375 (1965).

national and comparative law. The *Journal* publishes primarily honor papers presented in connection with third-year and graduate seminars at the Harvard Law School and material prepared by the *Journal* staff.

The latest issue of the *Harvard International Law Club Journal* (Vol. 6, No. 2) contains articles by Charles F. Goldfarb on "A Model Tax Statute for a Developing Nation"; and by Frank E. Samuel, Jr. on "Technical Data Export Regulations"; comments by William R. Harris on "Legal Aspects of Indonesia's 'Withdrawal' from the United Nations"; by M. Chase Waring on "Waiver of Sovereign Immunity"; notes on the doctrine of sovereign immunity as treated in the *Victory Transport* case, and on income taxes under tax conventions; and book reviews.

The editors for Volume 7 (1965-1966) are William E. Butler, Editor-in-Chief; Craig S. Bamberger, editor of comments and notes; Jeffrey M. Hertzfeld, articles editor; and Gerald S. Cook, Managing Editor. Faculty advisers are Professors Richard R. Baxter and Henry J. Steiner.

The *Harvard International Law Club Journal* appears twice a year, in winter and spring, during the academic year. Annual domestic subscriptions are \$3.00; foreign, \$3.50.

The John Bassett Moore Society of International Law, founded in 1951 at the University of Virginia Law School, also initiated the publication in 1960 of a student journal of international law, originally entitled *Journal of the John Bassett Moore Society of International Law*. Encouraged by its success, the publishers enlarged the scope of their project to, in their words, "the national publication of a journal of international law, aimed at offering the law student a contemporary picture of international law, its opportunities and advantages, and its problems and limitations." In 1963, beginning with Volume 3, the title of the publication was changed to *Virginia Journal of International Law*, and in 1964 its size and format were changed to regular law review style. The *Journal* carries articles by experts in various fields of international law, comments and notes, a special section on the European Common Market, and notes on judicial decisions. Beginning with Volume 6, it will also carry a book review section.

The latest issue (Vol. 5, No. 2) contains an article by Walter A. Slowinski, Thomas M. Haderlein and Dennis I. Meyer, entitled "International Tax Treaties—Where Are We—Where Are We Going?"; another article on "Legal Control of Populations in Subversive Warfare" by Colonel Joseph B. Kelly and Captain George A. Pelletier, Jr., of the U. S. Army Judge Advocate General's Corps; a comment by Lionel M. Summers on "Present Trends in the Policy of the United States on the Legal Settlement of International Disputes"; notes on the application of the Geneva Prisoners of War Convention of 1949 to the Viet-Nam conflict, the external tariff of the European Economic Community, and Common Market Cases and Rulings on movement of labor and competition; and notes on recent judicial decisions.

The Editor of the *Virginia Journal of International Law* is Wade S. Hooker, Jr.; the Executive Editor is Jack F. Lane, Jr. Associate editors are A. J. Adams, Jr., William Donald Cox, Sven Erik Hsia, Robert W.

Bartlett, David H. Savasten, and Dean C. Rohrer. Faculty adviser is Professor Marion Kellogg.

The *Journal* is presently published semi-annually, but expects to increase its publication to three issues a year in the near future. The subscription price is \$4.00 a year in North America, \$.50 additional elsewhere.

The University of Texas International Law Society was founded in the fall of 1963 and began publication of its *Journal* in January, 1965. This issue contained the papers delivered at the regional meeting of the Society held at the University of Texas Law School, February 22, 1964.⁵ The second and latest number appeared in June, 1965, under the new title: *The Texas International Law Forum*. It contains articles by Dr. Carl H. Fulda on "The European Common Market as a Customs Union and Its Effect on American Foreign Trade"; Mr. Sperry Lea on "Conceptual Integration in the Atlantic"; Sir John Slessor on "Atlantic Nuclear Policy"; and by the Honorable John D. Hickerson on "The Atlantic Council," the latter three being based on speeches made at a Conference on the Atlantic Community held at the University of Texas Law School February 12, 1965. The journal also contains comments on "The Formation of the Agricultural Law of the European Common Market," and on the decision of the Italian Constitutional Court in the *Costa* case involving the European Economic Community Treaty.

The editors of the *Texas International Law Forum* are J. Robert McKissick, James Gordon Vaughter, Vincent W. Perini, Adrian de Graffenreid, and Jack Gatewood. Faculty adviser is Professor E. Ernest Goldstein.

The *Texas International Law Forum* is published semi-annually. The subscription rate is \$3.00 a year in North America; \$.50 additional elsewhere.

As stated by the editors of the Harvard student journal, "many student papers of distinction never find a public forum but remain buried in university libraries." For this reason they proposed to publish such papers and give them circulation. All of the student journals provide an opportunity for those scholars seriously interested in the subject to express themselves on the many current aspects of international law which are of more than passing importance. To quote the Harvard editors again, "there is greater and greater interest among students in the development of international law. It is time for this interest to be expressed in print." Virginia Editor Hooker has commented that "in partnership with the community of international scholars, more and more students have entered the fascinating field of writing and editing the analysis of today's international legal problems." It is highly encouraging to those who have promoted the science and study of international law over a long period of time to recognize in these student publications the breadth and the depth of student "commitment"—to use a current expression—to the knowledge and application of international law.

ELEANOR H. FINCH

⁵ See 58 A.J.I.L. 743 (1964).

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section is compiled by Charles I. Bevans, Assistant Legal Adviser, Department of State. Alfred P. Rubin, of the Office of the General Counsel, Department of Defense, and Bruno A. Ristau, of the Department of Justice, provide material originating in their respective Departments.

DIPLOMATIC AND CONSULAR REPRESENTATIVES

Withdrawal of U. S. representatives from Congo (Brazzaville)

Following is the text of a note from the Secretary of State to the Ambassador of the Republic of Congo (Brazzaville) notifying him that the Government of the United States has decided to withdraw its diplomatic and consular representatives from the Republic of Congo (Brazzaville):

The Secretary of State presents his compliments to His Excellency the Ambassador of the Republic of Congo (Brazzaville) [Jonas Mouanza] and has the honor to notify him that the Government of the United States has decided to withdraw its diplomatic and consular representatives from the Republic of Congo (Brazzaville).

Within the past nine months there have been three instances of serious mistreatment by the Congolese authorities of American diplomats and officials. In each instance the American Embassy in Brazzaville discussed with the Congolese authorities the arrival of the American diplomat and officials involved. Technical matters raised regarding visas were of such nature that between nations maintaining normal diplomatic relations they would have been inconsequential and would have been settled without difficulty. However, the American diplomat and officials, on or after arrival in Brazzaville, were variously subjected to arrest, detention, incommunicado interrogation and forced departure. The treatment accorded to the American diplomat and officials was in contravention of the rules of international law and traditional practice governing diplomatic intercourse among nations—rules which have been codified in the comprehensive Vienna Convention on Diplomatic Intercourse and Immunities at a world conference meeting in 1961.

The United States Government in each instance sought to resolve the case amicably with the Government of the Republic of Congo (Brazzaville). In each instance the Republic of Congo (Brazzaville) has offered no satisfactory explanation. The American Ambassador [Henry L. T. Koren] discussed the latest of these instances, involving Mr. William K. Mackey, with the President and the Foreign Minister of the Republic of Congo (Brazzaville). The requests of the Ambassador and of the Secretary of State for an explanation were rejected. The United States Government's request for assurances that effective steps would be taken to prevent a recurrence of these incidents went unanswered.

This course of conduct on the part of the Government of Congo (Brazzaville) has made it impossible for the Government of the

United States to maintain its diplomatic and consular representation in the Republic of Congo (Brazzaville).

The Government of the United States has requested the British Government to assume protection of the interests of the United States in the Republic of Congo (Brazzaville), and the British Government has agreed to do so. The American Embassy in Brazzaville has already taken steps to arrange the departure of its staff. The Chargé d'Affaires *ad interim* and the remaining staff who are charged with turning over to the British Embassy the affairs of the American Embassy will depart Brazzaville as soon as they have fulfilled their functions, but at the latest within one week from today.

At such time as assurances are received from the Government of Congo (Brazzaville) that effective steps will be taken to assure the right of legation to American diplomatic representation in Brazzaville, the Government of the United States will be prepared to consider the resumption of diplomatic and consular representation.

(53 Dept. of State Bulletin 367 (1965).)

GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS

Application to hostilities in Viet-Nam

Following are texts of letters exchanged on June 11 and August 10, 1965, between the President of the International Committee of the Red Cross and the Secretary of State concerning the application of the Geneva Conventions of 1949 to the hostilities in Viet-Nam:

Geneva, June 11, 1965

Mr. Secretary,

The hostilities raging at the present time in Viet Nam—both North and South of the 17th parallel—have assumed such proportions recently that there can be no doubt they constitute an armed conflict to which the regulations of humanitarian law as a whole should be applied.

All Parties to the conflict, the Republic of Viet Nam, the Democratic Republic of Viet Nam and the United States of America, are bound by the four Geneva Conventions of August 12, 1949, for the protection of the victims of war, having ratified them and having adhered thereto. The National Liberation Front too is bound by the undertakings signed by Viet Nam.

Pursuant to the common Article 1 of the four Geneva Conventions, "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". It is likewise said in Article 2 that "The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the Contracting Parties, even if the state of war is not recognized by one of them".

In keeping with its humanitarian tradition, the International Committee of the Red Cross in Geneva reminds the governments of the aforesaid countries and the National Liberation Front of their obligations pursuant to the Geneva Conventions.

It is incumbent on them to implement the provisions thereof and to permit the ICRC to carry out its mission as a neutral intermediary, as laid down in these Conventions.

In particular the life of any combatant taken prisoner, wearing uniform or bearing an emblem clearly indicating his membership of the armed forces, shall be spared, he shall be treated humanely as a prisoner of war, lists of combatants taken prisoner shall be communicated without delay to the International Committee of the Red Cross (Central Information Agency), and the delegates of the ICRC shall be authorized to visit prison camps.

In addition, Parties to the conflict shall respect and protect civilians taking no part in hostilities, they shall abstain from attack against such persons and subject them to no form of violence.

The ICRC is prepared to co-operate with the authorities concerned as far as it is able in the loyal and strict application of the Geneva Conventions drawn up by the community of nations to alleviate the hardships engendered by war.

The ICRC conveys the present communication to the governments of the three aforesaid countries and will endeavour to deliver it also to the National Liberation Front. It would be pleased to know what measures are taken by the governments in conformity with the duties devolving upon them pursuant to the Geneva Conventions.

I avail myself, Mr. Secretary, of this opportunity to extend to you the assurances of my highest consideration.

For the President of the ICRC

JACQUES FREYMOND
Vice-President

The Honourable Dean Rusk
Secretary of State
Department of State
WASHINGTON D.C.

August 10, 1965

Dear Mr. Conrad:

I appreciate Mr. Freymond's letter concerning the application of the Geneva Conventions of 1949 to the hostilities in Viet Nam. The United States Government has always abided by the humanitarian principles enunciated in the Geneva Conventions and will continue to do so. In regard to the hostilities in Viet Nam, the United States Government is applying the provisions of the Geneva Conventions and we expect the other parties to the conflict to do likewise.

Among the particular measures being taken to implement the Conventions at the present time, the United States Government is developing plans to assist the Government of the Republic of Viet Nam to expand and improve facilities and procedures to process and care for an increased number of captives taken in combat. The two Governments are also increasing programs of instruction for personnel in the details of the provisions of the Conventions.

As you are aware, those involved in aggression against the Republic of Viet Nam rely heavily on disguise and disregard generally accepted principles of warfare. From the outset it has therefore been

difficult to develop programs and procedures to resolve fully all the problems arising in the application of the provisions of the Conventions. Continued refinement of these programs and procedures in the light of experience will thus undoubtedly be necessary.

The United States Government will cooperate fully and communicate further with the International Committee of the Red Cross concerning the performance in Viet Nam of its traditional and valuable humanitarian mission.

Sincerely yours,

DEAN RUSK

The Honorable
Samuel Conrad, President,
International Committee of the Red Cross,
7 Avenue de la Paix,
Geneva.

(Letters on file in Department of State.)

Prisoners of War Convention—Resolution adopted by the International Conference of the Red Cross

The Twentieth International Conference of the Red Cross, held at Vienna, adopted on October 9, 1965, the following resolution sponsored jointly by the Government of the United States and the American Red Cross:

The XXth International Conference of the Red Cross:

Recalling the historic role of the Red Cross as a protector of victims of war,

Considering that only too often prisoners of war find themselves helpless and that the utilization of prisoners of war as objects of retaliation is inhuman,

Recognizing that the international community has consistently demanded humane treatment for prisoners of war and facilitation of communications between prisoners of war and the exterior, and condemned reprisals directed against them,

Calls upon all authorities involved in an armed conflict to ensure that every prisoner of war is given the treatment and full measure of protection prescribed by the Geneva Convention of 1949 on the Protection of Prisoners of War, including the judicial safeguards afforded to every prisoner of war charged with any offense, and that the International Committee of the Red Cross is enabled to carry out its traditional humanitarian functions to ameliorate the conditions of prisoners of war.

(53 Dept. of State Bulletin 726 (1965).)

PROPERTY

Treaty provisions

On September 30, 1965, a letter was sent by the Department of State to the Governor of each State transmitting copies of a compilation of the treaty provisions in force on September 30, 1965, between the United States of America and other countries relating to rights of inheritance, acquisition and ownership of property.

NOTE: The treaties quoted from were those with:

- Argentina, July 27, 1853, 10 Stat. 1005.
 Australia. *See* United Kingdom.
 Austria, June 19, 1928, 47 Stat. 1876; TS 838; 118 LNTS 241.
 Bolivia, May 13, 1858, 12 Stat. 1003.
 Burma. *See* United Kingdom.
 Canada. *See* United Kingdom.
 Ceylon. *See* United Kingdom.
 China, Nov. 4, 1946, 63 Stat. 1299; TIAS 1871; 25 UNTS 69.
 Colombia, Dec. 12, 1846, 9 Stat. 881.
 Cyprus. *See* United Kingdom.
 Denmark, Oct. 1, 1951, 12 UST 908; TIAS 4797; 421 UNTS 105.
 Estonia, Dec. 23, 1925, 44 Stat. 2379; 50 LNTS 13.
 Ethiopia, Sept. 7, 1951, 4 UST 2134; TIAS 2864; 206 UNTS 41.
 Finland, Feb. 13, 1934, 49 Stat. 2659; 152 LNTS 45. *See also* Protocol, Dec. 4, 1952, 4 UST 2047; TIAS 2861; 205 UNTS 149.
 France, Feb. 23, 1853, 10 Stat. 992; and Nov. 25, 1959, 11 UST 2398; TIAS 4625; 401 UNTS 75.
 Gambia. *See* United Kingdom.
 Germany, Federal Republic of. Oct. 29, 1954, 7 UST 1839; TIAS 3593; 273 UNTS 3.
 Ghana. *See* United Kingdom.
 Greece, Aug. 3, 1951, 5 UST 1829; TIAS 3057; 224 UNTS 279.
 Guatemala, Aug. 27, 1901, 32 Stat. 1944.
 Honduras, Dec. 7, 1927, 45 Stat. 2618; 87 LNTS 421.
 India. *See* United Kingdom.
 Iran, Aug. 15, 1955, 8 UST 899; TIAS 3853; 284 UNTS 93.
 Ireland, Jan. 21, 1950, 1 UST 785; TIAS 2155; 206 UNTS 269.
 Israel, Aug. 23, 1951, 5 UST 550; TIAS 2948; 219 UNTS 237.
 Italy, Feb. 2, 1948, 63 Stat. 2255; TIAS 1965; 79 UNTS 171.
 Jamaica. *See* United Kingdom.
 Japan, Aug. 29, 1953, 4 UST 2063; TIAS 2863; 206 UNTS 143.
 Kenya. *See* United Kingdom.
 Korea, Nov. 28, 1956, 8 UST 2217; TIAS 3947; 302 UNTS 281.
 Latvia, April 20, 1928, 45 Stat. 2641; 80 LNTS 35.
 Liberia, Aug. 8, 1938, 54 Stat. 1739; TS 936; 201 LNTS 163.
 Luxembourg, Feb. 23, 1962, 14 UST 251; TIAS 5306.
 Malawi. *See* United Kingdom.
 Malaysia. *See* United Kingdom.
 Malta. *See* United Kingdom.
 Mexico, Feb. 2, 1848, 9 Stat. 922; TS 207.
 Morocco, Sept. 16, 1836, 8 Stat. 484; TS 244-2.
 Muscat, Dec. 20, 1958, 11 UST 1835; TIAS 4530; 380 UNTS 181.
 Netherlands, March 27, 1956, 8 UST 2043; TIAS 3942; 285 UNTS 231.
 New Zealand. *See* United Kingdom.
 Nicaragua, Jan. 21, 1956, 9 UST 449; TIAS 4024; 367 UNTS 3.
 Nigeria. *See* United Kingdom.
 Norway, June 5, 1928, and Feb. 25, 1929, 47 Stat. 2135; TS 852; 134 LNTS 81.
 Pakistan, Nov. 12, 1959, 12 UST 110; TIAS 4683; 404 UNTS 259.
 Paraguay, Feb. 4, 1859; 12 Stat. 1091; TS 272.
 Sierra Leone. *See* United Kingdom.
 South Africa. *See* United Kingdom.
 Spain, July 3, 1902, 33 Stat. 2105; TS 422.
 Sweden, June 1, 1910, 37 Stat. 1479; TS 557.
 Switzerland, Nov. 25, 1850, 11 Stat. 587; TS 353.
 Tanzania. *See* United Kingdom.
 Thailand, Nov. 13, 1937, 53 Stat. 1731; TS 940; 192 LNTS 247.
 Trinidad and Tobago. *See* United Kingdom.
 Tunisia. *See* France.
 Uganda. *See* United Kingdom.
 United Kingdom, Nov. 19, 1794, 8 Stat. 116; and chiefly March 2, 1899, 31 Stat. 1939; TS 146.
 Viet-Nam, April 3, 1961, 12 UST 1703; TIAS 4890; 427 UNTS 137.
 Yugoslavia, Oct. 2/14, 1881, 22 Stat. 963; TS 319.
 Zambia. *See* United Kingdom.

RECOGNITION OF STATES

United States recognition of Singapore

In a note dated August 11, 1965, the United States Government stated that it recognized Singapore as a sovereign and independent state. The text of the note follows:

AUGUST 11, 1965

EXCELLENCY: I have the honor to convey to the Government of Singapore the best wishes of the Government of the United States of America.

The Government of the United States recognizes that the Independence of Singapore Agreement, 1965, The Proclamation of Singapore of August 9, and The Constitution and Malaysia (Singapore Amendment) Act, 1965 represent the authoritative decision of the people of Singapore and of the people of Malaysia that their common interest in the welfare and security of their territories is best advanced on the basis of friendship and cooperation between independent and sovereign states. It is noted that these Acts make provision for the continuity of international obligations.

The United States Government therefore recognizes Singapore as an independent and sovereign state. Further, the Government and the people of the United States wish to reaffirm their close friendship for the Government and people of Singapore and to express their sincere desire for the successful development of the new state of Singapore. I look forward to early communication with you concerning the accreditation of representatives between our two Governments.

Accept, Excellency, the assurances of my highest consideration.

DEAN RUSK

(53 Dept. of State Bulletin 357 (1965).)

ROAD TRAFFIC CONVENTION, 1949

Application in the United States

On August 31, 1965, a letter was sent by the Department of State to the Governor of each State transmitting a statement regarding the application in the United States of the International Convention on Road Traffic of 1949. The statement reads in part as follows:

The International Convention on Road Traffic of 1949, drawn up at a conference sponsored by the United Nations, came into force on March 26, 1952 upon its ratification by the requisite number of nations. It was ratified by the United States on August 17, 1950 and proclaimed by the President on April 16, 1952. Its provisions are binding upon this country. Most of the nations of the world have become parties to the Convention and it has become the standard agreement among nations for the promotion and efficient administration of international motoring, in which United States citizens are participating to an important extent.

The text of the Convention is published in the statutory volumes entitled "United States Treaties and Other International Agreements," volume 3, page 3008.

Background

The Convention is designed to facilitate and encourage the movement of private motor vehicle traffic between and among all countries by simplifying formalities and establishing uniform reciprocal privileges on such matters as motor vehicle registration certificates, drivers' permits and customs bonds; the identification of vehicles in international traffic; rules for safe driving; equipment requirements, including brakes, lights and other technical characteristics; permissible maximum dimensions and weights of motor vehicles; and definitions. In brief, the Convention establishes the principle of international reciprocity for private passenger automobiles and for their drivers, to the same general end as the reciprocal privileges now existing among the several States of the United States. It is not applicable to the operations of commercial trucks and busses.

For the large and continually growing number of United States motorists who take their cars abroad or who drive foreign cars during their stay abroad, the new Convention will greatly facilitate their travel in foreign countries. Similar facilities are extended as a matter of reciprocity for foreign motorists traveling in the United States. . . .

Application of Convention

The following paragraphs summarize the principal features of the application of the Convention on Road Traffic of 1949 in the United States. Similar application is being given in all foreign countries which ratify the Convention, and United States motorists benefit from these privileges when they travel abroad in the same way as foreign motorists who travel in the United States.

1. *Issuance of International Identification*—Under the provisions of Articles 20 and 24 of the Convention, the American Automobile Association and the American Automobile Touring Alliance have been authorized to issue to United States motorists, for the purpose of international motoring only, a distinguishing oval sign or plaque bearing the letters "USA" and an international driving permit for use in any country or countries which may require it.

The reasons for extending such authorization to these responsible automobile organizations are:

1. They have member clubs in all parts of the United States, giving wide local coverage for information and service, as well as a close relationship with motoring associations in all other countries which have likewise been authorized by their respective governments to perform these services for international motorists.

2. Many foreign countries require deposit of customs duty or an equivalent bond for each tourist automobile entering its territory, and the motoring associations are equipped with the necessary facilities for providing expeditiously a standard bond document (Article 3).

It is the opinion of the Department of State that this arrangement with responsible motoring organizations is not only a convenience for

those who desire to benefit by the privileges of the Convention but is of assistance as well to the various States by providing readily available facilities for the issuance to their residents of the required identification documents. Any State wishing to perform this special service for its citizens in accordance with the provisions of the Convention may do so.

In foreign countries, motoring associations likewise issue identification of the same kind to persons who drive their automobiles into other countries.

2. Pertinent Points for Guidance of United States Traffic and Police Officials—The Convention is not applicable to United States motorists using their cars in the United States and has no effect upon the existing laws and regulations applicable thereto. For the foreign motorist entering the United States the following points must be observed:

(a) Reciprocal privileges are limited to a period not exceeding one year from date of entry into the United States (Article 1 of the Convention).

(b) Reciprocal privileges are limited to private vehicles, and the Convention does not authorize carriage of persons for hire or carriage of goods other than personal baggage of the occupants of the vehicle (Article 5). Commercial busses, trucks and trailers are excluded from the application of the Convention.

(c) Every vehicle must have a registration certificate issued in accordance with the laws of the country of residence and identifying the vehicle and owner. The vehicle registration number must be shown on the rear of the vehicle or on a plate attached to the rear (Articles 18 and 19).

(d) The vehicle must also show on the rear a sign or plaque to indicate the country from which it comes. This sign of oval shape, must be composed of one to three capital letters, black on a white ground. Those letters are shown in the list below of the countries now parties to the Convention.

(e) Every driver must have a valid driver's permit (license) issued by his home country or State. In case a country does not issue such permits, the driver must have an international permit issued by an authorized authority in the form of a booklet containing identification and photograph of the bearer and pages printed in several languages including English (Article 24).

(f) All countries ratifying the Convention are required to communicate to each other information regarding persons operating vehicles under the provisions of the Convention who are liable to proceedings for a driving offense or who have been involved in a serious accident. In the United States, information of this kind should be reported by the appropriate State agency to the Department of State, Washington, D.C. 20520, referring to the "Convention on Road Traffic of 1949" (Article 25).

(g) As of July 30, 1965, the Convention is in effect in 75 countries which have ratified or adhered to it as indicated in the list below. As other countries ratify, the terms of the Convention will become applicable to them and will permit movement of private motor vehicles among them. Passport and visa controls, which are not affected by the Convention on Road Traffic, will continue to govern the movement of individuals between the United States and all other countries.

Inquiries on this subject should be addressed to the Department of State, Washington, D.C. 20520, referring to the "Convention on Road Traffic of 1949."

List of Countries with Respect to Which the 1949 Road Traffic Convention is in Force

(the letters in parentheses indicate letters to be shown in oval plate on vehicle):

Algeria (DZ)	Japan (J)
Argentina (RA)	Jordan (JOR)
Australia (AUS)	Laos (LAO)
Austria (A)	Lebanon (RL)
Belgium (B)	Luxembourg (L)
Bulgaria (BR)	Malagasy
Cambodia (K)	Republic (RM)
Central African Republic (RCA)	Malawi (MW)
Ceylon (CL)	Malaysia (PTM)
Chile (RCH)	Mali (RMM)
China (RC)	Monaco (MC)
Congo (RCB)	Morocco (MA)
(Brazzaville)	Netherlands (NL)
Congo (CGO)	New Zealand (NZ)
(Leopoldville)	Niger (NIG)
Cuba	Norway (N)
Cyprus (CY)	Peru (PE)
Czechoslovakia (CS)	Philippines (PI)
Dahomey (DY)	Poland (PL)
Denmark (DK)	Portugal (P)
Dominican	Rumania (R)
Republic (DOM)	Rwanda (RWA)
Ecuador (EC)	San Marino (RSM)
Finland (SF)	Senegal (SN)
France (F)	Sierra Leone (WAL)
Ghana (GH)	South African
Greece (GR)	Republic (ZA)
Guatemala (GCA)	Spain (E)
Haiti (RH)	Sweden (S)
Hungary (H)	Syria (SYR)
India (IND)	Thailand (T)
Ireland (IRL)	Togo (TG)
Israel (IL)	Trinidad and
Italy (I)	Tobago (TT)
Ivory Coast (CI)	Tunisia (TN)
Jamaica (JA)	Turkey (TR)

United States (USA)	Vatican City (V)
Union of Soviet (SU)	Venezuela (YV)
Socialist Republics	Viet-Nam (VN)
United Arab	Western Samoa
Republic (ET)	Yugoslavia (YU)
United Kingdom (GB)	

SOVEREIGN IMMUNITY

Sovereign immunity from suit and the attachment of funds—King and Kingdom of Saudi Arabia

In a letter dated September 15, 1965, the Department of State, in response to an inquiry from a United States Senator relating to the case of *Thomas W. Kendall, et al.*, against *The Kingdom of Saudi Arabia, et al.*, filed in the United States District Court for the Southern District of New York on August 26, 1965, set forth information concerning the basis on which sovereign immunity from suit of the Government of Saudi Arabia was allowed and the suit against the Government of Saudi Arabia was dismissed and the attachment of its funds vacated. In a letter to the Attorney General, dated September 14, 1965, the Department of State stated that it recognized and allowed the immunity of King Faisal, as Head of State, from suit in the above-mentioned case and requested that a supplementary suggestion of immunity to that effect be filed with the court. The suit against the King and other defendants was subsequently dismissed and the attachment of funds in the King's name vacated.

The letter of September 15, 1965, reads in part as follows:

... As you have been informed by Mr. Kendall's attorney the Ambassador of Saudi Arabia addressed a note to the Secretary of State on August 30, 1965, requesting the Department's assistance in obtaining the release of funds in New York banks which had been attached in connection with the suit. In accordance with its practice, the Department informed the attorney for Mr. Kendall of this request for the Department's assistance and stated that it would be glad to receive any views he might wish to submit as to why the Department should not grant sovereign immunity from suit and from the attachment of funds. Mr. Kendall's attorney was informed of the Department's policy with respect to recognition of sovereign immunity from suit which is set forth in its letter of May 19, 1952 to the Acting Attorney General, the so-called Tate letter, a copy of which is attached. After considering the views of Mr. Kendall's attorney which were submitted in writing, the Department decided to grant the immunity requested since it was clear that the acts out of which the suit arose, destruction of an aircraft and personal injuries to occupants thereof through firing by Saudi Arabian soldiers on Saudi Arabian territory were, whether right or wrong, sovereign or public acts of the State for which under international law it cannot be sued in a foreign State without its consent. The Ambassador of Saudi Arabia was informed of this decision in a note of September 3, 1965, and Mr. Kendall's attorney was on the same date so advised by telephone and later by letter. In accordance with the practice in such cases, the Department of Justice was requested to file a suggestion of immunity with the

Court in which the suit was pending. This was done by the United States Attorney and on September 7 the Court on its own initiative held an informal hearing at which all parties were represented. Afterwards the Court issued an order dismissing the suit against the Government of Saudi Arabia and vacating the attachment of its funds. No action was taken with respect to the suit against individuals named as defendants or with respect to any funds in their names which may have been attached.

It will be apparent from the foregoing that the action taken by the Department in this case was in accordance with its long established policy and in accordance with its concepts of its obligations under international law.

Mr. Kendall's attorney has been advised in response to his inquiry that he may file a claim against the Government of Saudi Arabia with the Department if he so desires. Upon the receipt of such a claim, the Department would consider whether there is adequate basis for the presentation of such a claim to the Government of Saudi Arabia through diplomatic channels. . . .

The letter of September 14, 1965, to the Attorney General reads in part as follows:

. . . Pursuant to the suggestion of immunity which was filed with the Court in the above case, the Court dismissed the suit against The Kingdom of Saudi Arabia and vacated the attachments of funds in its name held by certain banks and corporations. However, the suit against King Faisal and the other defendants named individually was not dismissed and the attachment of funds in a New York bank in the name of "Mr." Faisal was not vacated. The Ambassador's note of September 10, 1965, a copy of which is enclosed, requests the release of such funds. It is the Department's understanding that the garnishees hold no funds of the other individually named defendants.

King Faisal Bin Abdull Aziz Al-Saud is the Head of State of The Kingdom of Saudi Arabia and as Head of State is not subject to the jurisdiction of any foreign Court without his consent. In these circumstances, the Department of State recognizes and allows the immunity of King Faisal from suit in the above named case and requests that the appropriate United States Attorney be instructed to appear and file with the Court a supplemental suggestion of immunity to that effect. . . .

(Letters of Sept. 14 and 15, 1965, on file in Office of Legal Adviser,
Department of State.)

TAXATION

Protocol modifying the 1954 Income Tax Convention with the Federal Republic of Germany

On September 29, 1965, the President transmitted to the Senate for approval the protocol with the Federal Republic of Germany, signed at Bonn on September 17, 1965, modifying the Convention of July 22, 1954, for the Avoidance of Double Taxation with respect to Taxes on Income (Senate Exec. I, 89th Cong., 1st Sess.). A press release relating to the protocol, issued by the Department of State on September 17, 1965, reads in part as follows:

Modification of the 1954 convention in certain respects has been made advisable by reason of experience in the application of the convention since its entry into force and by relevant changes in the Federal Republic's tax system.

A major feature of the revision effected by the protocol is a change in the taxation of dividends. Under the provisions as amended by the protocol, dividends passing from one country to the other will be subject to a reduced withholding tax of 15 percent. An exception to this rule is provided in respect of dividends paid by a Federal Republic company to a U. S. company having an interest of 10 percent or more in the Federal Republic company paying the dividends. The Federal Republic tax on dividends in such case will be withheld at the full rate of 25 percent, whenever the dividends are reinvested in the Federal Republic company. In this connection, reinvestment in any calendar year totaling less than 7.5 percent of the dividends received will be disregarded. On the other hand, any reinvestment made by the U. S. company in the year prior to or following the year in which the dividends are paid will be taken into account for purposes of imposing Federal Republic withholding tax at the full 25 percent rate.

Another important change effected by the protocol in the convention relates to know-how payments. Such payments will be treated as royalties and as such will be exempt from tax in the country of source as from January 1, 1963.

The definition of the term "permanent establishment" and the rule governing industrial and commercial profits are brought into line with the definition in other recent income tax conventions concluded by the United States. Other changes effected by the protocol relate to the taxation of interest and capital gains. Double taxation of dividends from portfolio investments in the United States will be avoided by crediting U. S. tax against Federal Republic tax. The convention would be extended to include the Federal Republic trade tax and capital tax. The protocol provides for a broadening of the exemption with respect to personal service income and the provisions dealing with governmental salaries, wages, and pensions. American nonprofit institutions would be accorded exemption from Federal Republic tax comparable with that accorded Federal Republic nonprofit institutions under U. S. law.

Except as otherwise indicated in the protocol, the convention as amended is to apply as of January 1 of the year in which the exchange of instruments of ratification takes place. The article regarding taxation of dividends would have effect with respect to dividends paid on or after January 1, 1965.

(Dept. of State Press Release No. 224, Sept. 17, 1965;
53 Dept. of State Bulletin 573 (1965).)

TEAR GAS

Use in Viet-Nam

Following is a statement made by Secretary Rusk on March 24, 1965, relating to the use of tear gas in Viet-Nam:

Some of you have asked me for some comment as to the policy aspects of the use in Viet-Nam of gases of the tear-gas family, back in December and January. And I am very glad to respond to those questions.

The shadow of gas warfare has been raised in connection with these incidents. That is not involved. We are not embarking upon gas warfare in Viet-Nam. There has been no policy decision to engage in gas warfare in Viet-Nam. We are not talking about agents or weapons that are associated with gas warfare in the military arsenals of many countries. We are not talking about gas that is prohibited by the Geneva convention of 1925 or any other understandings about the use of gas.

Now, we can understand the concern around the world and in this country about the specter of gas warfare. These memories go back to World War I, when tens of thousands were killed or maimed by what might be called "military gases."

This is not involved here. We are talking about a gas which has been commonly adopted by the police forces of the world as riot-control agents—gases that are available commercially and have been used on many occasions, some in this country, and on many occasions in other countries.

Now, why is tear gas a part of the equipment of police forces? It is because police forces would like to be able to use the minimum force that is required for the maintenance of law and order. It is a minimum instrument. And my information is that certain situations arose in South Viet-Nam where this problem presented itself.

On one occasion, for example, the Viet Cong had seized a village, was holding the villagers in hostage, and was firing through these villagers at mixed crowds outside the village. The decision was made to employ tear gas to try to deal with that situation as a riot-control type of problem in order to avoid the problem of whether to use artillery or aerial bombs that would inflict great damage upon innocent people.

There is no question here about gas warfare and gas in contravention of established conventions.

Now, it may be that there was a failure in full explanation, in briefing or in reporting, from Saigon on this matter. The initial reports tended to stimulate problems which were not present; for example, the use of the word "experimentation" suggested that something new and esoteric and weird might be involved here. This is not the case.

What has been involved has been well-known, traditional agents, in the hands of police forces in many parts of the world. And under the circumstances in which this gas was used in Viet-Nam, the desire was to use the minimum force required to deal with the situation to avoid death or injury to innocent people.

Now, that is at the heart of the policy question. We are not engaged in gas warfare. It is against our policy to do so, as it is against the policies of most other governments that I know about.

But we are reminded, when something of this sort comes up, of the nature of the war in South Viet-Nam. It isn't a comfortable and easy war. It isn't a war that is going to be decided by troops on parade with blank cartridges. It is a mean, dirty struggle carried out without regard to ordinary norms of conduct by the Viet Cong.

Those who are concerned about tear gas I would hope would be con-

cerned about the fact that during 1964 over 400 civilian officials were killed and over a thousand were kidnaped in South Viet-Nam—village chiefs, schoolteachers, public-health officers. Among other civilians, 1,300 were killed, over 8,000 were kidnaped, and entire villages have been burned to the ground, and families of those who were in the armed forces were kidnaped and held as hostages.

There is nothing more urgent, from the point of view of the United States, than that peace be restored to that country as quickly as possible. And peace can be restored if Hanoi would stop infiltrating military trained personnel into South Viet-Nam, stop the sending of arms into South Viet-Nam, and stop directing these operations aimed at taking over South Viet-Nam against the wishes of the people of that country.

Now, these are the essential policy aspects of the problem. We do not expect that gas will be used in ordinary military operations. Police-type weapons were used in riot control in South Viet-Nam—as in many other countries over the past 20 years—and in situations analogous to riot control, where the Viet Cong, for example, was using civilians as screens for their own operations.

But this does not represent a new departure of policy, the introduction of new weapons, the introduction of any new approach to the very difficult problems in that country.

(52 Dept. of State Bulletin 528 (1965).)

UNITED NATIONS

Financing —Articles 17 and 19 of the Charter—U. S. position

Following is an excerpt from the statement made by Ambassador Goldberg on August 16, 1965, in the U.N. Special Committee on Peacekeeping Operations:

I do not intend to review here in detail the position which the United States has taken with respect to articles 17 and 19 of the charter. As the members of this committee are well aware, we believe in the soundness of the following straightforward principles: first, that the concept of collective financial responsibility adopted by the United Nations in 1945 is a sound principle and a landmark in the practice of international organizations; second, that article 17 of the Charter of the United Nations is impeccably clear on the right of the General Assembly to assess and apportion among its members the "expenses of the Organization"; third, that the costs of peacekeeping operations, once they are assessed and apportioned by the General Assembly, are expenses of the organization within the meaning of article 17—a proposition confirmed by the International Court of Justice and accepted by the General Assembly by an overwhelming vote; fourth, that article 19 is clear beyond question about the sanction to be applied in the case of 2-year delinquents.

Our views on these matters have not represented a bargaining position, nor have they changed. They have not been based on narrow national

interest but on the clear language of the charter and what seemed to us to be the clear interests of the organization.

This is not and never has been an issue in the so-called cold war. Under the law of the charter the questions would be identical regardless of which member or members happened to be in arrears, or for what assessed United Nations activity they failed to pay, or why they refused to pay for it.

Nonetheless, the issue has been interpreted widely as a "confrontation," not between the delinquent members and the law of the United Nations but between major powers. And I will say for my Government and for myself that we do not so regard it.

We, for our part, cannot abandon our adherence to positions which we firmly believe to be constitutionally, legally, procedurally, and administratively correct.

Much less can we abandon positions taken and precedents established by the Assembly itself by overwhelming majorities, acting within the framework of the charter and according to its established procedures. I refer specifically to the formal actions of the General Assembly since 1956 levying assessments to finance the United Nations Emergency Force; to the similar assessment resolutions since 1960 for the United Nations Operation in the Congo; to the decision in 1961 to submit to the International Court of Justice the question of whether these assessments are, in the words of the charter, "expenses of the Organization" within the meaning of article 17; to the Assembly's authorization in 1961 of the United Nations bond issue; to the Assembly's acceptance in 1962 of the advisory opinion of the Court on the question submitted to it; to the reaffirmation by the Assembly's fourth special session in 1963 of the collective financial responsibility of all United Nations members; to the appeal by the same body to all delinquent members to pay their arrears.

All this has been done by the Assembly and cannot be undone by a few of its members. The law and the history of this matter cannot be revised.

The United States regretfully concludes, on ample evidence, that at this stage in the history of the United Nations the General Assembly is not prepared to carry out the relevant provisions of the charter in the context of the present situation. From private consultations, from statements by the principal officers of the organization, from the statements and exhaustive negotiations within and outside this committee, from an informal polling of the delegations—indeed from the entire history of this affair—the inevitable conclusion is that the Assembly is not disposed to apply the loss-of-vote sanction of article 19 to the present situation.

We regret exceedingly that the intransigence of a few of the member states, and their unwillingness to abide by the rule of law, has led the organization into this state of affairs.

The United States adheres to the position that article 19 is applicable in the present circumstances. It is clear, however, that we are faced with a simple and inescapable fact of life, which I have just cited. Moreover, every parliamentary body must decide, in one way or another, the issues

that come before it; otherwise it will have no useful existence and soon no life.

Therefore, without prejudice to the position that article 19 is applicable, the United States recognizes, as it simply must, that the General Assembly is not prepared to apply article 19 in the present situation and that the consensus of the membership is that the Assembly should proceed normally. We will not seek to frustrate that consensus, since it is not in the world interest to have the work of the General Assembly immobilized in these troubled days. At the same time, we must make it crystal clear that if any member can insist on making an exception to the principle of collective financial responsibility with respect to certain activities of the organization, the United States reserves the same option to make exceptions if, in our view, strong and compelling reasons exist for doing so. There can be no double standard among the members of the organization.

Some members may believe that in not applying article 19 no important decision is being made. The United States believes—and I believe—that no one can or should overlook the fact that the exercise of important prerogatives of the Assembly granted to it under the charter is being impaired. The United States wishes to strengthen, not weaken, the United Nations by adhering to rather than departing from basic, sound principles. Therefore, we must disclaim responsibility for the Assembly's attitude, which has developed contrary to the views which we still hold to be valid, and place the responsibility where it properly belongs—on those member states which have flouted the Assembly's will and the Court's opinion.

We look forward nonetheless to the not too distant day when the entire membership will resume its full range of collective responsibility for maintaining world peace. In the meantime, it is all the more important for the membership, though unready to apply article 19, to solve the United Nations financial problems and to continue to support in practice the sound principle of collective financial responsibility, and to adopt practical and equitable means by which those willing to share the responsibility for peace can act in concert to maintain and strengthen the indispensable peace-keeping capacity of the United Nations.

Meanwhile, the Security Council retains its primary—and I emphasize "primary"—responsibility, although this does not mean sole responsibility, for the maintenance of international peace and security; and the General Assembly retains its residual authority for this purpose, especially when the Security Council is unable to meet its responsibilities.

My Government has never been prepared, and is not prepared, to accept a situation in which the capacity of the United Nations to act for peace could be stopped by the negative vote of a single member. Nor should the effectiveness of this organization be determined by the level of support forthcoming from its least cooperative members.

(53 Dept. of State Bulletin 454 (1965).)

JUDICIAL DECISIONS

BY JOHN R. STEVENSON *

Of the Board of Editors

Act of state doctrine—legislation, removing bar imposed by doctrine to judicial determination of validity under international law of foreign sovereign act, held constitutional and applicable to cases pending at the time of enactment, including “Sabbatino” case

BANCO NACIONAL DE CUBA v. FARR. 243 F. Supp. 957.**

U. S. Dist. Ct., S.D. New York, July 30, 1965. Frederick van Pelt Bryan, D.J.

This case is before me on remand from the Supreme Court of the United States (*Banco Nacional de Cuba v. Sabbatino et al.*, 376 U. S. 398 (1964)), which reversed summary judgment in favor of defendants granted by the District Court (193 F. Supp. 375 (1961)) and affirmed by the Court of Appeals (2 Cir., 307 F.2d 845 (1962)).*** . . .

The case involves the proceeds of the sale of a cargo of sugar which was expropriated by the Castro government while in Cuban territorial waters from Compania Azucarera Vertientes-Camaguey de Cuba (C.A.V.), a corporation organized under Cuban law whose capital stock was owned principally by United States citizens.

The sugar was sold to Farr, Whitlock & Co. (Farr), New York sugar brokers, and the proceeds of the sale came to the United States.

The claim of plaintiff Banco Nacional de Cuba (Banco), an instrumentality of the Cuban government, to the proceeds of the expropriated sugar is founded on the Cuban expropriation. Defendant Farr and defendant *Sabbatino*,¹ a State Court Receiver for C.A.V. who held the proceeds, took the position that the Cuban government was not entitled thereto but that the proceeds were the property of C.A.V. from whom the sugar was expropriated.

Judgment for the defendants below was granted on the ground that the expropriation of the sugar violated international law, was therefore

* Assisted by John E. Donnelly, Cornelius B. Prior, Jr., and William J. Williams, Jr., of the New York Bar.

** Excerpted text of opinion; certain footnotes and citations omitted.

*** Supreme Court's opinion printed in excerpted form at 58 A.J.L.L. 779 (1964); Court of Appeals' opinion at 56 *ibid.* 1085 (1962); District Court's opinion at 55 *ibid.* 741 (1961).

¹ Subsequent to the decision of the Court of Appeals and before the decision of the Supreme Court, *Sabbatino* was discharged as receiver of C.A.V. and the funds in dispute were placed in escrow pending the outcome of this suit. After remand, pursuant to stipulation of the parties, the action was discontinued as against *Sabbatino* and the title was amended to name as defendants only the co-partners doing business as Farr, Whitlock & Co.

invalid and unenforceable in our courts, and was ineffective to deprive C.A.V. of its rights in the sugar and its proceeds.

The Supreme Court held that the "act of state doctrine" proscribed a challenge to the validity of the Cuban expropriation law in this case even if it violated international law. It reversed and remanded the case to the District Court for further proceedings.

On October 7, 1964, subsequent to the decision of the Supreme Court and before judgment was entered on remand, the President signed the Foreign Assistance Act of 1964 containing an amendment sponsored by Senators Hickenlooper and Sparkman, which precipitated the present phase of this litigation. (Section 301(d)(4) of Public Law 88-633, 78 Stat. 1009, 1013, hereafter referred to as the Hickenlooper Amendment.) The Amendment provided:

"Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court, or (3) in any case in which the proceedings are commenced after January 1, 1966."

* * * * *

The defendants . . . contend (1) that the Hickenlooper Amendment removed the bar interposed by the act of state doctrine to a determination of the validity of the Cuban expropriation under international law; (2) that under the Amendment this court is now required to adjudicate that issue; and (3) that in making such an adjudication this court is bound by the determination of the Court of Appeals in this case and defendants were therefore entitled to judgment dismissing the complaint.

Plaintiff, on the other hand, maintains (1) that the Hickenlooper Amendment is not applicable to this case, and (2) that if it is it is unconstitutional in its application to this case.

Some thirty-five cases involving a wide spectrum of questions arising out of Cuban expropriations are before me which had been delayed pending the final determination of the case at bar. These cases were likely to be affected if not determined by the decision on the present motions. Opportunity was therefore given to all counsel in these cases to par-

ticipate in the argument of the motions and submit briefs. A number did so.

The United States, through the Department of Justice, also appeared as amicus curiae at the suggestion of the court. The United States took the position that the Amendment did not apply to any pending cases but that if it did it was valid and constitutional.

The questions posed here then are:

1. Does the Hickenlooper Amendment apply to pending cases generally?
2. Does it apply to the case at Bar?
3. Is it unconstitutional in any respect?
4. What is the effect of the Amendment on this case?

* * * * *

I.

Application to Cases Pending at the time of Enactment

The Hickenlooper Amendment by its terms applies "in a case in which a claim of title or other right is asserted by *** a foreign state (or a party claiming through such state) based upon *** a confiscation or other taking after January 1, 1959." It is quite plain that Congress meant the legislation to apply to confiscations occurring after January 1, 1959, the date on which Castro came to power. There can be no doubt that by its specific language the Amendment applied retroactively to past confiscations and transactions arising therefrom which had occurred between January 1, 1959 and the date of its enactment.

The Amendment does not deal with confiscations and transactions in the abstract. It deals with "cases" and the action which courts are to take upon such cases. It consistently uses the word "case" throughout its text. Nowhere does it distinguish between cases pending at the time of its enactment and cases which were commenced prior thereto. There is certainly no language which could be remotely said to exclude the case at bar.

The Amendment contains three exceptions, including that authorizing the President to determine that application of the act of state doctrine is required in a particular case by the foreign policy interests of the United States and to file a suggestion to this effect with the court. Another relates to the time by which law suits must be commenced in order for the Amendment to apply. Each of the exceptions applies "in any case." There is no doubt that when Congress intended to make exceptions it did so and it made no exceptions as to pending cases.

The direction to the courts is mandatory. It is provided that "no court in the United States *shall decline* on the ground of the federal act of state doctrine to make a determination" *in a case* which it describes. These words are not prospective as has been urged. They are mandatory in their intention and effect and require the courts to give retroactive effect to the directions of the Amendment.

Thus, looking at the Amendment in terms of its language, it plainly includes cases pending at the time of its enactment based on past confisca-

tions and transactions coming within its terms. I find no language which can remotely be said to manifest an intention on the part of Congress to exclude pending cases or to limit its effect to prospective law suits only.

It is urged that the legislative history of the Amendment dictates the conclusion that it should not be applied to pending cases.

There is at least grave doubt as to whether, in view of what seems to be the plain meaning and intendment of the language of the Amendment, resort to legislative history is either necessary or appropriate. . . .

But assuming that legislative history is apposite, I find nothing in it which indicates that Congress intended the Amendment to be inapplicable to pending cases. Such indications as there are are to the contrary.

Nowhere in the reports of the Senate Committee on Foreign Relations or of the Conference Committee is there any indication of an intention to differentiate between pending cases and those not yet commenced at the date of enactment.

* * * * *

The amendment was not a haphazard rider extraneous to the purposes of the bill to which it was added. It is part of a consistent pattern of legislation, the purpose of which was to protect private investment abroad and to discourage foreign expropriations. As carried over from previous years the Foreign Assistance Act already included provisions for the cut-off of foreign aid to countries which had expropriated property of American nationals. It also provided for cutting off all aid to Cuba and authorized an embargo on trade with that country. These provisions had been strengthened from year to year.

Congress was particularly concerned with the Cuban confiscations which had taken place on such a large scale. It was for this reason, as Senator Hickenlooper made clear, that the date of January 1, 1959 was used as the operative date. A prime concern was to prevent the Castro government from reaping the fruits of what Congress considered to be illegal and unconscionable acts in violation of international law. It can scarcely be assumed that Congress intended to exclude a substantial portion of the Cuban confiscations at which the statute was directed from the benefits of the statute in the absence of specific language to that effect.

It is true that the Amendment also had a broader purpose—to discourage illegal confiscations by foreign governments in violation of international law and thus to strengthen the flow of investment in commerce and protect American investments abroad under the aid program and otherwise. One of the ways in which it sought to do this was to insure that the United States did not become a "thieves' market."

It is urged that the Amendment should be construed so as to apply only to cases filed after its enactment because to do otherwise would not further these broad congressional purposes. It is difficult to see, however, how such purposes would be furthered by a construction which excluded from the deterrent effect of the Amendment a substantial number of confiscations which had already occurred and on which suits were presently pending.

On the contrary, bold and immediate action with respect to all confiscations, including those already in litigation, would serve firm notice that as far as the United States was concerned no benefits would be permitted to accrue from such takings.

Congress was concerned not only with the assertion of claims to expropriated property but with permitting one who had suffered expropriation to resist a suit in our courts by the expropriating government to obtain the fruits of expropriation. . . . This is what had occurred in this case and in other pending cases where an instrumentality of the Cuban government was seeking to enforce its expropriation against assets in this country over which it otherwise could assert no control. To exclude such cases from the Amendment would frustrate congressional purpose.

Both the language of the Amendment and the legislative history lead to but one conclusion—that it was intended to apply to cases pending at the time it became law.

II.

The Application of the Amendment to the Case at Bar

It is urged that the Amendment does not apply to this case at least, even if it applies to other pending cases and that Congress so intended. I find nothing to sustain that view.

The language of the Amendment does not support this position. There is no dispute that the Amendment was directed at the *Sabbatino* decision and the act of state doctrine which it enunciated but there is no specific reference to this case either in the Amendment as it was introduced or as it was passed. There is merely the mandatory direction that “no court shall decline” to make a determination on the merits under the principles of international law on the ground of the Federal Act of State Doctrine in a case based on a confiscation after January 1, 1959 and commenced before January 1, 1966. This case is plainly such a case. The statute applies to this case unless it is excluded for reasons apart from its language.

If the legislative history of the statute indicated plainly that Congress intended to exclude the *Sabbatino* case from the application of the statute the Amendment might well be held inapplicable for that reason. However, I do not find anything in the legislative history which demonstrates such an intention and certainly that intention would have to be clearly expressed were the language of the Amendment to be overridden.

* * * * *

. . . [I]n the light of its strongly expressed views concerning the iniquities of the Castro regime and its confiscations, it is most unlikely that Congress intended to exclude the *Sabbatino* case from the Amendment if this court has power to apply it. Due to no fault of the defendants *Sabbatino* was the bell-wether case on Cuban confiscation. Some forty pending cases were delayed to await its determination by the Supreme Court.

Thus, by a purely fortuitous circumstance the defendants in *Sabbatino* would be the only victims of the confiscations among the litigants who would be denied the benefits of a determination on the merits under the principles of international law.

Moreover, the Cuban government would receive a windfall. It would avoid a determination on the merits as to whether the taking had been in violation of international law.

Against the background of the fulsome record of Congressional attitude with respect to the Castro government and its confiscations, no intention to permit such a result can be ascribed to Congress.

* * * * *

I hold (1) that this is a case within the purview of the Hickenlooper Amendment; (2) that the Amendment is supervening law which must be applied here despite the opinion of the Supreme Court in *Sabbatino*; and (3) that I am therefore required to make a determination on the merits giving effect to the principles of international law as the Amendment provides.

III.

Constitutional Aspects

The United States takes the position that the Hickenlooper Amendment is valid and constitutional whether or not it applies to pending cases and in particular to the case at bar. Plaintiff, however, claims that the Amendment violates the Constitution both generally and insofar as it is held to apply in this case. A discussion of the constitutional questions raised is in order.

(a)

The contention that Congress lacks constitutional power to enact legislation of this nature is without substance.

* * * * *

The power granted to Congress by Art. I, § 8, cl. 3, of the Constitution "to regulate Commerce with foreign Nations, and among the several States" is broad and plenary. . . .

It cannot be seriously disputed that the Foreign Assistance Act is a valid exercise of congressional power under the commerce clause. American investment abroad is an important part of the Foreign Assistance program. That part of the program is dependent upon whether American investors receive fair treatment from foreign governments. . . .

. . . Congress was of the view that the weapons available to the political branches to insure fair treatment of United States nationals investing abroad were inadequate. A major purpose of the Amendment was to afford additional protection to such investors against foreign confiscation. It was designed to "discourage foreign expropriation by making sure that the United States cannot become a 'thieves market' for the product of foreign expropriations."

Congress sought to encourage foreign investment by removing the bar of the act of state doctrine to determination on the merits of suits arising out of foreign confiscations in violation of international law.

Whether the act of state doctrine is applied or withheld by the courts may profoundly affect foreign investments and the flow of international trade and commerce as the Supreme Court recognized in *Sabbatino*. . . .

Congress determined that the national interests in the areas of foreign investment and international trade and commerce require the elimination of the act of state doctrine except where the President determines otherwise. It so provided in the Hickenlooper Amendment. This, like the Foreign Assistance Act itself, was plainly within the powers of Congress under the commerce clause.

Were there any doubt as to this it would be dispelled by the grant of the additional power under Art. I, § 8, cl. 18, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

It is unnecessary to look further for sources of congressional power. It may well be that, as Congress thought, the Amendment is also a valid exercise of its power under Art. I, § 8, cl. 10 to "define and punish *** Offences against the Law of Nations." The Amendment may also fall within the ambit of implied congressional power over foreign relations. . . .

But congressional power under the commerce clause is so clear that to discuss these less obvious questions would be merely gilding the lily.

(b)

The suggestion is made that the Amendment impinges upon the power of the President over foreign relations and thus violates the doctrine of separation of powers. I see no merit in this suggestion.

This Amendment did not become law by the action of Congress alone. It was part of an act signed into law by the President. While the Executive Branch opposed the Amendment before the Senate committee, the President did not choose to exercise his veto power when it came before him for signature. He certainly had the power to do so had he felt that the Amendment seriously impinged upon his executive functions.

Indeed, the act cannot be said to impinge on such functions. It does not preclude the President from exercising his role in foreign relations. On the contrary, the exception written into the act expressly provides that the courts shall apply the act of state doctrine whenever the President determines that the foreign policy interests of the nation require its application and makes such a suggestion. He may do so "in any case" in which he so determines, and there is nothing in the act theoretically to prevent him from so doing in every case if he determines he should make such a determination.

"The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government ***." *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302 . . . (1917), (quoted with approval in *Sabbatino*, 376 U. S. at 423 . . .). Congress has frequently exercised power in this field.

The Foreign Assistance Acts, profoundly affecting foreign relations, are classic examples. No case has been cited and I know of none in which action by Congress, within one of the express powers granted to it by Art. I, § 8, cl. 3, which affected foreign affairs, has been stricken down as in violation of the separation of powers doctrine.

In the *Sabbatino* case itself the Supreme Court recognized that the scope of the act of state doctrine "must be determined according to federal law" drawn from sources such as the power of Congress to regulate foreign commerce under Art. I, § 8, cl. 3, and to define and punish offenses against the law of nations under Art. I, § 8, cl. 10 of the Constitution, 376 U. S. at 427 & n. 25, and refers to the power of the "political branches" to protect American investors, *e.g.*, 376 U. S. at 436.

* * * * *

. . . Congress is not restricted from exercising its enumerated powers because foreign relations are affected. The Amendment does not violate the separation of powers doctrine because it involves foreign relations and imposes a duty on the President to make specific determinations as to whether "in any case" application of the act of state doctrine is required by our foreign policy interests. It does not impinge on the constitutional prerogatives of the President in the field of foreign relations and is not unconstitutional for that reason.

(c)

Application of the act of state doctrine is not required by the Constitution as the Supreme Court made plain in *Sabbatino*.

"*** it cannot of course be thought that 'every case or controversy which touches foreign relations lies beyond judicial cognizance.' *Baker v. Carr*, 369 U. S. 186, 211. . . . The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." 376 U. S. at 423.

It is true that the doctrine does have "constitutional underpinnings." 376 U. S. at 423. . . . But this is not because the doctrine itself is of constitutional dimensions. Under the act of state doctrine the courts abstain from passing on the acts of a foreign state not because they are required to do so by the Constitution but because of a sensitive regard for the functions entrusted by the Constitution to the political branches of the government in the field of foreign affairs and the foreign policy interests of the nation which may be affected by a determination on the merits of the case before the courts. The doctrine is merely a principle of decision " *** compelled by neither international law nor the Constitution ***." 376 U. S. at 427.

(d)

While the act of state doctrine is not of constitutional dimensions, and there is no constitutional requirement that it be applied by the courts, this does not resolve the question of whether there is a constitutional impediment to a legislative direction that the courts abstain from applying it. Plaintiff urges that there is such an impediment, and that the legislative direction to the courts in the Amendment not to apply the doctrine is an unconstitutional interference with the judicial power. I do not agree.

There is no doubt that issues concerning international law as they may affect confiscations by foreign governments are within the constitutional jurisdiction and judicial competence of the courts, as *Sabbatino* makes clear. By applying the act of state doctrine the courts have merely declined as a matter of judicial policy to decide such issues where a decision may affect our foreign relations. The doctrine is a self-imposed discretionary rule of "judicial abnegation," 307 F.2d at 857, under which the court as a matter of policy declines to decide the issue of the validity of a foreign act of state.

The reasons why the courts determined on such a policy are significant. As *Sabbatino* also indicates, the conduct of foreign relations is particularly a concern of the political branches of the Government. It was because of apprehension that decisions on the merits concerning acts of confiscation by foreign governments might embarrass the political branches in conducting foreign relations and adversely affect the national interests in that area that the court adopted the policy of abstention.

When a determination is made by the political branches charged with the responsibility for foreign relations as to where the interests of the United States lie, it is not for the courts to say them nay. The basic reason for the application of the act of state doctrine disappears. To require that the doctrine be applied despite the express directions of the political branches on the subject would be to place the court in the position of having the last word in matters affecting foreign affairs, the determination of which is committed to other branches of the Government. This would be wholly inconsistent with the doctrine of separation of powers and with the very rationale of the act of state doctrine.

In any event Congress does not lack power to direct that the act of state doctrine be eliminated as an instrument of judicial decision.

Congress has been given a considerable measure of power with respect to the courts. See Art. I, § 8, cl. 9, (power "to constitute Tribunals inferior to the Supreme Court"); Art. III, § 1 (judicial power vested in Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish"); Art. III, § 2, cl. 2 (appellate jurisdiction in the Supreme Court "with such Exceptions, and under such Regulations as the Congress shall make"); and Art. I, § 8, cl. 18 (power to make all laws necessary and proper "for carrying into Execution the

foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States * * * '').

There are a number of cases upholding acts of Congress under these powers limiting the appellate jurisdiction of the Supreme Court or the jurisdiction of the lower federal courts. . . .

Moreover, in a number of instances the courts have abandoned a formerly declared voluntary policy of abstention, basing their change of position in whole or in part upon an act of Congress directing that issues on which the courts had abstained should be decided. . . .

It seems clear that when Congress, dealing with subject matter within the powers delegated to it by the Constitution, speaks with respect to a voluntary judicial policy of self-limitation, the courts are bound to follow its directions unless compelled not to do so by the Constitution. There is no constitutional compulsion to disregard the directions of Congress as to the elimination of the self-imposed limitation of the act of state doctrine as provided in the Amendment.

As Chief Justice Marshall said in *Cohens v. Commonwealth of Virginia*, 19 U. S. (6 Wheat.) 264, 404 (1821) . . . :

"It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us."

(e)

The provision in the Amendment giving the President the power to invoke the act of state doctrine in cases where national foreign policy interests so require does not oust the court of jurisdiction. Nor is it an unwarranted or unconstitutional interference with the judicial function.

* * * * *

Under the Amendment, as in the sovereign immunity situation, the President is not sitting as a court of review over decisions of the judiciary. He does not attempt to decide the merits of the controversy between the parties. He is merely given the power to determine whether the courts should abstain from deciding one aspect of the merits. The effect of what he does may not be determinative of the final outcome of the litigation. But its effect upon the foreign policy interests of the United States may well be vital.

The purpose of the Hickenlooper Amendment is to establish a presumption that an adjudication on the merits will not embarrass the Executive Branch in the conduct of our foreign policy. . . . But when a presumption, designed by the courts to meet the requirements of another branch in the exercise of its plenary constitutional powers, is determined by that branch not to meet such requirements, and the courts are so advised, the

courts will not give effect to the presumption. This is so even if decisions have already been made by the courts on the basis of the presumption. In such case the courts will revise their decisions accordingly.

Thus, proper adjustment between the functions of the executive and judicial branches of the Government in the delicate field of foreign affairs is assured, a result entirely consistent with the constitutional purpose.

(f)

Finally, it is urged that the Amendment may not be constitutionally applied in the case at bar. The thrust of this contention is that application of the Amendment would retroactively deprive plaintiff of vested property rights without due process of law in violation of the Fifth Amendment.

At the outset there is serious doubt as to whether this plaintiff is entitled to the constitutional protection which it seeks. Plaintiff is an instrumentality of the Cuban government and stands in its shoes. For the purposes of this case at least, it is the Cuban government. Nothing has been called to my attention and I know of nothing to the effect that a foreign government is a "person" within the meaning of the due process clause and entitled to the constitutional protections which it affords. It is difficult to imagine that the Founding Fathers intended to shackle the political branches of the Government in their conduct of foreign affairs by granting such constitutional rights to foreign states.

But assuming that plaintiff is entitled to invoke the due process clause, the application of the Hickenlooper Amendment to the case at bar does not violate the Fifth Amendment.

Plaintiff goes on the theory that it acquired vested rights under the Supreme Court decision in *Sabbatino* which, once acquired, cannot be taken away by subsequent legislation.

Here . . . plaintiff acquired no vested rights. Whatever rights it may have had arose entirely from expropriation by the Cuban government. If the expropriation is wrongful under international law now it was wrongful then. No judgment has been entered in plaintiff's favor. The expropriation was plainly not made in reliance upon the protections afforded by the act of state doctrine. But even had it been, that doctrine creates no property rights. The Hickenlooper Amendment creates no new liabilities.

Here Congress has merely lifted a bar to consideration of pre-existing questions of substantive rights and liabilities. What the Amendment accomplishes is closely analogous to what a legislature does when it extends a statute of limitations. In such case retroactivity poses no constitutional infirmity . . . even though the extension of the limitations period is applied to pending cases.

* * * * *

The Cuban government could acquire no vested right by virtue of the expropriation if it was wrongful and certainly not a vested right to be

protected against liability for such wrongful act by the bar of the act of state doctrine.

There are numerous cases in which legislation has been applied in various stages of pending litigation on facts without the same strong equities for retroactivity as exist here. . . .

The plaintiff here has received all the due process to which it was entitled. I hold that the application of the Amendment to the case at bar does not deprive the plaintiff of any vested rights in violation of the due process clause of the Fifth Amendment.

IV.

The Effect of the Amendment on This Case

Remaining is the disposition to be made of the case at bar in the light of what has thus far been held.

The moving defendants urge that judgment should be entered in their favor dismissing the complaint. Their position is that the Court of Appeals in this case has already held that

“Since the Cuban decree of expropriation not only failed to provide adequate compensation but also involved a retaliatory purpose and a discrimination against United States nationals, we hold that the decree was in violation of international law.” 307 F.2d at 868.

And that court went on to conclude that

“[S]ince the Cuban decree violated international law, the appellant’s title is invalid and the district court was correct in dismissing the complaint.” 307 F.2d at 869.

Defendants contend that since I have held the act of state doctrine as enunciated by the Supreme Court in *Sabbatino* to be inapplicable to this case under the Hickenlooper Amendment, this court is bound by the prior decision of the Court of Appeals, and without further inquiry on the merits, must give judgment for the defendants dismissing the complaint. Plainly I am bound by the decision of the Court of Appeals that the expropriation by the Cuban government violated international law. The opinion of the Supreme Court does not impair that holding. Its discussion of international law was limited to the question of compensation and did not relate to questions of discrimination and retaliation.

But defendants’ position fails to take into account one vitally important factor. The Amendment provides that it shall not be applicable

“in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.”

That exception is an integral and essential part of the Amendment. It must be given effect.

* * * * *

Prior to the argument of the present motions counsel for the plaintiff formally requested that the President make a determination pursuant to the Amendment that the application of the act of state doctrine was required in this case by the foreign policy interests of the United States. Replying on the President's behalf the Acting Legal Adviser to the Secretary of State on November 27, 1964 said:

"We have been advised that in the opinion of the Department of Justice the cited provision is not applicable to the above case which, as you know, was decided by the Supreme Court under the name of *Banco Nacional de Cuba v. Sabbatino* prior to the passage of the amendment. Accordingly, the Department of State does not believe it is appropriate for the President to make any determination with respect to this case under section 620 (e) of the Foreign Assistance Act, as amended."

Thus, as far as the record in this case is concerned, the President has made no determination as to whether application of the act of state doctrine is required by the foreign policy interests of the United States. It appears that such a determination has been withheld upon the assumption, which I have now held to be erroneous, that the Hickenlooper Amendment did not apply to this case at all, and that the decision of the Supreme Court in *Sabbatino* remained applicable.

The United States on these motions urged that the Amendment did not apply to cases pending in the courts at the time of its enactment and thus would not apply to the case at bar. Its position is consistent with that taken by the Acting Legal Adviser of the Department of State in his letter of November 27, 1964.

It is plain to me that proper respect and consideration for the Executive Arm requires that the court give full opportunity to the President to make the determination provided for by the Amendment and, if in his wisdom he sees fit, to have a suggestion filed on his behalf that in this case application of the act of state doctrine is required by the foreign policy interests of the United States.

This is not a situation where the court should make assumptions as to what the presidential position may or may not be on the basis of a confusing and somewhat incomplete record. On the contrary, it is a fundamental intentment and purpose of the Amendment that the Executive Branch be given full opportunity to express its views if it so desires. To fail to give it that opportunity would nullify the protections expressly given by the Amendment to the interests of United States foreign policy.

I would assume that the Executive Arm will be able to make such a determination and to file a suggestion with the court as the Amendment provides if it so desires within sixty (60) days of the filing of this opinion. If more time is required the court should be so advised.

For these reasons determination of the question as to whether final judgment dismissing the complaint should be entered in this case will be withheld for a period of sixty (60) days for the purposes I have indicated.

It is so ordered.

NOTE: In a letter dated September 29, 1965, Robert M. Morgenthau, United States Attorney, sent the following to U. S. District Judge Frederick van P. Bryan, concerning the decision in *Banco Nacional de Cuba v. Sabbatino et al.* (60 Civ. 3929) upon remand from the Supreme Court:

"In its decision of July 30, 1965 this Court afforded the Executive Branch the opportunity to file a suggestion indicating whether the application of the act of state doctrine is required by the foreign policy interests of the United States, as provided for in Section 620(e)(2) of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2370 (e)(2)). I am instructed to inform the Court that no determination has been made that application of the act of state doctrine is required in this case by the foreign policy interests of the United States.

"So that there will be no ambiguity, the Court is advised that no such determination is contemplated."

(A.S.I.L. Newsletter, September-October, 1965.)

Act of state doctrine—neither New York nor Federal law or policy requires giving effect to acts of state purporting to confiscate property outside the acting state at the time of the act

REPUBLIC OF IRAQ *v.* FIRST NATIONAL CITY BANK. 241 F. Supp. 567. U. S. Dist. Ct., S.D.N.Y., April 15, 1965.¹ McLEAN, D. J.

[The Republic of Iraq brought a diversity action in the United States District Court for the Southern District of New York in 1962 against the administrator appointed by the New York Surrogate's Court in October, 1958, of certain funds and securities in New York banks which had belonged to the late King Faisal II of Iraq. The King was killed on July 14, 1958, in the course of the revolution which established the Republic of Iraq. On July 19, 1958, the Presidential Council of Iraq issued an Ordinance which the court construed as confiscating the former King's property, wherever situated. The court held that the Ordinance would not be given extraterritorial effect with respect to the King's property located in New York at the time the Ordinance was passed.]

* * * * *

Plaintiff rests its claim primarily upon the "act of state" doctrine, the most recent pronouncement of which is found in *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398. . . .

The holding in *Sabbatino* was summed up in these words (376 U. S. at 428 . . .):

"* * * we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the

¹ Excerpted text of opinion; certain footnotes of the court are omitted and the others have been renumbered.

time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.”²

This holding does not dispose of the present case. *Sabbatino*, as well as the other “act of state” cases, applies only to a taking within the territory of the foreign sovereign. We are here concerned with an attempted taking of property outside that territory. . . .

Defendant points out that in a diversity case, this court in effect sits as a court of New York. This is true as a general proposition. . . .

But it does not follow necessarily that the law to be applied is New York law. *Sabbatino* held, with respect to confiscations within the territory of the foreign state, that (376 U. S. at 425 . . .):

“*** an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.”

And even where the act of the foreign government purports to affect title to property in New York, New York policy must yield to an overriding federal executive policy, if one exists. *United States v. Belmont*, 301 U. S. 324 . . . (1937); *United States v. Pink*, 315 U. S. 203 . . . (1942).

What is the policy of the executive department of the federal government with respect to the confiscation by the Republic of Iraq of the property of that country’s former sovereign? The Department of State has not informed the court of any policy. On the contrary, it has adopted a “hands off” attitude. In a letter dated January 15, 1965 to defendant’s attorney, the Deputy Legal Adviser of the Department of State said:

“While the recognition of and maintenance of diplomatic relations with a foreign government are political matters within the province of the executive department of the Federal Government, questions regarding the administration of estates and the determination of rights and interests in property in the United States ordinarily are matters for determination by the courts of competent jurisdiction. Accordingly, the Department considers that the legal effect of Ordinance No. 23 as it may pertain to title to property in the United States of King Faisal II is a question for determination by the competent United States court.”

Plaintiff points to *United States v. Belmont*, *supra*, and *United States v. Pink*, *supra*, each of which was an action brought by the United States as assignee of the Soviet Government under the “Litvinov Assignment” to recover property of a Russian corporation in the State of New York which had been confiscated by the Soviet Government prior to the recogni-

² The doctrine of *Sabbatino* has since been drastically modified by statute, at least with respect to proceedings commenced before January 1, 1966 involving confiscations occurring after January 1, 1959. 22 U.S.C. § 2370(e)(2). Since the confiscation involved here occurred before January 1, 1959, this statute has no application to the present case.

tion of that government by the United States. In each case the lower courts had dismissed the complaint on the ground that the confiscation offended New York policy and hence would not be enforced. In each case the Supreme Court reversed, holding that New York policy was immaterial, in view of the federal policy in favor of enforcement which was manifested by the recognition of the Soviet Government and the simultaneous acceptance by the United States of an assignment from the Soviet Government of its claim to the confiscated property here.

Despite the broad language of the opinions in these cases, I cannot escape the conclusion that the decision in each turned upon the existence of the assignment, which the Court in *Belmont* referred to as an "international compact" (301 U. S. at 327 . . .), and which in *Pink* the Court characterized as "interdependent" with the act of recognition (315 U. S. at 230. . . .).

Recognition of a foreign government in and of itself is not a sufficient manifestation of federal policy to require the court to give extraterritorial effect to its confiscatory decrees. . . .

And the judgment of a court which refuses to give such effect to confiscatory action of a recognized government is a valid judgment which must be respected in the courts of the United States. *Ingenohl v. Walter E. Olsen & Co.*, 273 U. S. 541 (1927). . . .

. . . Where, as here, there is no such specific agreement, and where the Department of State has expressly left the question open for decision by the court, it cannot be said that there is any federal executive policy in favor of enforcing the title acquired by confiscation. . . .

Two theories have been suggested as a basis for the refusal of an American court to give extraterritorial effect to such a decree. One is the principle that one state will not enforce the penal laws of another. The other is the doctrine that a state will not enforce a cause of action based upon a foreign law which contravenes the public policy of the forum. . . .

In a sense, both theories come down to the same thing, or at least the former can be regarded as a variant of the latter.

The penal law doctrine has its origin in a decision of Chief Justice Marshall in *The Antelope*, 10 Wheat. 66, 23 U. S. 66 . . . (1825). It was again recognized in *Huntington v. Attrill*, 146 U. S. 657. . . . The Court there defined a penal law as a law the purpose of which is "to punish an offense against the public justice of the state," rather than to "afford a private remedy to a person injured by the wrongful act." (146 U. S. at 673-674 . . .).

The New York Court of Appeals has laid down a substantially similar definition in *Loucks v. Standard Oil Co.*, 224 N. Y. 99 . . . (1918).

The Supreme Court has not abandoned this doctrine. Indeed, its existence was noted in *Sabbatino* (376 U. S. at 414 . . .), although the Court considered it to be inapplicable there, because it is a doctrine which comes into play only when extraterritorial enforcement of a penal law is attempted.

The doctrine has been explicitly recognized in England in the well-known case of *Banca de Vizcaya v. Don Alfonso de Borbon y Austria*, [1935] 1 K.B. 140. There a decree of the Spanish Republic confiscated the property of the late King Alfonso. The decree declared that the King was guilty of treason. The court held that the decree was ineffective to deprive the King of title to securities in England. It found the law to be penal in nature and hence unenforceable outside Spain.

There is a distinct parallel between the Iraqi ordinance in the present case and the Spanish decree in the English case. The Iraqi ordinance is also directed against a former sovereign. It also is prefaced with a recital of wrongdoing on his part, exploitation of the people, in this instance, rather than treason. In this case, as in the other, the property is seized for a public rather than a private purpose.

Finally, it may still be appropriate to consider the public policy of New York. *Sabbatino*, *Belmont* and *Pink* may be regarded as holding only that state policy is irrelevant when a contrary federal executive policy is found to exist. As I have pointed out, there is no indication of any such federal executive policy. If there is room to apply New York public policy, it seems clear that this action cannot succeed. The New York courts have consistently declined to enforce a cause of action based upon a foreign decree which purports to seize title, without payment of compensation, to property in New York. . . .

I conclude, therefore, both as a matter of federal law and as a matter of New York law, that plaintiff is not entitled to recover the property which it seeks in this action. I reach this conclusion on the strength of the authorities heretofore cited, without regard to the nationality or residence of the heirs of King Faisal II. It is therefore unnecessary to take further testimony on that subject or to inquire into the disputed question of whether Al Malika Genevieve Al Iraq (also known as Genevieve Arnault), who the Surrogate held to be the wife of King Faisal II, was in fact his wife. It is also unnecessary to consider the questions raised by the defendant's defense of the New York statute of limitations or its contention that plaintiff is bound by the decree of the New York Surrogate's Court.

Nor is it necessary to deal with defendant's contention that in fact the property here involved was not the property of King Faisal II on July 19, 1958, when Ordinance No. 23 was enacted, because under the Iraqi law of inheritance, title to it vested in his heirs immediately upon his death on July 14, 1958. Defendant's evidence of Iraqi law on this point was not entirely convincing, but I see no need to discuss it in detail, since we do not reach that question here. Assuming, contrary to defendant's argument, that the bank accounts and stock were in fact the property of King Faisal II on July 19, 1958, as the Republic of Iraq obviously considered them to be, plaintiff still may not recover them in this action, for the reasons which I have indicated.

* * * * *

CASE NOTES

(a) UNITED STATES COURTS—PUBLIC INTERNATIONAL LAW

Warsaw Convention—Belgian law inconsistent with Convention did not invalidate ratification—Hague Protocol of 1955

In consolidated wrongful death actions against Sabena Belgian World Airlines, arising out of a crash of one of its planes near Brussels in 1961 on a flight from New York, several important questions were raised concerning the 1929 Warsaw Convention, 49 Stat. 3000 (1934).

The plaintiffs' attack on Sabena's defense that the Warsaw Convention's limitations on liability applied was based on three principal grounds: (1) that Belgium had not effectively ratified the Convention, a reciprocal treaty, and hence it was inapplicable to plaintiffs, citizens of the United States, just as it was inapplicable to Belgian citizens; (2) that the damage limitation, if the Convention controlled, was \$16,600 rather than \$8,300; and (3) that the Convention's \$8,300 limitation was inequitable.

The plaintiffs' argument that Belgium had not effectively ratified the Convention was based on a Belgian law of April 7, 1936, which the court found was intended to approve the Convention signed by Belgium in 1929, make the Convention's provisions applicable to internal air transportation and convert the Convention's monetary standard for the limitation on liability (\$8,300) to what was then its equivalent in Belgian francs (250,000). In 1949, however, Belgium devalued its currency without amending the 1936 law, and as a result 250,000 Belgian francs were equal to only about \$5,000 in 1961, the time of the crash. In July, 1963, Belgium passed a law setting a limitation on liability of \$16,600, in accordance with the 1955 Hague Protocol to the Warsaw Convention. This 1963 law expressly repealed the 250,000-franc limitation of 1936 and provided for conversion into Belgian francs in accordance with the gold value of the Belgian currency.

The court first found that the 1936 law was not itself the Belgian ratification of the Warsaw Convention. Ratification was accomplished, as the Convention provided, by Belgium's depositing with the Polish Government an instrument approving the terms of the Convention (signed by the King of Belgium), acknowledged in a Procès-Verbal of the Polish Government. Thus, there was no failure by Belgium to ratify effectively the Convention and its terms.

The court rejected the plaintiffs' argument that even if Belgium had properly ratified the Convention, the 1936 law and subsequent devaluation of the Belgian franc constituted a breach of the Convention by Belgium. On this point the court ruled that it did not have the power to decide if Belgium had violated the terms of the Convention, indicating that this was a question requiring diplomatic resolution by the executive branch. The court also ruled that the question of whether the inconsistent law of 1936, passed by the legislative branch prior to ratification of the Convention by the King, divested him of authority to ratify the Convention "lies beyond judicial cognizance."

The court disposed of the plaintiffs' claim that the Hague Protocol limitation of \$16,600 controlled, if the Convention applied at all, by pointing out that Article XIII of the Protocol limited its application to cases involving "territories of two parties to this Protocol," and that the United States had never ratified the Protocol.

Finally the court rejected the argument that the \$8,300 limitation was inequitable on the ground that this was a question for the "political branches" of the government. *Kelley v. Société Anonyme Belge d'Exploitation de la Navigation Aérienne*, 242 F. Supp. 129 (U. S. Dist. Ct., E.D.N.Y., May 3, 1965).

Warsaw Convention—conflicting views on venue requirements

Another recent case concerning the interpretation of the Warsaw Convention involved the question of the proper venue for an action governed by the terms of the Convention. Article 28(1) of the Convention states that "an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business or where he has a place of business through which the contract has been made, or before the court at the place of destination."

The plaintiff's claim depended upon a finding that suit was brought where the defendant airline had a "place of business through which the contract [was] made." Basing its reasoning on a recent decision by the Appellate Division of the New York Supreme Court between the same parties, the United States District Court for the Southern District of New York held that for proper venue there must be a "close relationship" between the airline office and the place where the contract was made. Although the defendant had an office in New York City, and although the court recognized that the Convention did not concern itself with intra-national territories, the court held that because plaintiff had purchased his ticket through another airline in California, venue was improper in New York.

The New York Court of Appeals (*Eck v. United Arab Airlines, Inc.*, 15 N.Y. 2d 53, 203 N.E. 2d 640, December 3, 1964, digested in 59 A.J.I.L. 643 (1965)), later reversed the decision of the Appellate Division upon which the District Court's opinion had relied, but on rehearing the District Court affirmed its original decision. *Eck v. United Arab Airlines, SAA*, 241 F. Supp. 804 (U. S. Dist. Ct., S.D.N.Y., November 27, 1964; Opinion on Re-argument, March 12, 1965).

Treaties—alleged deserter from Spanish warship entitled to protection of Immigration and Nationality Act in absence of other laws or orders intended to enforce treaty

On December 6, 1963, the Immigration and Naturalization Service (INS), without a warrant, arrested the relator Martinez-Angosto, alleging that he had deserted from a Spanish warship in 1960. The INS turned him over to the United States Navy and custody was continued with the intention

of delivering him to the captain of a Spanish cruiser for return to Spain. The Court of Appeals for the Second Circuit reversed a District Court order¹ dismissing habeas corpus proceedings brought by petitioner.

The INS and the Navy claimed authority for their action was provided by a 1903 Treaty of General Relations and Friendship with Spain (33 Stat. 2105), which authorizes the return of naval deserters by "competent national or local authorities." At the time the Treaty with Spain was signed, a Federal law, Rev. Stat. §5280 (1375) permitted certain Federal officers to enforce treaty provisions dealing with deserting seamen. In 1915, however, Congress passed an act to protect merchant seamen, which repealed Rev. Stat. §5280 as it applied to seamen on both merchant vessels and warships. The court found no later laws or Presidential order providing for the enforcement of the treaty provision or designating the INS or Navy as "competent national or local authorities," and ruled that the INS and Navy had acted without legal authority.

The court was careful to point out that its decision would not disrupt the "legitimate diplomatic and strategic interests served by the Treaty," because: (1) it only rejected summary procedures in a case where a speedy return of the alleged deserter was not required to enable a ship of war, which is in a United States port, to resume its operations; (2) it rejected the INS and Navy as authorities competent to execute the Treaty without passing on whether other authorities were so qualified; and (3) it indicated that the Immigration and Nationality Act of 1952 provided procedures relating to alien crewmen (with greater safeguards to the accused) which could be applied to alleged naval deserters.

The court rejected the argument that a naval deserter is not covered by, or is immune from, United States immigration laws, indicating that no principle of international law precludes such immigration laws from being applied where the deserter "has become economically and socially integrated within a local community."

In its order of reversal, the Court of Appeals ordered that Martinez-Angosto should be set at liberty unless within a reasonable time the INS instituted appropriate deportation proceedings under the Immigration and Nationality Act of 1952, or some agency, demonstrating to the District Court that it had competence to execute the deportation provision of the 1903 Treaty with Spain, took over the conduct of his case. *United States ex rel. Martinez-Angosto v. Mason*, 344 F. 2d 673 (U. S. Ct. App., 2d Cir., April 7, 1965).

(b) UNITED STATES COURTS—PRIVATE INTERNATIONAL LAW

Judicial jurisdiction—foreign airline's New York office's activities as "doing business"

In an action brought by a resident of New York against Finnish National Airline ("Finnair") for injuries allegedly caused by Finnair's negligence at a Paris airport, the Appellate Division judgment dismissing

¹ Pending a final decision on the habeas corpus petition, the District Court had released Martinez-Angosto to the custody of his wife and the parish priest.

the action on the ground that Finnair was not subject to personal jurisdiction, since it was not "doing business" in New York, has been reversed by the Court of Appeals. Commenting that the test of "doing business" "is and should be a simple pragmatic one," the Court of Appeals reviewed the facts as to the business operations of defendant's New York office. In concluding that Finnair should be held to be suable in New York, the court stated:

The New York office is one of many directly maintained by defendant in various parts of the world, it has a lease on a New York office, it employs several people and it has a bank account here, it does public relations and publicity work for defendant here including maintaining contacts with other airlines and travel agencies and, while it does not make reservations or sell tickets, it transmits requests for space to defendant in Europe and helps to generate business. These things should be enough.

Bryant v. Finnish National Airline, 260 N.Y.S. 2d 625 (N. Y. Ct. App., May 27, 1965) (Appellate Division opinion noted in 59 A.J.I.L. 394 (1965)).

Intestate succession—City of Lucerne as statutory heir

Malvina Utassi died in 1935 in New York where she was a resident, leaving all her property by will to Etelka Utassi, her sister. Etelka Utassi, a citizen of the United States, died in 1944 in Lucerne, Switzerland, where she had been a resident for many years. She had not taken the property willed her in 1935 by Malvina out of New York. The assets of both estates were securities in New York corporations.

Etelka died without heirs, and, under Swiss law, in such a case the inheritance passes to the Canton of the decedent's last domicile, or to a municipality designated by the Canton, here the City of Lucerne. (Swiss Civil Code, Art. 466.) In accounting proceedings in the Surrogate's Court of New York County involving the estates of both sisters, the Attorney General of New York contended that the proceeds of both estates should be paid to the New York State Comptroller as "unclaimed personal property located and situated in the State of New York" to be held "for the benefit of the unknown heirs, next of kin or distributees" of the decedent. (Abandoned Property Law, Consol. Laws, c. 1, §600, subd. 1, par. [b]; §602, subd. 2; Surrogate's Ct. Act, §272.) The Surrogate ordered payment to the City of Lucerne of the proceeds of both estates (217 N.Y.S. 2d 389) and his order was affirmed by the Appellate Division (246 N.Y.S. 2d 478).

Upon appeal to the Court of Appeals, the court first noted its agreement with the lower courts that the securities of Etelka, which were in Switzerland when she died but were later transferred to New York, should not be treated as New York abandoned property, since "Swiss law would manifestly govern the succession of property found in Switzerland and belonging to a resident thereof dying without heirs." Characterizing the disposition of the estate left by Malvina to Etelka in New York as an "open question," the court emphasized that the legal theory underlying the Swiss intestate succession statute is that the Canton or city takes the property

"as strict legal heirs" and not by escheat or confiscation. In upholding the claim of the City of Lucerne the court stated: "Nothing in our statutory law relating to abandoned property, which functionally is a statutory mechanism to hold assets found in this State for the benefit of a future lawful claimant, or in any New York public or legal policy, should lead us to discredit the law of succession of Switzerland, where Etelka was domiciled and died. Our view of the Swiss law ought not to be parochial. On the contrary we should accord the Swiss statute of succession the recognition which comity between enlightened governments requires." *In re Utassi's Will*, 261 N.Y.S. 2d 4 (N. Y. Ct. App., May 27, 1965).

Rumanian legatee—applicable exchange rate ruled confiscatory

In a proceeding in the Surrogate's Court of New York County, a legatee under the will, resident in Rumania, sought advance payment of his legacy. The Attorney General of New York appeared in the proceeding to contend that the Rumanian legatee would not receive the "benefit, use or control" of his inheritance, which therefore should be deposited for his benefit in Surrogate's Court pursuant to Section 269-a of the Surrogate's Court Act. Finding that the Rumanian legatee would receive his inheritance in Rumanian currency at a rate of 12 lei for each dollar, while Rumanian lei were procurable within the United States at a rate of 31- $\frac{3}{4}$ to the dollar, the Surrogate ruled that this exchange rate differential was so great as to be regarded as "confiscatory" of the Rumanian's legacy, and denied his petition for its advance payment. *In re Greenberg's Estate*, 261 N.Y.S. 2d 176 (Surrogate's Court, New York County, June 12, 1964) (affirmed, per curiam, by the Appellate Division, First Department, June 22, 1965, 260 N.Y.S. 2d 818).

Inheritance by non-resident aliens—California Probate Code's requirement of reciprocity

California Probate Code §259 provides that the right of an alien not residing within the United States or its territories to take real and personal property in California upon succession or testamentary disposition upon the same terms and conditions as residents and citizens of the United States is dependent upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property upon the same terms and conditions as residents and citizens of the country of which such alien is a resident. In a consolidated proceeding to determine the interests of claimant heirs and legatees, citizens and residents of the U.S.S.R., in the estates of two California decedents, the trial court found that under the laws of the U.S.S.R. the necessary "reciprocal right" afforded to U. S. citizens and residents existed only as to personal property. With respect to real property, the court decided that there could not be any "reciprocal right" because there were no individual rights to ownership of real property in the U.S.S.R.

Upon appeal, the District Court of Appeal held that as of the dates of the decedents' deaths in 1960 there was no "reciprocal right" of inheritance

granted to U. S. residents and citizens by the U.S.S.R. to inherit either real or personal property. *In re Larkin's Estate*, 44 Calif. Reporter 731 (Calif. Dist. Ct. App., 2d Dist., Div. 1, May 4, 1965).

Comity—Mexican divorce decree

The New York Court of Appeals has affirmed the decision of the Appellate Division in *Rosenstiel v. Rosenstiel*, 253 N.Y.S. 2d 206 (1964), reported at 59 A.J.I.L. 394 (1965), giving effect to a Mexican divorce decree valid under Mexican law, although neither party was domiciled in Mexico. *Rosenstiel v. Rosenstiel*, 16 N.Y. 2d 64, 254 N.Y.S. 2d 527 (N. Y. Ct. App., July 9, 1965).

(c) ARBITRAL TRIBUNAL

Convention for settlement of claims against Germany—nationals and residents of the United States entitled to present claims for compensation

A decision of the full Arbitral Commission, set up to determine the validity of claims against Germany for property taken or destroyed by Germany in the occupied territories during World War II, reversed a decision of the Third Chamber of the Commission which had, on its own motion, denied the right of United States nationals or residents to make such claims.

The decision of the Third Chamber was based upon an interpretation of the Settlement Convention which was signed by the United States, Great Britain and France at the end of World War II. Article 4 (2) of Chapter 5 of the Convention¹ provided for the payment of compensation by Germany, "provided that the plaintiff is a national or a resident of a State which has acceded to the Charter of the Arbitral Commission. . . ." On the ground that the United States was a signatory to the Convention, and hence did not "accede" to its terms, the Third Chamber concluded that United States nationals and residents had no right to present claims under the Convention.

The full Arbitral Commission, while affirming the Third Chamber's right to raise the issue of the claimant's right to present a claim on its own motion, rejected its reasoning on the ground that

a discriminatory treatment, to the detriment of the interest of de-spooled persons who are nationals or residents of the three Allied Signatory States as compared with the rights granted to nationals or residents of the Acceding States, offends the intelligence.

The Commission found nothing in the negotiations which led to the Settlement Convention or in unanswered *notes verbales* to Germany from the Allied states to compel a different conclusion. *Scheidt v. Federal Republic of Germany* (unreported decision of the Arbitral Commission on Property, Rights and Interests in Germany, March 26, 1965).

¹ Convention on Settlement of Matters Arising out of the War and the Occupation of Germany, 1954. 49 A.J.I.L. Supp. 69, at 93.

BOOK REVIEWS AND NOTES

LEO GROSS

Book Review Editor

The Changing Structure of International Law. By Wolfgang Friedmann.
New York: Columbia University Press; London: Stevens & Sons, 1964.
pp. xvi, 410. Index. \$8.75.

Its title does not do justice to this monumental volume. The work in fact deals with the changing structure of not only international law, unless that term is understood in the rather comprehensive Continental European sense (including geography)—for which the present reviewer has some sympathy—but with wide reaches of international politics and international organization (in a general unsystematic and imprecise sense) and (appropriately) economics, sociology and psychology.

It would be difficult to summarize the book in hand without simply quoting the Table of Contents. These run from "Changes in the Structure of International Relations" ("and Law"?!) through "The Place of International Law" (in what?), and "New Subjects of International Law," "Problems and Trends of International Organization" to "Mankind's Divisions" et cetera.

With most of the stated and implied juridical conclusions of the author most members of the fraternity of international law and government will have little difficulty in agreeing—on "sovereignty," the position of the individual and the private corporation, codification, modifications of the principle of unanimity, new fields and subjects of international law and organization, et cetera. The book constitutes a most valuable contribution to contemporary evolution of international law and organization.

Any prospective reader, on taking up this volume, would logically expect to find a discussion of current developments in international law as such: its "structure" (parties, forms, content), but possibly also a consideration of its modes of formation and application. These he will find discussed, here and there, in Chapters 4, 10, 12, et cetera, and especially in Chapters 11 and 13–15. Just what the author means by "legal change" seems cloudy; it might mean change of the law or it might mean change of the law by legal (i.e., authorized) methods. In any case it is all there. On the other hand the problem of enforcement, admittedly a problem of government rather than of law, is treated rather briefly, albeit with the utmost perspective, in a few pages under an ambiguous title: "The Reality of International Law" (pp. 81–95). The crucial questions of codification and international legislation by majority vote do not seem to be given adequate attention, nor the problem of obligatory adjudication. Nor is there any mention of the World Law movement of Wallace McClure or reference to Oppenheim's old *Future of International Law* (1921).

On the other hand one may be permitted to suggest certain criticisms. The failure to distinguish more sharply between purely political considerations, formal legal problems and *staatswissenschaftliche* considerations of political organization leads to confusion. The book makes great contributions in all of these fields but it is rather difficult to sort them out.

A small, perhaps purely verbal, point arises (p. 275) in the proposed distinction between a "constitutional" and a "functional" approach to the problem of international organization. This is rather an obvious error. The so-called constitutional organizations (the United Nations) are set up for the functions which they can perform; the so-called functional organizations possess—even boast!—constitutional form: the International Labor Organization was the first to adopt the term "constitution." Controversies over membership and organization in F.A.O., I.L.O., and UNESCO in recent years also emphasize this element. Perhaps the important distinction runs between organizations devoted to special subject matters (health, labor, meteorology) and those of general jurisdiction, but this—the question of relative values—is clearly a matter for consideration and discussion.

The book constitutes a magnificent contribution to the field in general.

PITMAN B. POTTER

*Emeritus Professor of International Law
The American University*

Law Among Nations. An Introduction to Public International Law. By Gerhard von Glahn. New York: Macmillan Co.; London: Collier-Macmillan Ltd., 1965. pp. xiv, 768. Index. \$9.95.

A new textbook by Gerhard von Glahn of the Duluth Branch of the University of Minnesota has the merit of providing students with an overview of the international law of the mid-1960's. For three reasons Professor von Glahn accords more attention to the law of war than do most contemporary writers of single-volume textbooks. He believes (1) that international law is observed consistently and routinely, despite gaps and weaknesses, (2) that assertions of a rapidly approaching rule of world law are Utopian, and (3) that war will be with us for a long time. Not toward world law but toward a system of regional legal orders and their potential for conflict—such is the present trend that von Glahn discerns for international law, although in one expression to this effect he adds, presumably hopefully, the phrase "for the time being." On the whole, it can be said that the point of view, indicated by attention to the laws of war, is one of realism—a realism that rests on the will theory and a thoroughgoing consensualism.

As a textbook, von Glahn's work is traditional in approach but adds the novelty of incorporating "briefs" (digests) of cases in order to reduce reliance on casebooks. The author's concern is for the non-professional student, especially for the student of political science. This concern also appears (a) in the restriction of references to English-language works in

light of undergraduates' linguistic incapacities and (b) to sources most likely to be found in college libraries. These reasons certainly reflect the realities at many colleges, but it is to be hoped that the present mass education at the college level is not to become an irresistible force further rigidifying culture-bound views of international law.

Criticism could undoubtedly be brought to bear on a number of specific expositions of points of law, but it may be best to mention but one point. In regard to the Stimson Doctrine there is an inconsistency. At one place we are told that the Stimson Doctrine "represents a basic principle of regional inter-American law, but not of general international law" (p. 261). But elsewhere it is said that Members of the United Nations have the duty to refrain from recognizing territorial acquisitions made in violation of Charter provisions, a duty described as a "restatement of the old Stimson Doctrine" (p. 171), and that the coming into force of the Charter "ended, in this writer's opinion, the legality of the acquisition of title to territory through conquest" (p. 262), even though "the Charter does not provide anywhere for nonrecognition of the title by conquest" (p. 263). It is to be regretted that this flaw and other occasional flaws were not cleared up, as it is never a happy event to find even minor slips in a worthy undertaking.

This reviewer regrets very much that some topics were not discussed more fully. For example, it seems that more than five pages could have been accorded as complex a matter as state succession. Indeed, the strongest criticism that can be brought against the book is the unevenness of treatment of its various topics. But to pursue that criticism may be to range too far into the realm of subjective choice of what is important in international law. It is better to say that, in what he has undertaken, the author has on the whole done well, has brought quite a number of topics up to date, and has made a useful contribution to the literature of international law.

WESLEY L. GOULD

Law, State, and International Legal Order. Essays in Honor of Hans Kelsen. Edited by Salo Engel and R. A. Métall. Knoxville: University of Tennessee Press, 1964. pp. x, 365. \$10.00.

This second American *Festschrift* honoring Hans Kelsen is a disappointment.¹ Instead of a collective reassessment of Kelsen's great contribution to legal science, we have a few worthy essays buried in a haphazard and undistinguished collection of twenty-eight. Indicative of the general impression of editorial sloth is the arrangement of chapters on a basis no more imaginative than the alphabetical order of the contributors' names, the failure to include an index in a book that could only take on lasting value if a reader could check parallel treatments of central issues in the Kelsenian approach, the absence of a general introduction discussing the

¹ The first was edited by George A. Lipsky under the title: *Law and Politics in the World Community* (1953) and reviewed by Denys P. Myers in 48 A.J.I.L. 514 (1954).

evolution of Kelsen's thought, and the failure to translate the French, German, and Spanish contributions (or, at least, provide English summaries).

The book is a mixture of essays on Kelsen and on anything else. Several prominent jurists were evidently induced to contribute by a promise that they need not submit anything new. A re-publication would suffice—it might for the editors, but not for the general reader asked to pay a fancy price. Among those essays dealing with Kelsen I would call valuable those by Otto Bundy, Charles Eisenmann, Chaïm Perelman, John Herz, Luis Récasens-Siches, and Helen Silving. None is major, but they each add something to what was already known, and the one by Miss Silving makes a judicious and essential effort to isolate those aspects of Kelsen's method and analysis that seem permanently valuable.

I found the most significant contribution in the volume to be Ervin P. Hexner's provocative essay on the interpretation of the basic instruments of international organizations. Hexner raises fundamental issues about the relation between the interpretative process, especially its politicization, and the maintenance of general confidence in the operation of international organizations. Oscar Schachter also deals significantly with the rôle of legal analysis in this interpretative process, but his piece is carved out of his excellent series of lectures delivered at the Hague Academy in the summer of 1963, and really warrants no separate attention.

This volume carries to excess the shortcomings inherent in so free a scholarly form as the *Festschrift*. It is one thing to assemble a compilation of testimonials by asking friends and notables of the honored scholar to send in whatever is at hand for a private presentation at a ceremonial dinner. It is quite another to prepare a volume for public distribution. This latter undertaking requires a measure of editorial discipline. The volume must stand as a coherent whole either because it contains a comprehensive treatment of the individual's contribution or because it treats a theme in a systematic fashion and is then merely dedicated to the individual. The volume under review combines in the worst possible way these two approaches by allowing either kind of contribution and then mixing them at random. This is a pity, for there is certainly a place for a collective undertaking of scholars to honor the achievement of a revered colleague and such ventures resist the de-personalizing trends that now beset academic life and threaten to undermine its promise of "the good life."

RICHARD A. FALK

Custom in Present International Law. By Karol Wolfke. Warsaw: Warsaw Scientific Society, 1964. pp. 186. Zł. 36.

Despite a formidable literature on the Communist approach to international law, it is rather surprising how little difference it *may* make whether or not an international lawyer is a Communist. For instance,

"blindfold" the reader of the book under review and it would require a combination of subtle discernment and skillful guesswork to arrive at the conclusion that it was written by a distinguished international lawyer in the Communist world, Karol Wolfke of Poland. In this reviewer's judgment, Wolfke's erudite monograph on customary international law might have been written by any European scholar of mildly liberal sentiment. In fact, the European character of the approach is much more salient than is the ideological orientation. Wolfke is very continental in his manner of canvassing what various jurists have had to say on his subject and in organizing his book around various doctrinal issues of ancient vintage.

But there are some surprises in store for the unsuspecting reader. Professor Wolfke carries his undogmatic approach to such extremes that he is led to give unblushing praise to Myres S. McDougal's conception of the evolution of customary international law, a conception principally developed, it should be recalled, in the course of a study arguing for the legality of nuclear weapons tests on the high seas. Although Wolfke inserts a perfunctory phrase disassociating himself from McDougal's substantive views, he is quite enthusiastic about McDougal's view that customary international law is formed by a process of assertion and counter-assertion of claims by nations pursuing their various interests.

Wolfke's book is neither very original nor very profound, but it does provide a convenient summary of the thinking that has been done on this important subject. Most of Wolfke's appraisal reflects his overriding awareness that national sovereignty must be respected in the law-creating processes going on in international society, a respect that he feels is now more important than ever before because of the ideological split between East and West and the economic split between North and South. One is entitled to be disappointed, I think, by Wolfke's failure to consider the extent to which a consensus approaching unanimity might not be a sufficient premise for the evolution of customary international law, given the expanded membership of international society, the centralized expressions of legal sentiments in international institutions, and the growing interdependence of global life as a consequence of science and technology. There is some consideration, but not enough, given to the rôle of international organizations in the creation of customary international law, and there is very little attention given by Wolfke to the modernization of Article 38(1)(b) of the Statute of the International Court of Justice in light of the needs of international life or, as Judge Alvarez puts it "the juridical conscience of the peoples."

Certainly, however, Wolfke's book is an indispensable guide to anyone undertaking a study of the questions raised in the last paragraph or, more generally, to anyone concerned with the wider subject of the sources of international law, a subject almost sure to return to the forefront of international legal studies, especially as the search continues to find ways by which to loosen the bonds of sovereignty that constrict the international process of law-creation.

RICHARD A. FALK

L'Interprétation des Accords en Droit International. By V. D. Degan.
The Hague: Martinus Nijhoff, 1963. pp. 176. Gld. 16.20.

This study on the interpretation of international agreements expresses incisive reasoning in lucid language. The systematic classification under appropriate categories of basic concepts sharing common characteristics is combined with trenchant distinctions between ostensibly overlapping terms.

The author distinguishes between three approaches to interpretation: (1) the essential methods of interpretation (the textual, the subjective and the functional); (2) the auxiliary means of interpretation that are germane to certain procedures of interpretation, *e.g.*, recourse to *travaux préparatoires*; and (3) the auxiliary means of interpretation in the form of maxims of interpretation, *e.g.*, the rule that words should normally be understood in their ordinary meaning. He credits Louis Cavaré and Sir Gerald Fitzmaurice with having, independently of each other, arrived at this classification (see pp. 70 and 73). However this may be, the author's presentation of the relationship between the essential methods and the first of the two above-mentioned auxiliary means of interpretation in the Table on p. 74 constitutes a very helpful, and indeed persuasive, catalogue of major techniques of treaty interpretation. And what is more, the author skillfully applies the scheme of this Table throughout Part III (pp. 67-148), the "special part" of the book, which deals with interpretation procedures and techniques. Having thus discussed in detail the criteria and relative merits of the textual, subjective and functional approaches to interpretation, the author states that the textual approach is the one most likely to ensure legal certainty and equal treatment of the contracting parties on the ground that the written text constitutes the only precise, invariable and clearly evident object of interpretation. This approach is also the most economical and reduces to a minimum the possibility for judges to be arbitrary or partial (pp. 154-155). However, the subjective method, which is designed to ascertain and reveal the intention of the contracting parties, also has its special qualities and uses: above all it emphasizes the sovereignty of states and their right freely to accept international obligations. For this reason, it is more suitable to international contractual relations than to multilateral treaties of a legislative character (pp. 151 and 161). The functional method, in the author's view, should be applied only with utmost discernment, and international judges and arbitrators may resort to the functional method only to bridge or fill gaps in a *traité-status* (p. 161). By contrast, the political organs of international organizations, which in effect continuously represent the parties to the governing intergovernmental agreement, may apply the functional approach with a view to elucidating the general responsibilities of the organization concerned (pp. 160-161). Functional interpretation, however, should not be confused with teleological interpretation, especially as conceived and advocated by Judges Alvarez and Azevedo; and the author quotes with approval those rulings of the International Court of Justice

(pp. 145-146) in which the majority of the Court expressly rejected the views of Judges Alvarez and Azevedo in support of teleological interpretations which contradict the letter and, in the view of the Court, also the spirit of the treaty involved.

The auxiliary means most frequently applied in conjunction with the textual interpretation are: (1) the language, *i.e.*, the language or languages in which the international agreement in question has been accepted as binding by the contracting parties; (2) the wording, *i.e.*, the ordinary or technical meaning of individual terms used; (3) the context in which the words are used; and (4) logical inferences—this category includes analogy, the principle of effectiveness, *argumentum ab absurdo*, *argumentum a contrario*, and interpretation *contra proferentem*. In this context the author's observations on the ordinary and technical meaning of words may be quoted: "*Malgré sa vaste application par la jurisprudence internationale, la règle du sens ordinaire est limitée par sa contre-règle, celle du sens technique.*" (p. 89.) Among the auxiliary means grouped under "logical inferences" only the principle of effectiveness appears to the author to be of major significance in practice (p. 100). The auxiliary means most intimately linked with the subjective method of interpretation are the search for: (1) the intention of the parties as reflected in the text; (2) recourse to *travaux préparatoires*; (3) subsequent attitude of the parties; and (4) the original purpose or object of the agreement. The author's views of the relative significance of the auxiliary means of interpretation are succinctly presented on pp. 156-159.

The foregoing theoretical or doctrinal findings on treaty interpretation are preceded by discussion in Part II of "the teachings of the most highly qualified publicists"—for the classical doctrine see pp. 27-48, and for the modern doctrine see pp. 48-57; of selected arbitral decisions; and of the contributions rendered by research organizations such as the Harvard Law School and the 1956 Resolution of the *Institut de Droit International*. It is noteworthy that the references to the relevant literature take into account (in addition to the better known standard works in English, French, Italian and Spanish) also Czech, Russian and Yugoslav writers (see on this point the bibliography on pp. 166-170).

Throughout Part III the exposition of the author's views is presented by references to appropriate quotations from the awards and advisory opinions of the Permanent Court of International Justice and the International Court of Justice. It seems that the study does not purport to deal comprehensively with the special question of the interpretation of the charters of international organizations,¹ but the treatment of related questions arising under United Nations law and practice appears to be accurate and generally persuasive.

As regards the legal nature of interpretation the author concludes by saying "*l'interprétation n'appartient pas au droit, elle le sert*" (p. 164). This finding strikes perhaps too modest a note, since the principles of

¹ See article by Edward Gordon in 59 A.J.I.L. 794 (1965).

interpretation, as evidenced by this study, have been worked out over the years with considerable precision. Some of these principles are probably in the nature of logical formulas which, however, reveal their full implication only in the context of the specific legal provisions they are designed to clarify. This may explain why the rules of interpretation have taken on a special meaning for the lawyer, a meaning which may elude the logician not versed in legal techniques. On the other hand, it is no doubt true, as the author states on p. 162, that the different methods of interpretation lead to different results even if applied to the same document or provision, and that therefore the correct choice of the appropriate method is most important in each interpretation. In other words, the principles of legal interpretation are comparable to "choice of law" rules. Considering that, as previously stated, different methods of interpretation lead to different legal results, knowledge of the rules and methods of interpretation does not by itself provide legal certainty; but the rules and techniques of interpretation can serve the organ charged with the interpretation of an international agreement as guiding principles with the help of which that organ can arrive at legally persuasive conclusions.

Though Degan's study, published in 1963, antedates the Draft Articles on the Law of Treaties, set forth in the 1964 Report of the International Law Commission,² it furnishes an excellent presentation of major problems which actually have been dealt with by the Commission in Articles 69-73 (Interpretation of Treaties) of the Draft Articles. It is noteworthy that the Commission in its comments cites Degan's book at least five times alongside the contributions to the subject by Charles De Visscher, Sir Gerald Fitzmaurice, Lord McNair, and Charles Rousseau.

In conclusion, this short treatise on the interpretation of international agreements proves, if proof were needed, that only understanding insight and systematic presentation of the legal material at hand can give life and significance to legal analysis and research. To paraphrase Justice Holmes' famous but often misunderstood dictum—"the life of the law has not been logic; it has been experience"—law becomes meaningfully alive only through logic *and* experience, as persuasively shown by Justice Holmes himself in his celebrated landmark decisions and dissenting opinions.

HANS AUFRICHT *

Die Auslegung völkerrechtlicher Verträge insbesondere in der neueren Rechtsprechung internationaler Gerichte. By Rudolf Bernhardt. Cologne and Berlin: Carl Heymanns Verlag KG, 1963. pp. xi, 200. DM. 28.50.

This study on the interpretation of international treaties is not only the most recent but actually the only monograph in German on the subject

² 59 A.J.I.L. 434-465 (1965).

* Counselor, International Monetary Fund, Washington, D.C. The views expressed are those of the reviewer, but not necessarily those of the International Monetary Fund.

known to this reviewer. As its subtitle indicates, it treats the subject with special reference to the more recent decisions of international tribunals, covering decisions of the Permanent Court of International Justice, the International Court of Justice, the Court of the European Communities, the European Commission and the European Court of Human Rights and of various arbitral commissions and tribunals. A selected list of the decisions cited may be found on pp. 189-196. The major sections of the book are grouped under five headings which may be freely translated as follows: Part I, Foundations; Part II, Interpretation of the Text as such; Part III, Means of Ascertaining the Intentions of the Parties; Part IV, Consideration of the Surrounding Legal and Social Order; Part V, Technical-Formal Maxims of Interpretation.

The work contains, in general, a valuable exposition of the principal problems encountered in the theory and practice of treaty interpretation. The author proves throughout his familiarity with the two types of sources which are of primary concern to him, namely, judicial decisions and the pertinent literature in English, French, German and Italian, including the writings of the "classics of international law." Notwithstanding the preoccupation with the practice of international tribunals in the field, his is not a purely "inductive" approach, considering that the principal topics and sub-topics are arranged under a workable and, on the whole, systematic frame of reference.

The principal features of the author's approach may be briefly indicated as follows: (1) the object of interpretation is the text of the treaty (see especially pp. 30-32, 186); (2) the intention of the parties, to the extent that it may be ascertained outside the wording of the treaty to be interpreted, is a subsidiary source rather than the principal aim of treaty interpretation (see pp. 34-39, 186). In general, the quest for the intention of the parties should not aim at "psychological questioning" (*psychologisierende Fragestellung*) but at finding clues to the objective meaning of their intent; (3) the purpose of the treaty (*der Vertragszweck*) is of major significance in the course of interpretation; the author adds that, although there is considerable agreement on this point in the literature and the decisions of international tribunals, there is hardly any agreement on its specific implications (pp. 88 and 89). Moreover, recognition of the purpose of a treaty as an essential factor in treaty interpretation does not necessitate resort to "teleological" interpretation, especially if the latter is identified with considerations of general utility; on the contrary, the author tends to exclude teleological interpretation from the principles that are necessary and proper for an adequate elucidation of a treaty (see on this point, *e.g.*, pp. 42, 88-89). These brief indications of some of the highlights of the study can, by their very nature, convey only incompletely the favorable impression, in general, of the presentation and analysis of its principal theme.

There are certain passages and sections in this study, however, that are not quite persuasive, at least, to this reviewer. In reference to interpre-

tation of treaties by international organizations the author alleges that there is no indication whatsoever that the practice of the community organs has made any significant contribution to the general doctrine of interpretation (p. 48); this point may be a question of definition, but in this case the implications of such a definition should be clearly demonstrated. The treatment of the relevant questions on pages 46-49 falls somewhat short of the scholastic standards observed in other parts of the book; in particular, the statement that the organs of international organizations are authorized and obligated to interpret the treaties governing their activities. This may be true for some of the principal organs of the United Nations, but the contention that this statement reflects a general legal principle of the law governing international organizations—*einen Rechtsgrundsatz der internationalen Organisation* (p. 48)—is potentially misleading rather than enlightening; it certainly does not hold true, *e.g.*, for the relevant provisions of the Articles of Agreement of the International Monetary Fund. Also, the author's comments on Article XVIII of the Fund Agreement, despite his occasional references to the periodical articles by Fawcett, Gold and Hexner on the subject (pp. 47-48), do not sufficiently bring out the significance of this provision in Fund law and practice. The discussion of *travaux préparatoires* (pp. 109-120) focuses on the use of these sources as a means of clarifying the intent of the parties rather than the meaning of the text, an approach which differs at least in emphasis from the above-mentioned proposition that the text itself is the principal object of treaty interpretation. As regards the legal nature of the rules or maxims of interpretation, the author's position is by no means unequivocal, since in some places he is inclined to characterize several rules of interpretation as pertaining to customary international law (see, *e.g.*, pp. 29 and 187), while he states elsewhere (*e.g.*, on p. 28) that a definitive answer to the question of the legal nature of the rules relating to treaty interpretation would necessitate a comprehensive scrutiny of the sources of international law which is outside the scope of this study. Moreover, it is stated in rather cryptic fashion on page 29 that the rules of interpretation cannot be imputed directly (*können nicht ohne weiteres [sic] zugerechnet werden*) to the general principles of law in the sense of Article 38(1)(c) of the Statute of the International Court of Justice.

The author may wish to take the foregoing observations into account in his future work on a topic to which he evidently has devoted so much time and intellectual energy; but even in its present form the book will serve as a useful guidebook and handbook in a field which should be of interest, not only to specialists in international law, but which concerns everyone who, as a national or international civil servant or governmental representative, is engaged in the negotiation, administration or adjudication of international treaties.

HANS AUFRICHT *

* Counselor, International Monetary Fund, Washington, D.C. The views expressed are those of the reviewer, but not necessarily those of the International Monetary Fund.

Federalism and the New Nations of Africa. Edited by David P. Currie. Chicago and London: University of Chicago Press, 1964. pp. viii, 440. Index. \$8.50.

East African Unity Through Law. By Thomas M. Franck. New Haven and London: Yale University Press, 1964. pp. xii, 184. Index. \$5.50.

For Professor Franck, as for the participants in the symposium held at the University of Chicago Center for Legal Research under the Chairmanship of Professor Denis V. Cowen, the object of inquiry is the federative process as applied to Africa. The former accepts the premise that "federation alone can provide . . . a rational political context within which united . . . policies toward trade expansion, foreign policy and economic planning can be formulated" (p. 170), a formula that he would extend (p. 4) to the entire Continent. Unlike the former, the symposium examines rather than accepts that premise. It does so largely by inquiring into the relevancy for Africa of the experience of established federations, in particular, the United States and Canada. Such an inquiry proves to be largely irrelevant in view of the widespread extension of the single-party regime in Africa. Thus, there seemed to be general agreement with the view (p. 288) that in non-African federations "Illiberalism can and does find shelter more readily behind regional frontiers than in a unitary structure." This problem is, of course, not without interest for the international lawyer in the context of protection of human and minority rights. Yet the relevancy of non-African experience is largely lost when transposed into the regime of the single-party state. From the standpoint of federation as a process for the merging of independent African states, there was general acceptance of Dean Griswold's support of an "omni-competent treaty power" as a device for eluding the difficulties which have plagued U. S. and Canadian federal-state relationship. Oscar Schachter reminded the participants that from the point of view of international organizations, the United Nations, at least, has been more concerned with issues in substance than with limitations imposed by a federal-state system. The utility of the volume lies less in its contribution to our knowledge on the subject than as an appropriate warning against trying to translate the experience of non-African federations into models meaningful for African constitution-makers.

Professor Franck is more directly concerned with the merger of independent states under a federal formula. The study, prepared under the auspices of the American Society of International Law, is written in an engaging style. Its account of the history of East African regionalism as a prelude to federation is refreshingly concise. It is also compendious to the point of becoming at times fragmentary on important issues of federalism. Over-compression is particularly evident in respect of the Raisman Report, in the problem of reconciling the mandate-trusteeship regime of Tanganyika with the East African regional structure, the political parties whose goals and programs have such deep and peculiar significance for East African

regionalism, the explosively divisive rôle of Buganda, the Somalia issue and the southern orientation of Zambia and Malawi. The chapter "Statutory Uniformity: The Common Service of the Law" is excellent and constitutes a valuable contribution to the analysis of regionalism, with suggestive insights for other areas of Africa. One could have wished, however, that research had not been limited to statutory uniformity, since traditional law obviously stands as an obstacle to the achievement of federation. The contributions of Fallers, Schiller and Potekhin suggest the rewards of continued research in this field. Professor Franck carries his optimism with regard to the level of East African legislative uniformity achieved to the point of observing that this legislative uniformity is remarkable, and that

Many nations have been formed out of components far poorer in this precious resource than Kenya, Uganda and Tanganyika and mature federations like Canada and the United States are still struggling to achieve anything like the uniformity East Africa already has. (p. 151.)

This achievement is significant for him in terms of the ultimate objective of an all-African federation. For the reviewer, the opposite conclusion is more persuasive in assessing the possibilities for an all-African federation. Surely, the experience of the francophone states of Africa should be highly relevant in this connection. They possess legislative, indeed constitutional, uniformity to a far greater degree than does East Africa. There is the added fact that francophone Africa, quite unlike East Africa, has been dominated by the pattern of inter-territorial political parties. Yet federation failed here as the author admits that it has, for political reasons, in East Africa. Which, then, is decisive, the legal or the political? One might also question whether the objective of an all-African federation has not today become already outmoded in view of the latest currents of thought and events in Africa. If not, then the prospect of a single (federated) state embracing an entire continent would be nearly as disturbing politically and as disruptive legally as, for example, would be the establishment of a single state for all of South America.

JOHN H. SPENCER

Britain's Clandestine Submarines, 1914-1915. By Gaddis Smith. New Haven and London: Yale University Press, 1964. pp. xii, 155. Index. \$4.50; 33s. 6d.

This well-written and well-documented monograph provides new information concerning the American manufacture of twenty submarines for Great Britain during the period of American neutrality in World War I. The episode throws light on the varied interpretations by United States officials of the legal obligations of neutrals, on the influence of corporations seeking profits on international politics, on the development of British Commonwealth relations, and on the incapacity of statesmen to foresee the influence of technological innovations on international politics and war.

During the Napoleonic wars Admiral Jervis, First Lord of the British Admiralty, perceived that, with command of the surface of the sea, Great Britain should discourage the development of the submarine which had begun in the United States.¹ A century later, however, Admiral Fisher, as First Sea Lord, after developing the Dreadnought and persuading the British public that it was the measure of sea power, became the major advocate of the submarine, and before World War I persuaded the Admiralty to invest heavily in them. Events proved that the submarine made the Dreadnought obsolete and the submarine was not very useful to Britain. German submarines nearly brought Britain to its knees in World War I, but British submarines were not useful against German submarines and there were few German merchant vessels at sea for them to attack. It is not surprising, therefore, that Britain reverted to Admiral Jervis's opinion, and at the Washington Conference of 1921 tried unsuccessfully to outlaw the submarine. When World War I began, however, the British Admiralty, convinced by Admiral Fisher, was anxious to get more submarines rapidly. Charles Schwab, President of Bethlehem Steel Co., was aware of this, and the present volume is concerned with his tactics to reap profits from this knowledge.

Schwab concluded a contract with the Admiralty in the autumn of 1914 to construct twenty submarines in the United States. Acting Secretary of State Lansing, with the *Alabama* case in mind, although pro-British, felt it necessary to consult the three-man Neutrality Advisory Board with James Brown Scott as its Chairman. The Board advised that "the United States is entitled to adopt the least burdensome interpretation of its duties of neutrality that is consistent with its traditional policy." As a result Lansing held that, while completed submarines could not leave the United States for a belligerent, the export of submarines in parts was permissible. With this assurance, Schwab began to construct the submarines, but Secretary of State Bryan returned from campaigning in the West and persuaded President Wilson that export of submarine parts ready for assembly would violate the spirit of neutrality. Schwab then arranged with the British Admiralty to take over Canadian Vickers, to supply materials and expert workers, and to complete the submarines in Canada. This subterfugious action was to be secret, but the Germans discovered it and protested. However, the *Lusitania* was sunk, Bryan resigned, and Lansing, as Secretary of State, decided that shipments of materials, if not finally fabricated as submarine parts, was proper.

Britain, therefore, got ten Canadian-Bethlehem-made submarines by the summer of 1915 but, finding them of less use than expected, gave neutral Chile six of the remainder which had been completed in the United States but impounded by the Government to prevent shipment to a belligerent. The remaining four were shipped to Britain after the United States entered the war.

One of the most significant results of the episode was its contribution

¹ Bernard Brodie, *Sea Power in the Machine Age* 266 (Princeton University Press, 1941).

to the independence of Canada. That country, suffering from unemployment, had sought the opportunity to build naval vessels for the British Admiralty. Prime Minister Borden was annoyed at discovering the arrangement between the British Admiralty and Schwab without consulting or informing him, and involving the use of American labor in Canada contrary to Canadian immigration laws. This and other incidents during the war strained Borden's loyalty to the Empire, with the result that the diplomatic independence of the Dominions was recognized by the Treaty of Versailles and the British Government made arrangements to assure full consultation with them on matters of imperial policy.

The incident was also, according to Gaddis Smith, an important contribution to the development of Canada's rôle in North Atlantic defense policy and, it might be added, in compromising differences between the United States and the United Kingdom, as illustrated by Lester Pearson's initiative in the Suez episode of 1956. The submarine incident is interesting in itself and the author indicates, with perhaps some exaggeration, its ramifications in the broader spheres of international law, international economics and international politics.

QUINCY WRIGHT

Documents on German Foreign Policy, 1918-1945. Series D (1937-1945).

Vol. XIII: *The War Years, June 23-December 11, 1941.* (Dept. of State Pub. No. 7682.) Washington, D. C.: U. S. Government Printing Office; London: H. M. Stationery Office, 1964. pp. lxxx, 1035. \$4.00.

This last fraction of German diplomatic archives which have been selected for publication by British-American-French editors is probably the most roseate of the Nazi Foreign Office operations. The period ends with the declaration of war on the United States resulting from "circumstances brought about by President Roosevelt." Italy took similar action and, with Germany, on December 11 announced with these declarations their agreement with Japan for "joint conduct of the war against the United States and England until the victorious conclusion" (pp. 982, 998, 1005, note 1). This alliance was buttressed by a renewal of the Anti-Comintern Pact for five years from November 25, 1941 (p. 820), by the three and nine others, including the transitory Manchukuo, Croatia and Slovakia. The German identification of the United States as a direct enemy satisfied the political frustration of witnessing its enemies supported and sustained by American supplies and equipment; as a belligerent it was believed able to do little more (see Hitler, p. 716; Ribbentrop, p. 831).

The Germans invaded the Soviet Union June 22, 1941, and by October 29 Hitler wrote to Mussolini: "I know nothing but joint victory." In his Nazi vision other things were going very well: "Regardless of what England or even America may do, our economic situation . . . must rather get better . . . and militarily no one can break us" (p. 716). After the invasion of the Soviet Union Germany tried fruitlessly to get

Japan to repudiate the neutrality agreement which it had made at Moscow on April 13. By November 9 Foreign Minister Ribbentrop had "verified information" that "the American armaments industry is totally incapable" of supporting a "two-front war in the Atlantic and the Pacific" in the foreseeable future (p. 761). By request on November 21 (p. 806), Ribbentrop informed Tokyo (Department of Foreign Armies) "that armistice or peace was to be concluded only jointly, in case Japan or Germany should become involved in a war with the USA, no matter for what reason, was considered a matter of course." Ambassador Eugen Ott repeated the pledge on November 30 on the diplomatic level, when he was told of the "American efforts to render the Tripartite Pact inoperative," which caused the Japanese Imperial Conference on December 1 to resolve on declaring war (p. 957, note 3). On December 3 Rome and Berlin received a communication in which Japan discussed its relations with the United States with regard to the Tripartite Pact, stated that "further conversations are of no use" and submitted a draft agreement for joint conduct of war (p. 942). It was revised and signed December 11, the same day the German and Italian declarations of war against the United States were ready. The three partners worked all this out on the supposition that the United States as a belligerent was no more formidable than as a lend-leasing neutral.

Germany's confidence in continued victory was sustained by its dominance in Europe. With neutrals like Turkey and Sweden its supply agreements were satisfactory. Finland and Rumania as allies expected rewards at Soviet expense. The occupation régimes in Denmark, Netherlands, Belgium, France, Norway and Yugoslavia varied greatly, giving scope for exercise of authority. In November and December, 1941, the leaders of governments, parties, allies and others turned up at the Führer's Headquarters to discuss their problems and report their positions. Accepting Hitler's directive of October 10 that the Soviet armed forces in the main theater of operations had been "smashed or destroyed" and those reports as facts, it can be seen that Germany, as Ribbentrop asseverated (p. 656), was in a "completely unassailable position," America or no America.

DENYS P. MYERS

BRIEFER NOTICES

A Textbook of International Law. By Satyavrata R. Patel. (New York: Asia Publishing House, 1964. Distr. in U. S. by Taplinger Publishing Co. pp. xii, 322. Index. \$9.00.) This introductory text by an Indian international lawyer seems designed for student use. It attempts to state in accurate and simple form the main outlines of international law doctrine. Although the author has worked hard to produce this book, I find it less rewarding as introductory reading than Kaplan-Katzenbach, Gould, Friedmann, Brierly, Corbett, Jessup and Schwarzenberger-Keeton, to mention only authors writing in English. Patel has produced a rather uneven text. As might be expected, his hornbook

approach to international law works best where the law is fairly settled in the form of a series of widely accepted rules. It is at its worst when coping with a subject such as jurisdiction, where "the rules" are far less significant than is the process by which they are applied. Patel gives very little sense of how, why and where international law works.

There is some commendable effort by Patel to disclose India's special contributions—ancient and recent—to the development of international law. In fact, Patel makes a quite convincing argument that the origin of international law is properly traced to the beginnings of Indian civilization in Vedic and pre-Vedic times. And more recently, Nehru is credited with "the Nehru Doctrine," which Patel compares to the Monroe Doctrine, while contending that the former has a far better claim to constitute "law" than does the latter. The Nehru Doctrine consists of the bundle of policies known under such titles as "active neutralism" and "non-alignment" and emphasizing such matters as opposition to racialism and colonialism, non-entanglement in the Cold War, and support for ideas of non-intervention and Asian solidarity (see p. 36).

The author is capable of outlandish statements. For instance: "The Nuremberg Trial constitutes a milestone in the progress of international law. Henceforward, international law is made a stronger law. It has made future wars almost impossible." (p. 186.)

In conclusion, it should be said that it is encouraging to find a growing number of Asian scholars contributing actively to the contemporary literature of international law. The future of international law will be much brighter if it receives reaffirmation throughout Asia by Asians.

RICHARD A. FALK

La Convention Européenne des Droits de l'Homme. By Karel Vasak. (Paris: Librairie Générale de Droit et de Jurisprudence R. Pichon et R. Durand-Auzias, 1964. pp. vii, 327. Index. Fr. 42.90.) This reviewer has expressed the opinion elsewhere¹ that the examination by the European Commission on Human Rights of petitions from individuals has transformed the abstract idea of the international protection of human rights into a concrete, tangible, day-to-day task; that it has laid bare the formidable problems and pitfalls inherent in so novel an experiment; and that it has demonstrated the necessity of tireless effort, attention to detail, and ingenuity. On reading Dr. Vasak's book here under review this conviction is not only affirmed; one finds that the European Convention on Human Rights has "arrived"; it is now not only possible but also desirable and necessary to write textbooks in the legal tradition of the European Continent about it as if it were a nineteenth-century code.

In writing such a textbook the author has performed extremely well. The book testifies to his immense industry, his great learning and his familiarity with the subject or, rather, the many subjects that are involved. The book is not a secretariat-type document. On many a subject, however difficult and delicate, Vasak presents his own often critical views. He deals in great detail with the substantive provisions of the Convention of 1950 and the additional Protocol of 1952 and the case law relating thereto; with the machinery of international enforcement (Commission, Court, Committee of Ministers, the Secretary General); with the status of the Convention in the municipal legal systems of the states parties; and with the impact of the Convention on constitutional and legal developments outside Europe. A foreword and a preface by two very distinguished champions of the movement for the international protection of

¹ 18 International Organization 531 (1964).

human rights, President René Cassin and Assistant Secretary General Polys Modinos, adorn the book which, by any standard, is a great contribution to legal literature.

EGON SCHWELB

Proteção Internacional dos Direitos Humanos; and Proscrição das Armas Nucleares. By C. A. Dunshee de Abranches. (Rio de Janeiro and São Paulo: Livraria Freitas Bastos, S.A., 1964. pp. 159 and 188.) These two volumes, although having no immediate connection with each other, may be reviewed together as being admirable summaries in brief space and scholarly form of their respective subjects. In the volume on the *International Protection of Human Rights* the distinguished Brazilian jurist, a member of the Inter-American Commission on Human Rights, has combined facts and comment in due proportion, tracing the historical development of the protection of human rights and the practical problems with which the enforcement of the obligation is presented. A chapter on the Charter of the United Nations is followed by chapters on the Inter-American Declaration of the Rights and Duties of Man, on the Universal Declaration, and on the European Convention. Of particular interest is the detailed discussion of the extent to which the several declarations create a legal obligation for the parties; and a significant contribution of the volume in this respect is the constant citation of authorities on the points at issue.

A similar treatment is presented in the volume on *Prohibition of Nuclear Weapons*. The opening chapters deal with background material, "The Nuclear Age" and "War before Nuclear Weapons," so as to present by contrast the use of nuclear weapons, their devastating effects, and the extent of nuclear radiation. Then follow chapters on the successive efforts made to restrict the use of atomic weapons, the Baruch and other preliminary plans, and the Moscow Treaty of 1963. Here the author examines in detail the difficulties encountered and the practical problems presented by the attempts at complete prohibition, balancing the alleged illegality of atomic weapons with the necessity of mutuality in the measures of control to be taken.

As in the volume on human rights, the citations by the author of the views of distinguished jurists and the elaborate bibliography add greatly to the value of the volume. Both will serve their purpose well in the universities of Brazil.

C. G. FENWICK

Le Principe de "Supranationalité." By Francis Rosenstiel. (Paris: Éditions A. Pédone, 1962. pp. 136.) It may not be too late to salute this "Essay on the Relation of Politics and Law" as a precursor of sorts. Its thesis, developed with a great deal of passion and literary flair, is simple and brutal. Sovereignty is will; will is indivisible. Power is the expression of sovereignty; administration is only the servant of power. There are two methods for the exercise of sovereignty—the unitary state and the federal state. But supranational institutions are neither one nor the other; they are, on the level of ideas, a kind of collective myth or mistake and, on the level of institutions, a collection of public services without will or power: the will and the power remain in the hands of the nation-states, and would cease being in their hands only in a fully federated Europe that would be an effective and sovereign power with a political will of its own. Rosenstiel's analysis of the legal powers of the European Communities pitilessly minimizes these agencies' autonomy.

His critique echoes the earlier warnings of the champions of political

federalism against the functional method advocated by Jean Monnet. But it also echoes—in a fascinating kind of convergence—the Gaullist critique of supranationality, and could be used as a theoretical rationalization for the Gaullist attacks on the supranational agencies in Brussels and Luxembourg. The weakness of the author's thesis lies in the fact that, should the national wills converge on endowing supranational institutions with autonomous and expanding powers, sovereignty would indeed become fragmented and a process of gradual federalization develop along the lines so well analyzed by Ernst B. Haas. But the strength of Rosenstiel's argument is his stress on the political fragility of institutions which can always be paralyzed when the national wills, or one particularly strong national will, refuse suicide and block federalization. He is right in putting his finger on power and will; he is wrong in assuming that the organization of power and the options of will are limited to the unitary-federal dilemma. Whether Haas' process or Rosenstiel's dogmas will triumph in reality is of far more than theoretical interest.

STANLEY HOFFMANN

International Aspects of Civil Strife. Edited by James N. Rosenau. (Princeton: Princeton University Press, 1964. pp. x, 322. Index. \$7.50.) Princeton University's Center of International Studies has been sponsoring a project on internal war. One resultant publication is a symposium on international aspects of civil war. Most of the articles by eight distinguished authors, among them Karl W. Deutsch, Morton A. Kaplan, and George Modelski, are concerned with broad political aspects of civil war and intervention. Only one article deals explicitly with international law.

Deliberately blurring the line between commentary on the *lex lata* and speculation *de lege ferenda*, Richard A. Falk employs his familiar dichotomous structural analysis of the international community to evaluate norms concerning non-intervention. Ineffectiveness of non-intervention norms leads the author to suggest the desirability of structural reform of the international community, preferably the establishment of a supranational legislative competence and centralized procedures designed to ensure domestic suppression of insurrection. In the absence of structural reform, Professor Falk recommends candid abandonment of non-intervention obligations due to lack of mutuality and the failure of self-restraint, lest particular obsolete rules make the entire system of international law appear obsolete. Wrestling with the intricacies of the intervention problem brings forth the author's desire for national deference to an international consensus which might choose to allow an internal war to proceed to an outcome dictated by the domestic balance of power or might approve action in support either of the incumbent government or of the rebels. What is sought is management of outcomes of internal wars through a supranational choice between normative legitimacy and the social change represented by rebels. Since "outcomes in accord with a universally valid consensus" are desired, it would be useful to identify the universe, which must be either one capable of functioning with dissent or a universe of consenters only, from which dissenters are excluded. It would also be useful to indicate criteria of validity, since an undefined valid consensus is too vague a goal to seek.

The other essays do not help to define the desired consensus. Nor do they in other ways touch upon problems of international law except peripherally. Nevertheless, the essays suggest some directions in which empirical research on internal war can be pointed, and it is as suggestions, not as explanations of internal wars, that they may prove useful.

WESLEY L. GOULD

Essays on Intervention. Edited by Roland J. Stanger. (Publication of Mershon Center for Education in National Security. Columbus: Ohio State University Press, 1964. pp. xii, 125. \$4.00.) This book is a compilation of four papers, delivered at a Regional Meeting of the American Society of International Law, which, according to the editor, seek to draw a clearer line between permissible and impermissible interventionary acts. He claims they reflect a consensus that customary standards of international law are confusing and inadequate on the subject; that the distinction between internal and external conflicts has become more difficult and less significant with reference to world peace; and that community action through the United Nations is the best response to pressures for change and the risks of unilateral intervention.

In the first and perhaps the best chapter, Roger Fisher argues persuasively for the development of law on intervention. His basic premise is that United States policy is best served by universal respect for rules on intervention and that the way to develop such respect is to refrain from intervention ourselves and to increase the political costs of illegal intervention by others. The difficult problems of characterizing the facts of a given situation he would leave to the United Nations, because "we can do more to maintain those rules (on intervention) by not insisting that we should be the judge in every case."

Richard Falk advocates "legislative intervention" by the United Nations, *i.e.*, "selective coercion of domestic social change." He argues blandly that such intervention "is nothing more than an extension of practice" and, since intervention is a commonplace, the real issue is the form to be used, "legitimate exercise of community power" being preferable. At times the author strains to make his argument logical. For example, he consistently justifies intervention in civil strife because it threatens world peace, but admits that the United Nations can successfully intervene only when major Powers are in agreement. If that happy condition exists, however, the threat to world peace is not very ominous. If the idea is to commit the United Nations to action on a matter before the major Powers become antagonists, the author weakens his own argument by noting that the Congo illustrated how a crisis can be deepened and the United Nations itself threatened when an apparent consensus dissolves.

Michael Cardozo considers the permissibility of intervention in the form of conditions attached to U. S. aid. After building a rather good case for conditions on aid being permissible and after narrowing those that he considers potentially impermissible to the supervision of those conditions irrelevant to program purposes, the author argues for the use of international organizations as aid channels with an urgency that is not altogether attuned to his analysis.

Finally, William Burke offers an outline for "inquiry into the legal regulation of less intense forms of international coercion and seeks to raise questions concerning the community policies at stake in such regulation." Articles that attempt to outline directions for inquiry often have greater utility than interest and this chapter is no exception. The usefulness of the author's re-labeling old and basic concepts is also questionable.

In general the volume sheds light on an area of international law that is sorely in need of illumination, especially in a nation committed to massive aid programs, counter-insurgency warfare and to clandestine intervention via the C.I.A. wherever necessary. If the conclusions are not likely to

set academia on its collective ear, they are for the most part convincingly and imaginatively presented.

GARY L. WAMSLEY
University of Pittsburgh

Kryzys Karaibski 1962 roku [The Crisis in the Caribbean in 1962]. By Ludwik L. Gelberg. (Warsaw: State Scientific Publications, 1964. pp. 204. Zł. 30.) This is a brief for Khrushchev's missile adventure in Cuba, including an analysis of military, political and legal aspects of the Soviet-American confrontation. Western and, particularly, American observers have heard most of the argument for the legality of Soviet action, as the question was debated with great frankness by American scholars, and our author has added little of his own in the matter.

The work suffers grievously on the side of objectivity and displays the usual (as similar tracts produced in the Soviet camp) array of half-truths. Thus, for instance, United Nations inability to tackle effectively Great-Power conflicts is attributed to the American sabotage of the U.N. Security Council, a statement of singular audacity in view of the current Soviet position as regards the cost of the U.N. peacekeeping operations. Also Mr. Gelberg is firmly convinced that the Soviet Union acted exclusively in defense of Cuban independence and had nothing to gain militarily from placing intermediate range missiles in Cuban territory. He finds it difficult, however, to explain why Soviet acceptance of the American demand to remove the missiles from Cuba was made without consultation with Castro.

In general Mr. Gelberg's work obviously suffers from the fact that it appeared before Khrushchev's removal for what *Pravda* of October 17, 1964, termed "harebrained scheming, half-baked conclusions and hasty decisions and actions . . ." of which the Cuban venture was a supreme example.

K. GRZYBOWSKI

Das Staatsangehörigkeitsrecht der Arabischen Staaten. By Thomas Oppermann and Ahmad Yousry. (Ergänzungsband. Sammlung geltender Staatsangehörigkeitsgesetze, herausgegeben von der Forschungsstelle für Völkerrecht und ausländisches öffentliches Recht der Universität Hamburg, Band 15a. Frankfurt am Main and Berlin: Alfred Metzner Verlag, 1964. pp. 178. DM. 36.) The Collection of Current Nationality Laws edited by the Research Institute for International Law and Foreign Public Law of the University of Hamburg is to my knowledge the most extensive modern series of this kind. The editors take pains to keep it up to date by bringing out supplements whenever changes in the nationality laws of a country make an existing volume obsolete or partially obsolete.¹ Since Volume 15, dealing with the nationality laws of the Arab states, first appeared in 1955 (edited by Hans Kruse, 118 pages), great political changes have occurred: Morocco, Tunisia and Algeria became independent; the United Arab Republic was established in 1958; Syria separated from this union and became an independent state again in 1961; Iraq saw a revolution. All these changes brought about new nationality legislation or revision of existing laws. The present volume catches up with the development up to January 1, 1964. At the same time, the lawyer who has to ascertain and apply previous legislation is furnished references to texts in the main volume and in official or unofficial publications in German, French or English. The texts of the current nationality laws of twenty

¹ See review of the new volume by Geilke on Soviet Russia, 59 A.J.I.L. 703 (1965).

independent states and dependent territories are presented in German translation and carefully footnoted. These are preceded by a "General" section, which includes references to the Law on Ottoman Nationality, relevant Peace Treaties, and agreements made among members of the Arab League. The interesting introductory remarks on the Islamic concept of nationality (pp. 17-20) should be read together with the historic survey which opens the main volume (pp. 11-25), just as generally the two volumes should be used as one.

M. MAGDALENA SCHOCH

Diplomatické Styky a Imunity. By Stanislav Myslík. (Prague: Nakladatelství Československé Akademie Věd, 1964. pp. 396. Index. Kčs. 31.) *Diplomatic Relations and Immunities, With Special Regard to the Results of the Vienna Codification Conference Held in 1961*, is a systematic, comprehensive and useful—though not very imaginative—study of the modern ways and means of diplomats and diplomacy culminating with the 1961 Vienna Convention on Diplomatic Relations. In particular, it is a learned, though opinionated commentary on the Vienna Convention (and Conference). On the initiative of the U.N. General Assembly, the International Law Commission undertook the task of codification of rules and procedures of diplomatic relations. The Vienna Conference was convened to discuss the Commission's final draft. Thanks to the set of thoughtful proposals prepared by the Commission, the task proved to be much less onerous than might have been expected.

Fortunately, the Convention on Diplomatic Relations, as adopted in Vienna, represents "a progressive codification," although the author does not like all the provisions of the Convention. In fact, he suggests preferred interpretations of those clauses he does not approve of, namely, Article 11 concerning the size of a diplomatic mission's staff (the receiving state has no absolute right to demand a limit for the mission's staff); Article 47, paragraph 2(a), containing an exception from the principle of non-discrimination (minimal interpretation may be chosen in uses of reprisals);¹ and Articles 48 and 50, which bar non-members of the United Nations, in this case China and other divided Communist-party states, from among the signatories of the Convention. On the whole, however, he is quite satisfied with it: "A great contribution was made by the Vienna Convention . . . in drawing up a new system of rules governing diplomatic intercourse, privileges and immunities, in clarifying their legal basis, and in formulating the terminology of diplomatic law."

No treatment of procedures and rules of procedure, however penetrating, lends itself to the excitement of discovery and philosophical depths—even if its concern is such a lofty norm as "peaceful coexistence" with the Communist party-states. But as the hortatory statement on the book jacket expounds, the commentary "fills a gap in contemporary literature as one of the first more comprehensive works, after the Vienna Conference, on the subject of diplomatic relations." This modest aim the monograph ably and matter-of-factly fulfills. The generally objective tone of the tome is in fact bound to surprise pleasantly all those interested in the international law output emanating from the other side of the Iron Curtain.

The volume also contains the text of the Vienna Convention; an adequate English (and Russian) abstract of the book; a copy of the Czechoslovak ratification document of the Convention, dated March 27, 1963; a good

¹ Cf. Herbert W. Briggs, "Codification Treaties and Provisions on Reciprocity: Non-Discrimination or Retaliation," 56 A.J.I.L. 475 (1962).

selected bibliography, chiefly of Western authors and sources; and a useful index.

JAN F. TRISKA

The United States and the United Nations. Edited by Franz B. Gross. (Norman: University of Oklahoma Press, 1964. pp. x, 356. Index. \$6.95.) This volume rests on the premise that "the interactions between United Nations decisions and United States policy are becoming increasingly important." For obvious reasons, attempts to see more clearly just what is important about the relationship are to be welcomed. In conception, then, this book is useful and to the point. Its scholarly interest, however, stretches beyond the ordinary. For the contributors include at least two men not normally ranked among the *aficionados* of world organization, notably Robert Strausz-Hupé, Director, and Col. William N. Kintner, the Deputy Director, of the University of Pennsylvania Foreign Policy Research Institute, under whose auspices the volume was prepared.

As two of the best-known American scholars of the "hard" persuasion, they prescribe in the United Nations as elsewhere a determined "forward strategy" aimed at fighting more effectively the war against world Communism. Thus it is as a stage for unremitting political warfare that they see the prime value of the United Nations to the United States. In Strausz-Hupé's words, "the UN happens to be one battlefield of the universal struggle over a unitary world order and of the protracted conflict forced by Communism upon a free people." Similarly, Dr. Kintner prescribes United States policy in terms of countering Soviet propaganda and re-establishing the reality of American power.

But the United Nations is also seen here as having positive values, even viewed as the forerunner of a universal society toward which free men should be striving: "We must develop plans for preserving the United Nations as a first, albeit most imperfect, cast for world order—a likely model . . . that may help us design a more unitary and elaborate structure." If leading spokesmen for the conservative position should turn out to hold quasi-utopian views of the need for world order, their differences with the more sentimental pro-United Nations school may be tactical rather than strategic. This clearly overstates the parallels. And if the hard-nosed position has yet to accept the possibility that a blatantly anti-Communist line pays decreasing diplomatic dividends, the soft-nosed still have to learn the need for more cogent doctrines about the United Nations, and this volume can contribute thereto, if only as a partial corrective.

Also included are essays by Franz B. Gross, Waldo Chamberlin, Norman D. Palmer, Arthur P. Whitaker, and Harold K. Jacobson.

LINCOLN P. BLOOMFIELD

BOOKS RECEIVED*

- Académie de Droit International de La Haye. *Recueil des Cours*, 1964. Tome I (Vol. 111 of the Collection). Leyden: A. W. Sijthoff, 1964. pp. viii, 728. Index. Fl. 45.
- Annales de l'Université de Lyon. *La Doctrine Juridique de Kelsen*. By Jacques Prévaut; *Quelques Notions sur le Formalisme Ancien et Moderne*. By Colette Bétaille-Raquin. Paris: Librairie du Recueil Sirey, 1965. pp. 168. Fr. 15.
- Annuaire Français de Droit International*, 1964. Vol. X. Paris: Centre National de la Recherche Scientifique, 1965. pp. xiv, 1237. Index.

* Mention here neither assures nor precludes later review.

- Anuario Uruguayo de Derecho Internacional, 1964.* Vol. III. (Universidad de la Republica, Facultad de Derecho y Ciencias Sociales.) Montevideo: Republica Oriental del Uruguay, 1965. pp. 390.
- Aronowitz, Dennis S. *Legal Aspects of Arms Control Verification in the United States.* Dobbs Ferry, N. Y.: Oceana Publications, 1965. pp. 222. Index. \$6.50.
- Ashley, Maurice. *Magna Carta in the Seventeenth Century.* Charlottesville, Va.: The University Press of Virginia, 1965. pp. viii, 62. \$7.5.
- Aubert, Jean-Marie. *Loi de Dieu Loi des Hommes.* Tournai, Belgium: Desclée & Cie, Éditeurs, 1964. pp. xiv, 258. Index.
- Australian Institute of International Affairs. *Nuclear Dispersal in Asia and the Indo-Pacific Region.* 1965 Defence Studies Project conducted in the Australian National University, Canberra. Proceedings of Seminar Sept. 5-6, 1964. Vancouver, B. C.: Publications Centre, University of British Columbia, 1965. pp. iv, 101. \$3.50.
- Bator, Victor. *Vietnam, A Diplomatic Tragedy. The Origins of the United States Involvement.* Dobbs Ferry, N. Y.: Oceana Publications, 1965. pp. xiv, 271. Index. \$7.50.
- Boehmer, Gerhard. *Der Völkerrechtliche Vertrag im Deutschen Recht.* Cologne and Berlin: Carl Heymanns Verlag KG, 1965. pp. xii, 115. DM. 14.50.
- Cappelletti, Mauro, and Joseph M. Perillo. *Civil Procedure in Italy.* The Hague: Martinus Nijhoff, 1965. pp. xxxiv, 451. Index. Gld. 54.
- Castel, J. G. *International Law: Chiefly as Interpreted and Applied in Canada.* Toronto: University of Toronto Press, 1965. pp. xxii, 1402. Indexes. \$30.00.
- Chaudhri, Mohammed Ahsen. *Growth of International Law and Pakistan.* A Collection of Essays. Karachi: University of Pakistan, 1965. pp. xi, 140. Rs. 10; \$4.00.
- Deutsche Nansen-Gesellschaft. *Internationales Asyl-Colloquium, Garmisch-Partenkirchen, 1964.* (Schriftenreihe, Vol. 4.) Cologne, Berlin, Bonn, and Munich: Carl Heymanns Verlag KG, 1965. pp. xii, 148.
- Doherty, Kathryn B. *Jordan Waters Conflict.* (International Conciliation, No. 553, May, 1965.) New York: Taplinger Publishing Co., 1965. pp. 66. \$50.
- European Commission and European Court of Human Rights. *Yearbook of the European Convention on Human Rights, 1963.* Vol. VI. The Hague: Martinus Nijhoff, 1965. pp. xvi, 849. Index. Gld. 81.
- European Communities Court of Justice. *Recueil de la Jurisprudence.* Vol. X, No. 6, 1964. pp. 1201-1406; Vol. XI, Nos. 1-5, 1965. No. 1, pp. 34; No. 2, pp. 4; No. 3, pp. 26; No. 4, pp. 24; No. 5, pp. 13. Luxembourg: Service des Publications des Communautés Européennes, 1964, 1965. Complete vol.: Fr. B. 400; DM. 32; Fr. 39; Lit. 5000; Fl. 29.
- Federal Bar Association Foundation. *Equal Justice under Law. The Supreme Court in American Life.* Washington, D. C.: Published with the co-operation of the National Geographic Society, 1965. pp. 144. Index. \$2.75, cloth; \$1.25, paper.
- Fenwick, Charles G. *International Law.* 4th ed. New York: Appleton-Century-Crofts, 1965. pp. liii, 849. Index. \$7.50.
- Gomez Robledo, Antonio. *México y El Arbitraje Internacional. El Fondo Píadoso de las Californias—La Isla de la Pasión—El Chamizal.* Mexico, D. F.: Editorial Porrúa, 1965. pp. xii, 412. Index.
- Graupner, R. *The Rules of Competition in the European Economic Community.* A Study of the Substantive Law on a Comparative Law Basis. With special reference to patent license agreements and sole distributorship agreements. The Hague: Martinus Nijhoff, 1965. pp. xxxvi, 283. Index. Gld. 33.
- Guldemann, Werner. *Internationales Lufttransportrecht. Kommentar zu den Abkommen von Warschau 1929/55 und Guadalajara 1961.* Zürich: Schulthess & Co. AG, 1965. pp. xii, 263. Index. Sw. Fr. 30.
- Haley, Andrew G., and Mortimer D. Schwartz (eds.). *Proceedings of the Seventh Colloquium on the Law of Outer Space.* International Institute of Space Law of the International Astronautical Federation, September 9-10, 1964, Warsaw, Poland.

- Norman, Oklahoma: University of Oklahoma Research Institute, 1965. Distributed by Fred B. Rothman & Co., Hackensack, N. J. pp. viii, 425. \$5.00.
- International Commission of Jurists. *The Dynamic Aspects of the Rule of Law in the Modern Age*. Report on the Proceedings of the South-East Asian and Pacific Conference of Jurists, Bangkok, Thailand, February 15-19, 1965. Geneva: 1965. pp. 192.
- . *Executive Action and the Rule of Law*. A Report on the Proceedings of the International Congress of Jurists, Rio de Janeiro, Brazil, December 11-15, 1962. Geneva: 1965. pp. vi, 187.
- Jenks, C. Wilfred. *Space Law*. New York and Washington: Frederick A. Praeger, 1965. pp. xviii, 476. Index. \$16.00.
- Keeton, George W., and Georg Schwarzenberger (eds.). *The Year Book of World Affairs, 1965*. Vol. 19. London: Stevens & Sons, 1965. pp. xxiv, 389. Index. £3 17s. 6d.
- Kiel Universität, Institut für Internationales Recht. *Jahrbuch für Internationales Recht, 1965*. Vol. 12. Göttingen: Vandenhoeck & Ruprecht, 1965. pp. 629.
- LaFave, Wayne R. (ed.) *Law in the Soviet Society*. Urbana, Ill.: University of Illinois Press, 1965. pp. xiv, 297. \$4.75, cloth; \$1.95, paper.
- Larson, Arthur, C. Wilfred Jenks, and others. *Sovereignty Within the Law*. Dobbs Ferry, N. Y.: Oceana Publications; London: Stevens & Sons, 1965. pp. x, 492. Index. \$12.50.
- Lillich, Richard B. *The Protection of Foreign Investment: Six Procedural Studies*. (Vol. V, Procedural Aspects of International Law Series.) Syracuse: Syracuse University Press, 1965. pp. x, 222. Index. \$7.50.
- Moseoni, Franco. *La Tutela dei Minori in Diritto Internazionale Privato*. (No. 24, Studi di Diritto Internazionale.) Milan: Dott. A. Giuffrè, 1965. pp. xiii, 459. L. 3500.
- New York City, Association of the Bar. *Hammar skjöld Forums*. Lyman M. Tondel, Jr. (ed.) Background Papers and Proceedings of Fifth Forum, 1963. Case Studies on the Role of Law in the Settlement of International Disputes, No. 5: *The International Position of Communist China*. O. Edmund Clubb and Eustace Seligman, authors of working papers. pp. xii, 116. \$3.95, cloth; \$1.75, paper; Background Papers and Proceedings of Sixth Forum, 1965. Case Studies on the Role of Law in the Settlement of International Disputes, No. 6: *The Panama Canal*. Richard R. Baxter and Doris Carroll, authors of the working paper. pp. x, 118. \$3.95, cloth; \$1.75, paper; Background Papers and Proceedings of Seventh Forum, 1965. Case Studies on the Role of Law in the Settlement of International Disputes, No. 7: *The Aftermath of Sabbatino*. Richard A. Falk, author of working paper. pp. xii, 228. \$10.00, cloth; \$2.95, paper. Dobbs Ferry, N. Y.: Oceana Publications, 1965.
- Niebler, Horst (translator); Gerhart Mueller, Editor-in-Chief. *The German Code of Criminal Procedure*. (No. 10, American Series of Foreign Penal Codes, published by the Comparative Criminal Law Project of New York University in co-operation with the University of Michigan Law School.) South Hackensack, N. J.: Fred B. Rothman & Co.; London: Sweet & Maxwell, 1965. pp. xviii, 236. \$10.95.
- Parry, Clive. *The Sources and Evidences of International Law*. Dobbs Ferry, N. Y.: Oceana Publications; Manchester, England: Manchester University Press, 1965. pp. viii, 122. Index. \$5.00; 25s.
- Pěchota, Vratislav. *Mnohostranné Mezinárodní Smlouvy a Přístup k Nim* [International Multilateral Treaties and Accession Thereto]. (In Czechoslovakian with a summary in English.) Prague: Nakladatelství Československé Akademie Věd, 1965. pp. 243. Index. Kčs. 20.50.
- Proehl, Paul O. *Foreign Enterprise in Nigeria. Laws and Policies*. (American Society of International Law Studies in Foreign Investment and Economic Development.) Chapel Hill, N. C.: University of North Carolina Press, 1965. pp. xiv, 250. Index. \$7.50.

- Ronning, C. Neale. *Diplomatic Asylum. Legal Norms and Political Reality in Latin American Relations*. The Hague: Martinus Nijhoff, 1965. pp. vi, 242. Index. Gld. 27; \$7.50.
- Royal Institute of International Affairs. *The British Year Book of International Law, 1963*. Vol. XXXIX. Edited by Sir Humphrey Waldock and Professor R. Y. Jennings. London, New York, Toronto: Oxford University Press, 1965. pp. viii, 557. Index. £5 10s.; \$17.60.
- Sarantopoulos, Constantin X. *Principes Généraux de Contrôle des Finances Publiques*. (No. 8, Bibliothèque de la Comptabilité Publique.) Translated from the Greek text. Athens: 1965. pp. 68.
- Scheingold, Stuart A. *The Rule of Law in European Integration. The Path of the Schuman Plan*. New Haven and London: Yale University Press, 1965. pp. xiv, 331. Index. \$7.50; 56s.
- Schönlé, Herbert, Alain Hirsch, Michel Virally, and Jacques Bernheim. *Quatrième Journée Juridique. 10 Octobre 1964*. (Mémoires Publiés par la Faculté de Droit de Genève, No. 20.) Geneva: Librairie de l'Université Georg & Cie, S.A., 1965. pp. ii, 120.
- Soviet Association of International Law. *Soviet Year-Book of International Law, 1963*. (In Russian with summaries in English.) Moscow: Publishing House "Nauka", 1965. pp. 624. R. 2, k. 73.
- Speeckaert, G. P. *Select Bibliography on International Organization, 1885-1964*. (In French and English.) Brussels: Union of International Associations, 1965. pp. 150. Index. \$4.00; B. Fr. 150; Fr. 15; Sw. Fr. 13; 21s.
- Sutherland, Arthur E. *The Church Shall Be Free. A Glance at Eight Centuries of Church and State*. (Magna Carta Essays.) Charlottesville, Va.: University Press of Virginia, 1965. pp. iv, 41. \$75.
- UNESCO. *Unesco Handbook of International Exchanges*. Vol. I, 1965. (In English, French, Italian, and Russian.) New York: Unesco Publications Center, 1965. pp. 861. \$12.00.
- United States Arms Control and Disarmament Agency. *Documents on Disarmament, 1964* (Publication 27.) Washington, D. C.: U. S. Government Printing Office, 1965. pp. xv, 597. Index. \$1.50.
- United States Department of State. *American Foreign Policy. Current Documents, 1961*. Washington, D. C.: U. S. Government Printing Office, 1965. pp. lxxxi, 1402. \$4.75.
- . *Foreign Relations of the United States. Diplomatic Papers, 1944*. Vol. III: *The British Commonwealth and Europe*. (Publication No. 7889.) Washington, D. C.: U. S. Government Printing Office, 1965. pp. viii, 1478. Index. \$4.75.
- Van Cise, Jerrold G. *The Federal Antitrust Laws*. Revised ed. Washington, D. C.: The American Enterprise Institute for Public Policy Research, 1965. pp. viii, 83.
- Wagner, Heinz. *Grundbegriffe des Beschlussrechts der Europäischen Gemeinschaften*. (Kölner Schriften zum Europarecht, Vol. 5.) Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG, 1965. pp. xvi, 370. Index. DM. 67.
- Zagayko, Florence F. *International Law. A Classification for Libraries*. Dobbs Ferry, N. Y.: Oceana Publications, 1965. pp. x, 66. Index. \$6.00.

OFFICIAL DOCUMENTS*

UNITED NATIONS

REPORT OF THE INTERNATIONAL LAW COMMISSION

ON THE WORK OF ITS SEVENTEENTH SESSION, MAY 3-JULY 9, 1965 **

CHAPTER I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly Resolution 174 (II) of 21 November 1947, and in accordance with its Statute annexed thereto, as subsequently amended, held the first part of its Seventeenth Session at the European Office of the United Nations from 3 May to 9 July 1965. The work of the Commission during this part of the Seventeenth Session is described in this report. Chapter II of the report contains a description of the Commission's work on the law of treaties and twenty-five articles, consisting of general provisions and provisions on the conclusion of treaties, reservations, entry into force and registration, correction of errors and the functions of depositaries. Chapter III contains a description of the Commission's work on special missions and forty-four articles, with commentaries on the topic of special missions; sixteen of these articles were provisionally adopted by the Commission at its Sixteenth Session in 1964, and twenty-eight articles at the present session. Chapter IV relates to the programme of work and organization of future sessions of the Commission. Chapter V deals with a number of administrative and other questions.

A. MEMBERSHIP AND ATTENDANCE

2. The Commission consists of the following members:

Mr. Roberto AGO (Italy)

Mr. Gilberto AMADO (Brazil)

Mr. Milan BARTOŠ (Yugoslavia)

Mr. Mohammed BEDJAOUTI (Algeria)

Mr. Herbert W. BRIGGS (United States of America)

Mr. Marcel CADIEUX (Canada)

Mr. Erik CASTRÉN (Finland)

* Obtained and prepared by R. R. Baxter of the Board of Editors.

** U.N. General Assembly, 20th Sess., Official Records, Supp. No. 9 (A/6009). For reports of the International Law Commission covering its previous sessions, see Supplements to this JOURNAL, Vol. 44 (1950), pp. 1, 105; Vol. 45 (1951), p. 103; Vol. 47 (1953), p. 1; Vol. 48 (1954), p. 1; Vol. 49 (1955), p. 1; and Official Documents, Vol. 50 (1956), p. 190; Vol. 51 (1957), p. 154; Vol. 52 (1958), p. 177; Vol. 53 (1959), p. 230; Vol. 54 (1960), p. 229; Vol. 55 (1961), p. 223; Vol. 56 (1962), p. 268; Vol. 57 (1963), p. 190; Vol. 58 (1964), p. 241; Vol. 59 (1965), pp. 203, 434.

Mr. Abdullah EL-ERIAN (United Arab Republic)
 Mr. Taslim O. ELIAS (Nigeria)
 Mr. Eduardo JIMÉNEZ DE ARÉCHAGA (Uruguay)
 Mr. Manfred LACHS (Poland)
 Mr. LIU Chieh (China)
 Mr. Antonio de LUNA (Spain)
 Mr. Radhabinod PAL (India)
 Mr. Angel M. PAREDES (Ecuador)
 Mr. Obed PESSOU (Senegal)
 Mr. Paul REUTER (France)
 Mr. Shabtai ROSENNE (Israel)
 Mr. José María RUDA (Argentina)
 Mr. Abdul Hakim TABIBI (Afghanistan)
 Mr. Senjin TSURUOKA (Japan)
 Mr. Grigory I. TUNKIN (Union of Soviet Socialist Republics)
 Mr. Alfred VERDROSS (Austria)
 Sir Humphrey WALDOCK (United Kingdom of Great Britain and Northern Ireland)
 Mr. Mustafa Kamil YASSEEN (Iraq)

3. On 18 May 1965, the Commission elected Mr. Mohammed Bedjaoui (Algeria) to fill the vacancy which had arisen in consequence of the resignation of Mr. Victor Kanga (Cameroon).

4. All the members, with the exception of Mr. Liu Chieh, attended the session of the Commission.

B. OFFICERS

5. At its 775th meeting, held on 3 May 1965, the Commission elected the following officers:

Chairman: Mr. Milan Bartoš

First Vice-Chairman: Mr. Eduardo Jiménez de Aréchaga

Second Vice-Chairman: Mr. Paul Reuter

Rapporteur: Mr. Taslim O. Elias

6. At its 777th meeting, held on 5 May 1965, the Commission appointed a Drafting Committee composed as follows:

Chairman: Mr. Eduardo Jiménez de Aréchaga

Members: Mr. Roberto Ago; Mr. Herbert W. Briggs; Mr. Taslim O. Elias; Mr. Manfred Lachs; Mr. Paul Reuter; Mr. Grigory I. Tunkin; Sir Humphrey Waldoock and Mr. Mustafa Kamil Yasseen. Mr. Milan Bartoš took part in the Committee's work as Special Rapporteur on special missions when the articles relating to that topic were considered. In addition, the Commission at its 797th meeting held on 8 June 1965, appointed Mr. José María Ruda as a member of the Committee, and at its 811th meeting, on 25 June 1965, appointed Mr. Shabtai Rosenne as a member. The Committee was responsible for the preparation of the English, French and Spanish texts of the draft articles.

7. Also at its 777th meeting, the Commission appointed a Committee to study the exchange and distribution of its documents. The Committee was composed of Mr. Roberto Ago, Mr. Manfred Lachs, Mr. Obed Pessou, Mr. Shabtai Rosenne and Mr. José María Ruda. The Committee submitted a report¹ to the Commission.

8. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 793rd and 794th meetings, held on 1 and 2 June 1965 respectively, and represented the Secretary-General at those meetings. Mr. Constantin A. Baguinian, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General at the other meetings of the session, and acted as Secretary to the Commission.

C. AGENDA

9. The Commission adopted an agenda for the Seventeenth Session, consisting of the following items:

1. Filling of a casual vacancy in the Commission (Article 11 of the Statute).
2. Law of treaties.
3. Special missions.
4. Relations between states and inter-governmental organizations.
5. Question of the organization of future sessions.
6. Dates and places of the meetings in winter and summer 1966.
7. Co-operation with other bodies.
8. Other business.

10. In the course of the session, the Commission held forty-seven public meetings and four private meetings. In addition, the Drafting Committee held thirteen meetings. The Commission considered all the items on its agenda, except that on relations between states and inter-governmental organizations.

CHAPTER II

LAW OF TREATIES

A. INTRODUCTION

SUMMARY OF THE COMMISSION'S PROCEEDINGS

11. At its Fourteenth, Fifteenth and Sixteenth Sessions the Commission provisionally adopted Parts I, II and III of its draft articles on the law of treaties, consisting respectively of twenty-nine articles on the conclusion, entry into force and registration of treaties, twenty-five articles on the invalidity and termination of treaties and nineteen articles on the application, effects, modification and interpretation of treaties. In adopting each part the Commission decided, in accordance with Articles 16 and 21 of its Statute, to submit it, through the Secretary-General, to governments for their observations.

¹ A/CN.4/L.110.

12. At its Sixteenth Session, the Commission decided that in 1965 it would, after considering the comments received from governments, conclude the second reading of Part I, and as many further articles as possible of Part II, of the draft on the law of treaties, in accordance with suggestions of the Special Rapporteur. It also asked the Secretariat to request governments to submit their comments on Part II by January 1965 at the latest, so that the Commission could consider them at its Seventeenth Session. Moreover, while recalling its decision of 1958² that it should prepare its final draft only at the second session following that in which its first draft had been prepared, the Commission expressed the hope that the comments of governments on Part III of the law of treaties would be available to it before the commencement of its Eighteenth Session in 1966.

13. At the present session the Commission had before it a document, submitted by the Secretariat and dated 23 February 1965, which set out in Volume I the written comments of governments and in Volume II the comments of delegates in the Sixth Committee on Parts I and II of the Commission's draft articles on the law of treaties (A/CN.4/175). It also had before it four documents setting out the written comments of four further governments received after the above-mentioned date (A/CN.4/175/Add.1-4).³ The comments of governments and delegations in these documents contained detailed criticisms and proposals regarding the substance or wording of the draft articles. Eight other governments, the Commission was informed, had replied stating that they did not have any observations to make at the present stage of the work on the law of treaties.

14. The Commission also had before it: (1) a report (A/5687) on "Depositary Practice in Relation to Reservations," dated 29 January 1964 and submitted by the Secretary-General to the General Assembly in accordance with Resolution 1452 B (XIV) and (2) certain further information and material concerning the practice of depositaries and of the Secretary-General as registering authority under Article 102 of the Charter supplied by the Secretariat in response to the request of certain members of the Commission.⁴

15. In addition, the Special Rapporteur submitted a report (A/CN.4/177 and Add. 1-2) containing: (1) a summary, article by article, of the comments of governments and delegations on the twenty-nine articles of Part I and the first three articles of Part II provisionally adopted by the Commission in 1962 and 1963; and (2) proposals for the revision of the articles in the light of those comments. The Commission considered that

² Official Records of the General Assembly, 13th Sess., Supp. No. 9 (A/3859), pars. 60-61.

³ The Governments which submitted written comments were: Afghanistan, Australia, Austria, Burma, Canada, Czechoslovakia, Denmark, Finland, Israel, Jamaica, Japan, Luxembourg, Malaysia, Netherlands, Pakistan, Poland, Portugal, Sweden, Turkey, Uganda, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

⁴ See A/CN.4/SR.791, par. 61, and A/CN.4/SR.801, pars. 17-20.

report at its 776th–803rd, 810th–816th, 819th and 820th meetings, and re-examined the twenty-nine articles of Part I. Owing to lack of time it decided to adjourn its examination of addendum II of the Special Rapporteur's report dealing with Articles 30–32 of Part II until its next session.

16. *Form of the draft articles.* The Commission noted that certain governments had commented on the question of the form ultimately to be given to the draft articles and that two governments had expressed the view that the form should be that of a “code” rather than of a “convention” on the law of treaties. This question was discussed by the Commission in 1961 and 1962 at its Thirteenth and Fourteenth Sessions. In its report for 1962 it explained the considerations which had led it in the previous year to decide to change the scheme of its work on the law of treaties from that of a “code” to that of draft articles capable of serving as a basis for a multilateral convention:

“First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law: and the consolidation of the law of treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations.”

The Commission, in re-examining the question at the present session, saw no reason to modify the views which it had expressed in 1962. On the contrary, it recalled that at the Seventeenth Session of the General Assembly the Sixth Committee had stated in its report that the great majority of representatives had approved the Commission's decision to give the codification of the law of treaties the form of a convention. The Commission, moreover, felt it to be its duty to aim at achieving the maximum results from the prolonged work done by it on the codification of the law of treaties. Accordingly, it reaffirmed its decision of 1961 to prepare draft articles “intended to serve as the basis for a convention.” At the same time it noted that the appropriate moment for it to exercise its competence under Article 23, paragraph 1, of its Statute to make recommendations to the General Assembly regarding the action to be taken concerning its draft would be when it had completed its work on the revision of the articles and submitted its final report to the General Assembly.

17. In reaffirming its decision to prepare draft articles intended to serve as a basis for a convention the Commission observed that the draft articles provisionally adopted and submitted to governments still contained some elements of a “code”; and that, in conformity with its decision, these elements must, so far as possible, be eliminated in the course of the revision of the articles. This observation it considered to apply particularly

to the articles in Part I on the conclusion, entry into force and registration of treaties the revision of which was its principal task at the present session.

18. *A single draft convention.* When provisionally adopting Parts I (conclusion, entry into force and registration), II (invalidity and termination) and III (application, effects, modification and interpretation), the Commission left open as its Fourteenth, Fifteenth and Sixteenth Sessions the question whether the articles should be cast in the form of a single draft convention or of a series of related conventions. At the present session, in addressing itself to the revision of the draft articles as a whole, the Commission concluded that the legal rules set out in the different parts are so far inter-related that it is desirable that they should be codified in a single convention. It considered that, while certain topics in the law of treaties may be susceptible of being dealt with separately, the proper co-ordination of the rules governing the several topics is likely to be achieved only by incorporating them in a single, closely integrated, set of articles. Accordingly, it decided that in the course of their revision the draft articles should be rearranged in the form of a single convention.

19. *Scope of the draft articles.* At its Fourteenth Session,⁵ the Commission reaffirmed decisions which it had previously taken in 1951 and 1959 to defer examination of treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by states. At the same time, however, it recognized that international organizations may possess a certain capacity to enter into international agreements and that these agreements fall within the scope of the law of treaties. Moreover in Article 1 (a) of Part I it defined the term treaty, as used in the draft articles, to mean "any international agreement in written form . . . concluded between two or more states or other subjects of international law"; and in commenting upon this definition,⁶ it explained that the term "other subjects of international law" was "designed to provide for treaties concluded by (a) international organizations, (b) the Holy See which enters into treaties on the same basis as states, and (c) other international entities, such as insurgents, which may in some circumstances enter into treaties." Again, in formulating the rules regarding capacity to conclude treaties in Article 3, it included as paragraph 3 of that article a provision concerning the treaty-making capacity of international organizations.

20. The Commission at the present session noted that many of its draft articles on the law of treaties, as provisionally adopted, were formulated in terms applicable only to treaties concluded between states; and that further special study of treaties concluded by international organizations would be needed before it could be in a position to codify satisfactorily the rules applicable to this category of treaties. It considered, moreover, that its primary task at the present stage of the codification of international law was to codify the fundamental principles of the law of treaties

⁵ Official Records of the General Assembly, 17th Sess., Supp. No. 9 (A/5209), par. 21.

⁶ *Ibid.*, par. 8 of the commentary to Art. 1.

and that it would conduce to a greater clarity and simplicity in the statement of these principles if the draft articles were explicitly confined to treaties concluded between states. If a codifying convention covering treaties concluded between states were concluded, it would always remain possible, if found desirable, to supplement it by a further convention dealing specially with treaties concluded by international organizations. Accordingly, both for the above reasons and to give greater consistency to the structure of the draft articles, the Commission decided explicitly to limit the scope of the articles to treaties concluded between states. This decision finds expression in a new article inserted at the beginning of the draft which reads: "The present articles relate to treaties concluded between states." It also finds expression in a consequential change made in the definition of the term "treaty" as used in the draft articles and in the deletion from Article 3 of the provision relating to the capacity of international organizations to conclude treaties.

21. At the same time, the Commission recognized that the principles set out in the draft articles are to a large extent relevant also in the case of treaties concluded between states and other subjects of international law and between two or more such other subjects of international law. The Commission also considered it essential to avoid any possibility that the limitation of the draft articles to treaties concluded between states might be construed as denying the legal force of such other forms of treaties or the application to them of principles set forth in the draft articles which would be applicable to them under general international law independently of the draft articles. Accordingly, it inserted in Article 2 a new provision safeguarding the legal force of these forms of treaties and the application to them of relevant principles of general international law which find a place in the draft articles on treaties concluded between states.⁷

22. *Revision of the draft articles at the present session.* At the present session, as stated in paragraph 1, the Commission re-examined the twenty-nine articles of Part I on the conclusion, entry into force and registration of treaties. In addition to the changes already mentioned in paragraph 19, the articles were extensively revised with the object of eliminating from them such purely descriptive elements as might be appropriate in a "code" but out of place in a convention; and, where necessary, the articles were redrafted so as to formulate them more explicitly as rules of law. As part of this process, the Commission provisionally decided to omit Article 5 dealing with the negotiation and drawing up of a treaty which it considered to be descriptive rather than stating a legal rule.

23. In its 1962 report, the Commission employed the concept of "treaties in simplified form" as a basis for formulating certain rules in Article 4 (authority to negotiate, draw up, authenticate, sign, ratify etc.) and in Article 12 (ratification). It was, however, suggested by certain governments in their comments that this concept does not have sufficient precision

⁷ Art. 2, as adopted in 1962, already contained an analogous provision safeguarding the legal force of international agreements not in written form; and this provision, in slightly expanded form, also appears in the new text of Art. 2.

for it to be an adequate criterion in determining the application of legal rules. The use of simplified forms for the conclusion of many types of treaties is in the opinion of the Commission a development in treaty practice which is of great importance. Nevertheless, after re-examining the question the Commission concluded that there is substance in the view that the concept of a "treaty in simplified form" lacks the degree of precision necessary for it to provide a satisfactory criterion for distinguishing between different categories of treaties in formulating the rules in Articles 4 and 12. Accordingly, it decided to reformulate those articles in terms which do not call for any precise distinction to be drawn between "formal treaties" and "treaties in simplified form." In conformity with this decision the Commission further decided to delete the definition of "treaty in simplified form" from Article 1, paragraph 1 (b).

24. The statement of the law regarding "ratification" contained in Article 12, as drafted in 1962, depended entirely on the drawing of a distinction between "formal treaties" and "treaties in simplified form." Consequently, the Commission's decision not to employ that distinction would in any event have necessitated a reformulation of the article. In addition, the comments of governments disclosed differences of opinion, similar to those which had emerged in the Commission itself in 1962, as to whether or not there exists in the international law of today any basic residuary rule that ratification of a treaty is necessary unless a contrary intention appears. The Commission re-examined the whole question of the rules regarding signature and ratification as acts expressing consent to be bound by a treaty. Some members, as in 1962, favoured the statement of a residuary rule requiring ratification in the absence of a contrary intention. Others considered that such a rule would not reflect the actual position found in treaty practice today when so many treaties are concluded in simplified forms without ratifications being required. The Commission concluded that the question whether signature does or does not express consent to be bound or whether it is subject to ratification is essentially one of intention; and that its appropriate course was simply to set out in one article the conditions under which signature would be considered as a definitive expression of consent to be bound and in another the conditions under which consent to be bound would be expressed through ratification, acceptance or approval without stating any residuary rule in international law either in favour [of] or against the need for ratification. It accordingly redrafted Articles 11 and 12 on these lines, at the same time incorporating in Article 12 the rules regarding "acceptance" and "approval" which had formed the subject of a separate article—Article 14—in its 1962 report. In addition, it re-arranged the several provisions of its 1962 draft dealing with signature, initialling and signature *ad referendum* in such a manner as to make it possible to dispense with the article. Thus, in revising the articles dealing with signature, ratification, acceptance and approval, the Commission found it possible to dispense with both Articles 10 and 14 by transferring their substantive provisions to other articles.

25. A question which the Commission examined was that of participation in a treaty, which was dealt with in its 1962 report in Article 8 (participation in a treaty) and Article 9 (opening of a treaty to the participation of additional states). The comments of governments disclosed certain divergencies of view on these articles, more especially with regard to participation in general multilateral treaties. The Commission, as in 1962, was divided on this question and decided to adjourn the discussion of Articles 8 and 9 together with the definition of "general multilateral treaty" in Article 1 until the resumption of its session next January. Having regard to the close connexion of these articles with Article 13 concerning accession to treaties, the Commission also decided to postpone its re-examination of the latter article until its January session.

26. Another question which the Commission examined was that of reservations to multilateral treaties. It noted that in their comments governments, although offering detailed criticisms of the Commission's drafts, appeared in general to endorse its proposal for the solution of this difficult problem. Accordingly, the Commission retained the substance of the articles on reservations, namely, of Articles 18-22, which it had provisionally adopted in 1962. At the same time it revised and re-arranged their provisions extensively in order to simplify their formulation and to take account of suggestions made by governments.

27. The Commission, in all, adopted revised texts of twenty-five articles. In doing so, it noted that there were certain points of terminology to which it might be necessary to return in the final stage of the Commission's work in order to ensure consistency in the use of terms throughout the draft articles. It also noted that some articles might require further examination in 1966 in order to harmonize their provisions with those of later articles; and that in any event it would be necessary in 1966, in re-arranging the draft articles as a single convention, to give further consideration to the order in which the various articles should be placed. The Commission concluded that the texts of articles adopted at the present session must still be treated as subject to review at the Eighteenth Session when its work on the draft articles on the law of treaties will be completed.

28. Having regard to the considerations mentioned in the preceding paragraphs, the Commission did not think that any useful purpose would be served by attaching detailed commentaries to the texts in the present report. While requesting the Special Rapporteur to prepare drafts of the commentaries to accompany these articles, it preferred to postpone its consideration of the commentaries until its Eighteenth Session when it would have before it the final texts of all the articles to be included in the draft convention.

29. The Commission accordingly decided to confine itself in this report to the foregoing explanations of the revision of Part I of the draft articles undertaken by it at the present session and to set out in the report only the revised texts of the articles. These texts, as adopted by the Commission on the proposal of the Special Rapporteur, are reproduced below.

B. DRAFT ARTICLES ON THE LAW OF TREATIES

PART I

CONCLUSION, ENTRY INTO FORCE AND REGISTRATION OF TREATIES

SECTION I: GENERAL PROVISIONS

ARTICLE 0

The scope of the present articles

The present articles relate to treaties concluded between states.

ARTICLE 1

Use of terms

1. For the purposes of the present articles:

(a) "Treaty" means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

(b)

[Deleted by the Commission.]

(c) "General multilateral treaty". . . .

[Decision postponed until the Commission resumes its examination of Articles 8 and 9.]

(d) "Ratification," "Accession," "Acceptance" and "Approval" mean in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty.

[Reference to "signature" deleted by the Commission.]

(e) "Full powers" means a document emanating from the competent authority of a state designating a person to represent the state for negotiating, adopting or authenticating the text of a treaty or for expressing the consent of the state to be bound by a treaty.

(f) "Reservation" means a unilateral statement, however phrased or named, made by a state, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that state.

(f)(bis) "Party" means a state which has consented to be bound by a treaty and for which the treaty has come into force.

(f)(ter) "Contracting State". . . .

[Consideration of the use of this term and of the problem of terminology to be used in regard to states having a right to be consulted or notified with respect to acts relating to a treaty has been deferred by the Commission until a later stage of its work.]

(f)(quater) "International organization" means an inter-governmental organization.

(g)

[Deleted by the Commission.]

2.

[Decision concerning the inclusion of a provision regarding the characterization or classification of international agreements under internal law postponed.]

ARTICLE 2

Treaties and other international agreements not within the scope of the present articles

The fact that the present articles do not relate

(a) To treaties concluded between states and other subjects of international law or between such other subjects of international law; or

(b) To international agreements not in written form shall not affect the legal force of such treaties or agreements or the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles.

ARTICLE 3

Capacity of states to conclude treaties

1. Every state possesses capacity to conclude treaties.

2. States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.

ARTICLE 3 (bis)

Treaties which are constituent instruments of international organizations or which have been drawn up within international organizations

The application of the present articles to treaties which are constituent instruments of an international organization or have been drawn up within an international organization shall be subject to the rules of the organization in question.

SECTION II: CONCLUSION OF TREATIES BY STATES

ARTICLE 4

Full powers to represent the state in the negotiation and conclusion of treaties

1. Except as provided in paragraph 2, a person is considered as representing a state for the purpose of negotiating, adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the state to be bound by a treaty only if:

(a) He produces an appropriate instrument of full powers; or

(b) It appears from the circumstances that the intention of the states concerned was to dispense with full powers.

2. In virtue of their functions and without having to produce an instrument of full powers, the following are considered as representing their state:

(a) Heads of state, heads of government and ministers for foreign affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) Heads of diplomatic missions, for the purpose of negotiating and adopting the text of a treaty between the accrediting state and the state to which they are accredited;

(c) Representatives accredited by states to an international conference or to an organ of an international organization, for the purpose of negotiating and adopting the text of a treaty.

ARTICLE 5

Negotiation and drawing up of a treaty

[Deleted by the Commission]

ARTICLE 6

Adoption of the text

1. The adoption of the text of a treaty takes place by the unanimous agreement of the states participating in its drawing up except as provided in paragraphs 2 and 3.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the states participating in the conference unless:

(a) By the same majority they shall decide to apply a different rule; or

(b) The established rules of an international organization apply to the proceedings of the conference and prescribe a different voting procedure.

3. The adoption of the text of a treaty by an organ of an international organization takes place in accordance with the voting procedure prescribed by the established rules of the organization in question.

ARTICLE 7

Authentication of the text

The text of a treaty is established as authentic and definitive by such procedure as may be provided for in the text or agreed upon by the states concerned and failing any such procedure by:

(a) The signature, signature *ad referendum* or initialling by the representatives of the states concerned of the text of the treaty or of the Final Act of a conference incorporating the text; or

(b) Such procedure as the established rules of an international organization may prescribe.

ARTICLE 8

Participation in a treaty

[Decision postponed by the Commission]

ARTICLE 9

The opening of a treaty to the participation of additional states

[Decision postponed by the Commission]

ARTICLE 10

Initialling and signature ad referendum as forms of signature

[Deleted by the Commission and substance incorporated in Article 11]

ARTICLE 11

Consent to be bound expressed by signature

1. The consent of a state to be bound by a treaty is expressed by the signature of its representative when:

- (a) The treaty provides that signature shall have that effect;
- (b) It appears from the circumstances of the conclusion of the treaty that the states concerned were agreed that signature should have that effect;
- (c) The intention of the state in question to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiations.

2. For the purposes of paragraph 1:

- (a) The initialling of a text constitutes a signature of the treaty when it appears from the circumstances that the contracting states so agreed;
- (b) The signature *ad referendum* of a treaty by a representative, if confirmed by his state, constitutes a full signature of the treaty.

ARTICLE 12

Consent to be bound expressed by ratification, acceptance or approval

1. The consent of a state to be bound by a treaty is expressed by ratification when:

- (a) The treaty or an established rule of an international organization provides for such consent to be expressed by means of ratification;
- (b) It appears from the circumstances of the conclusion of the treaty that the states concerned were agreed that ratification should be required;
- (c) The representative of the state in question has signed the treaty subject to ratification; or
- (d) The intention of the state in question to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiations.

2. The consent of a state to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

ARTICLE 13

Accession

[Decision postponed by the Commission pending decisions on Articles 8 and 9]

ARTICLE 14

Acceptance or approval

[Deleted by the Commission and substance incorporated in Article 12]

ARTICLE 15

Exchange or deposit of instruments of ratification, accession, acceptance or approval

Unless the treaty otherwise provides, instruments of ratification, accession, acceptance or approval become operative:

- (a) By their exchange between the contracting states;
- (b) By their deposit with the depositary; or
- (c) By notification to the contracting states or to the depositary, if so agreed.

ARTICLE 16

Consent relating to a part of a treaty and choice of differing provisions

1. Without prejudice to the provisions of Articles 18 to 22, the consent of a state to be bound by part of a treaty is effective only if the treaty so permits or the other contracting states so agree.

2. The consent of a state to be bound by a treaty which permits a choice between differing provisions is effective only if it is made plain to which of the provisions the consent relates.

ARTICLE 17

Obligation of a state not to frustrate the object of a treaty prior to its entry into force

A state is obliged to refrain from acts calculated to frustrate the object of a proposed treaty when:

- (a) It has agreed to enter into negotiations for the conclusion of the treaty, while the negotiations are in progress;
- (b) It has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;
- (c) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION III: RESERVATIONS TO MULTILATERAL TREATIES

ARTICLE 18

Formulation of reservations

A state may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless:

- (a) The reservation is prohibited by the treaty or by the established rules of an international organization;

(b) The treaty authorizes specified reservations which do not include the reservation in question; or

(c) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.

ARTICLE 19

Acceptance of and objection to reservations

1. A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting states unless the treaty so provides.

2. When it appears from the limited number of the contracting states, the object and purpose of the treaty and the circumstances of its conclusion that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound, a reservation requires acceptance by all the states parties to the treaty.

3. When a treaty is a constituent instrument of an international organization, the reservation requires the acceptance of the competent organ of that organization, unless the treaty otherwise provides.

4. In cases not falling under the preceding paragraphs of this article:

(a) Acceptance by another contracting state of the reservation constitutes the reserving state a party to the treaty in relation to that state if or when the treaty is in force;

(b) An objection by another contracting state to a reservation precludes the entry into force of the treaty as between the objecting and reserving states unless a contrary intention is expressed by the objecting state;

(c) An act expressing the state's consent to be bound which is subject to a reservation is effective as soon as at least one other contracting state which has expressed its own consent to be bound by the treaty has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 a reservation is considered to have been accepted by a state if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

ARTICLE 20

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other contracting states.

2. If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving state when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

However, an objection to the reservation made previously to its confirmation does not itself require confirmation.

ARTICLE 21

Legal effects of reservations

1. A reservation established with regard to another party in accordance with Articles 18, 19 and 20:

(a) Modifies for the reserving state the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) Modifies those provisions to the same extent for such other party in its relations with the reserving state.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a state objecting to a reservation agrees to consider the treaty in force between itself and the reserving state, the provisions to which the reservation relates do not apply as between the two states to the extent of the reservation.

ARTICLE 22

Withdrawal of reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a state which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative when notice of it has been received by the other contracting states.

SECTION IV: ENTRY INTO FORCE AND REGISTRATION

ARTICLE 23

Entry into force of treaties

1. A treaty enters into force in such manner and upon such date as it may provide or as the states which adopted its text may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as all the states which adopted its text have consented to be bound by the treaty.

3. Where a state consents to be bound after a treaty has come into force, the treaty enters into force for that state on the date when its consent becomes operative, unless the treaty otherwise provides.

ARTICLE 24

Entry into force of a treaty provisionally

1. A treaty may enter into force provisionally if:

(a) The treaty itself prescribes that it shall enter into force provisionally pending ratification, accession, acceptance or approval by the contracting states; or

(b) The contracting states have in some other manner so agreed.

2. The same rule applies to the entry into force provisionally of part of a treaty.

ARTICLE 25

Registration and publication of treaties

Treaties entered into by parties to the present articles shall as soon as possible be registered with the Secretariat of the United Nations. Their registration and publication shall be governed by the regulations adopted by the General Assembly of the United Nations.

ARTICLE 26

Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the contracting states are agreed that it contains an error, the error shall, unless they otherwise decide, be corrected:

(a) By having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) By executing or exchanging a separate instrument or instruments setting out the correction which it has been agreed to make; or

(c) By executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter:

(a) Shall notify the contracting states of the error and of the proposal to correct it if no objection is raised within a specified time-limit;

(b) If on the expiry of the time-limit no objection has been raised, shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text, and communicate a copy of it to the contracting states;

(c) If an objection has been raised to the proposed correction, shall communicate the objection to the other contracting states and, in the case of a treaty drawn up by an international organization, to the competent organ of the organization.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which it is agreed should be corrected.

4. (a) The corrected text replaces the defective text *ab initio*, unless the contracting states otherwise decide.

(b) The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

5. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy to the contracting states,

ARTICLE 27

The correction of errors in the texts of treaties for which there is a depositary

[Deleted by the Commission and substance incorporated in Article 26]

ARTICLE 28

Depositaries of treaties

1. The depositary of a treaty, which may be a state or an international organization, shall be designated by the contracting states in the treaty or in some other manner.

2. The functions of a depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.

ARTICLE 29

Functions of depositaries

1. The functions of a depositary, unless the treaty otherwise provides, comprise in particular:

(a) Keeping the custody of the original text of the treaty, if entrusted to it;

(b) Preparing certified copies of the original text and any further text in such additional languages as may be required by the treaty or by the established rules of an international organization, and transmitting them to the contracting states;

(c) Receiving any signatures to the treaty and any instruments and notifications relating to it;

(d) Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the state in question;

(e) Informing the contracting states of acts, communications and notifications relating to the treaty;

(f) Informing the contracting states when the number of signatures or of instruments of ratification, accession, acceptance or approval required for the entry into force of the treaty have been received or deposited.

(g) Performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a state and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the other contracting states or, where appropriate, of the competent organ of the organization concerned.

ARTICLE 29 (*bis*)*Communications and notifications to contracting states*

Whenever it is provided by the present articles that a communication or notification shall be made to contracting states, such communication or notification shall be made:

(a) In cases where there is no depositary, directly to each of the states in question;

(b) In cases where there is a depositary, to the depositary for communication to the states in question.

CHAPTER III

SPECIAL MISSIONS

A. INTRODUCTION

SUMMARY OF THE COMMISSION'S PROCEEDINGS

30. At its Tenth Session, in 1958, the International Law Commission adopted a set of draft articles on diplomatic intercourse and immunities. The Commission observed, however, that the draft dealt only with permanent diplomatic missions. Diplomatic relations between states also assumed other forms that might be placed under the heading of "*ad hoc* diplomacy," covering itinerant envoys, diplomatic conferences and special missions sent to a state for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the Special Rapporteur to make a study of the question and to submit his report at a future session.⁸ The Commission decided at its Eleventh Session (1959) to include the question of *ad hoc* diplomacy as a special topic on the agenda of its Twelfth Session (1960).

31. Mr. A. E. F. Sandström was appointed Special Rapporteur. He submitted his report to the Twelfth Session, and on the basis of this report the Commission took decisions and drew up recommendations for the rules concerning special missions.⁹ The Commission's draft was very brief. It was based on the idea that the rules on diplomatic intercourse and immunities in general prepared by the Commission should on the whole be applied to special missions by analogy. The Commission expressed the opinion that this brief draft should be referred to the Conference on Diplomatic Intercourse and Immunities convened at Vienna in the spring of 1961. But the Commission stressed that it had not been able to give this subject the thorough study it would normally have done. For that reason, the Commission regarded its draft as only a preliminary survey, carried out in order to put forward certain ideas and suggestions which should be taken into account at the Vienna Conference.¹⁰

⁸ Official Records of the General Assembly, 13th Sess., Supp. No. 9 (A/3859), par. 51.

⁹ Yearbook of the International Law Commission, 1960, Vol. II, pp. 179 and 180.

¹⁰ *Ibid.*, p. 179, par. 37.

32. At its 943rd plenary meeting on 12 December 1960, the General Assembly decided,¹¹ on the recommendation of the Sixth Committee, that these draft articles should be referred to the Vienna Conference with the recommendation that the Conference should consider them together with the draft articles on diplomatic intercourse and immunities. The Vienna Conference placed this question on its agenda and appointed a special Sub-Committee to study it.¹²

33. The Sub-Committee noted that these draft articles did little more than indicate which of the rules on permanent missions applied to special missions and which did not. The Sub-Committee took the view that the draft articles were unsuitable for inclusion in the final convention without long and detailed study which could take place only after a set of rules on permanent missions had been finally adopted. For this reason, the Sub-Committee recommended that the Conference should refer this question back to the General Assembly so that the Assembly could recommend to the International Law Commission further study of the topic, *i.e.*, that it continue to study the topic in the light of the Vienna Convention on Diplomatic Relations which was then drawn up. At its fourth plenary meeting, on 10 April 1961, the Conference adopted the Sub-Committee's recommendation.¹³

34. The matter was again submitted to the General Assembly. On 18 December 1961, the General Assembly, on the recommendation of the Sixth Committee, adopted Resolution 1687 (XVI), in which it requested the International Law Commission to study the subject further and to report thereon to the General Assembly.

35. At its Fourteenth Session, the Commission decided to place the question of special missions on the agenda of its Fifteenth Session, and requested the Secretariat to prepare a working paper¹⁴ on the subject.¹⁵

36. During its Fifteenth Session, at the 712th meeting, the Commission appointed Mr. Milan Bartoš as Special Rapporteur for the topic of special missions.¹⁶

37. On that occasion, the Commission took the following decision:

"With regard to the approach to the codification of the topic, the Commission decided that the Special Rapporteur should prepare a draft of articles. These articles should be based on the provisions of the Vienna Convention on Diplomatic Relations, 1961, but the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions. In addition, the Commission thought that the time was not yet ripe for deciding whether the draft articles on special missions should be in the form of an additional protocol to the Vienna

¹¹ Resolution 1504 (XV).

¹² The Sub-Committee was composed of the representatives of Ecuador, Iraq, Italy, Japan, Senegal, the USSR, the United Kingdom, the United States of America and Yugoslavia.

¹³ Yearbook of the International Law Commission, 1963, Vol. II, Doc. A/CN.4/155, pars. 44-45.

¹⁴ A/CN.4/155 (see footnote 13 above).

¹⁵ Official Records of the General Assembly, 17th Sess., Supp. No. 9 (A/5209), par. 76.

¹⁶ *Ibid.*, 18th Sess., Supp. No. 9 (A/5509), par. 65.

Convention, 1961, or should be embodied in a separate convention or in any other appropriate form, and that the Commission should await the Special Rapporteur's recommendations on that subject."¹⁷

38. In addition, at the same session, the Commission considered again whether the study of special missions should also cover the status of government delegates to congresses and conferences, and it inserted the following paragraph in its annual report to the General Assembly:

"With regard to the scope of the topic, the members agreed that the topic of special missions should also cover itinerant envoys, in accordance with its decision at its 1960 session.¹⁸ At that session the Commission had also decided¹⁹ not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between states and inter-governmental organizations. At the present session, the question was raised again, with particular reference to conferences convened by states. Most of the members expressed the opinion, however, that for the time being the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences."²⁰

39. The Special Rapporteur submitted his report²¹ and the Commission, at its Sixteenth Session, considered it twice. First, at the 723rd, 724th and 725th meetings, it engaged in a general discussion and gave the Special Rapporteur general instructions on continuing his study and submitting a second report at the following session. Secondly, at the 757th, 758th, 760th-763rd and 768th-770th meetings, it examined a number of draft articles and adopted sixteen articles which were included in its report to the General Assembly on the work of its Sixteenth Session, and were to be supplemented, if necessary, during its Seventeenth Session. It decided that these articles would be submitted to the General Assembly and to the governments of Member States for information.

40. Owing to the circumstances prevailing at the time of its regular session in 1964, the General Assembly did not discuss the report and consequently did not express its opinion to the Commission. Accordingly, the Commission had to resume its work on the topic at the point it had reached at its Sixteenth Session in 1964.

41. The topic of special missions was placed on the agenda of the Commission's Seventeenth Session, at which the Special Rapporteur submitted his second report on the subject.²² The Commission considered that report at its 804th, 809th, 817th, 819th and 820th meetings.

42. The Commission considered all the articles proposed in the Special Rapporteur's second report. It adopted 28 articles of the draft, which follow on from the sixteen articles adopted at the Sixteenth Session. The Commission requested that the General Assembly should consider all the

¹⁷ *Ibid.*, par. 64.

¹⁸ Yearbook of the International Law Commission, 1960, Vol. I, 565th meeting, par. 26.

¹⁹ *Ibid.*, par. 25.

²⁰ Official Records of the General Assembly, 18th Sess., Supp. No. 9 (A/5509), par. 63.

²¹ A/CN.4/166.

²² A/CN.4/179.

articles adopted at the Sixteenth and Seventeenth Sessions as a single draft.

43. In preparing the draft articles, the Commission has sought to codify the modern rules of international law concerning special missions, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law.

44. In conformity with Articles 16 and 21 of its Statute, the Commission decided to communicate its draft articles on special missions to the governments through the Secretary-General, inviting their comments. The governments are asked to submit their comments by 1 May 1966. This short time-limit is regarded as essential if the Commission is to finish its preparation of the final draft on special missions with its present membership.

45. The Commission decided to submit to the General Assembly and to the governments of Member States, in addition to the draft articles in section B of this chapter, certain other decisions, suggestions and observations (set forth in section C) on which the Commission requests any comments likely to facilitate its subsequent work.

B. DRAFT ARTICLES ON SPECIAL MISSIONS²³

PART I

GENERAL RULES²⁴

ARTICLE 1²⁵

The sending of special missions

1. For the performance of specific tasks, states may send temporary special missions with the consent of the state to which they are to be sent.

2. The existence of diplomatic or consular relations between states is not necessary for the sending or reception of special missions.

Commentary

(1) Article 1 of the draft on special missions differs from the provisions of the Vienna Convention on Diplomatic Relations. The difference is due to the fact that the tasks and duration of special missions differ from those of regular missions.

²³ Arts. 1-16 were adopted by the Commission at its Sixteenth Session (1964) on the basis of the Special Rapporteur's first report (A/CN.4/166). Arts. 16-36 of that report were not discussed by the Commission and were replaced by Arts. 17-40 of the Special Rapporteur's second report (A/CN.4/179) which was discussed by the Commission at its Seventeenth Session and formed the basis of Arts. 17-44 of these draft articles.

²⁴ Title adopted at the 319th meeting.

²⁵ Introduced as Art. 1 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 757th and 758th meetings of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 772nd meeting. The Commission decided that this article would be preceded by a definitions article.

(2) A special mission must possess the following characteristics:

(a) It must be sent by a state to another state. Special missions cannot be considered to include missions sent by political movements to establish contact with a particular state, or missions sent by states to establish contact with a movement. In the case of insurrection or civil war, however, any such movements which have been recognized as belligerents and have become subjects of international law have the capacity to send and receive special missions. The same concept will be found in the Vienna Convention on Diplomatic Relations (Article 3, paragraph 1 (a)).

(b) It must not be in the nature of a mission responsible for maintaining general diplomatic relations between the states; its task must be precisely defined. But the fact that a task is defined does not mean that its scope is severely limited; in practice, some special missions are given far-reaching tasks of a general nature, including the review of relations between the states concerned and even the formulation of the general policy to be followed in their relations. But the task of a special mission is in any case specified and it differs from the functions of a permanent diplomatic mission, which acts as a general representative of the sending state (Article 3, paragraph 1 (a) of the Vienna Convention on Diplomatic Relations). In the Commission's view, the specified task of a special mission should be to represent the sending state in political or technical matters.

(c) A state is not obliged to receive a special mission from another state unless it has undertaken in advance to do so. Here, the draft follows the principle set out in Article 2 of the Vienna Convention, but the Commission points out that the way in which consent is expressed to the sending of a permanent diplomatic mission differs from that used in connexion with the sending of a special mission. In the case of a special mission, consent usually takes a more flexible form. In practice, such an undertaking is generally given only by informal agreement; less frequently, it is given by formal treaty providing that a specific task will be entrusted to the special mission; one characteristic of a special mission, therefore, is that consent for it must have been given in advance for a specific purpose.

(d) It is of a temporary nature. Its temporary nature may be established either by the term fixed for the duration of the mission or by its being given a specific task, the mission usually being terminated either on the expiry of its term or on the completion of its task.²⁶ Regular diplomatic missions are not of this temporary nature, since they are permanent (Article 2 of the Vienna Convention on Diplomatic Relations). However, a permanent specialized mission which has a specific sphere of competence and may exist side by side with the regular permanent diplomatic mission is not a special mission and does not possess the characteristics of a special mission. Examples of permanent specialized missions are the United States missions for economic co-operation and assistance to certain countries, the Australian immigration missions, the industrial co-operation missions of the socialist countries, and commercial missions or delegations which are of a diplomatic nature, etc.

²⁶ See Art. 12,

(3) The sending and reception of special missions may—and most frequently does—occur between states which maintain regular diplomatic or consular relations with each other, but the existence of such relations is not an essential pre-requisite. Where such relations do exist and the regular diplomatic mission is functioning, the special mission's particular task may be one which would have been within the competence of the ordinary mission if there had been no special mission. During the existence of the special mission, however, states are entitled to conduct through the special mission relations which are within the competence of the general mission. The Commission deemed it advisable to stress that the existence of diplomatic or consular relations between the states in question is not a pre-requisite for the sending and reception of special missions. The Commission considered that special missions can be even more useful where such relations do not exist. The question whether special missions can be used between states or governments which do not recognize each other was also raised. The Commission considered that, even in those cases, special missions could be helpful in improving relations between states, but it did not consider it necessary to add a clause to that effect to Article 1.

(4) The manner in which the agreement for sending and receiving a special mission is concluded is a separate question. In practice, there are a number of ways of doing so, namely:

(a) An informal diplomatic agreement providing that a special mission will be sent and received;

(b) A formal treaty providing that certain questions will be discussed and settled through a special mission;

(c) An offer by one state to send a special mission for a specific purpose, and the acceptance, even tacit, of such a mission by the other state;

(d) An invitation from one party to the other to send a special mission for a specific purpose, and the acceptance of the invitation by the other party.

(5) Where regular diplomatic relations are not in existence between the states concerned—whether because such relations have been broken off or because armed hostilities are in progress between the states—the sending and reception of special missions are subject to the same rules cited above. Experience shows that special missions are often used for the settlement of preliminary questions with a view to the establishment of regular diplomatic relations.

(6) The fact that a special mission is sent and received does not mean that both states must entrust the settlement of the problem in question to special missions appointed by the two parties. Negotiations with a delegation sent by a state for a specific purpose may also be conducted by the regular organs of the receiving state without a special mission being appointed. Both these practices are considered to be usual, and in the second case the special mission acts on the one side and the Ministry (or some other permanent organ) on the other. The Commission did not deem it necessary to refer to this concept in the text.

(7) Cases also arise in practice in which a specific delegation, composed of the head or of members of the regular permanent diplomatic mission accredited to the country in which the negotiations are taking place, appears in the capacity of a special mission. Practice provides no clear-cut answer to the question whether this is a special mission in the proper sense or an activity of the permanent mission.

ARTICLE 2²⁷

The task of a special mission

The task of a special mission shall be specified by mutual consent of the sending state and of the receiving state.

Commentary

(1) The text of this article differs from the corresponding article (Article 4) of the Vienna Convention on Diplomatic Relations.

(2) The scope and content of the task of a special mission are determined by mutual consent. Such consent may be expressed by any of the means indicated in paragraph (4) of the commentary on Article 1. In practice, however, the agreement to the sending and reception of special missions is usually of an informal nature, often merely stating the purpose of the mission. In most cases, the exact scope of the task becomes clear only during the negotiations, and it frequently depends on the full powers or the authority conferred on the representatives of the negotiating parties.

(3) Diplomatic history records a number of cases where special missions have exceeded the task for which they were sent and received. The customary comment is that this is done to take advantage of the opportunity, and that any good diplomat makes use of such opportunities. There are also a number of cases showing that special missions for ceremonial and formal purposes have taken advantage of propitious circumstances to conduct negotiations on other matters. The limits of the capacity of a special mission to transact business are normally determined by full powers, given in good and due form, but in practice the legal validity of acts by special missions which exceed the missions' powers often depends upon their acceptance by the respective governments. Though the Commission considered this question to be of importance to the stability of relations between states, it did not deem it necessary to propose an article dealing with it and considered that its solution was closely related to Section II (Conclusion of treaties by states) of Part I of the draft articles on the law of treaties.²⁸

(4) The tasks of a special mission are sometimes determined by a prior treaty. In this case, the special mission's task and the extent of its powers

²⁷ Introduced as Art. 2 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 758th meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 772nd meeting.

²⁸ Official Records of the General Assembly, 17th Sess., Supp. No. 9 (A/5209), Arts. 4 and 5 (pp. 7-9).

depend on the treaty. This is so, for instance, in the case of commissions appointed to draw up trading plans for a specific period under a trade treaty. However, these cases must be regarded as exceptional. In most cases, on the contrary, the task is determined by informal *ad hoc* mutual agreement.

(5) In connexion with the task and the extent of the powers of a special mission, the question also arises whether its existence encroaches upon the competence of the regular diplomatic mission of the sending state accredited to the other party. It is generally agreed that the permanent mission retains its competence, even during the existence of the special mission, to transmit to the other contracting party, to which it is accredited, communications from its government concerning, *inter alia*, the limit of the special mission's powers and, if need be, the complete or partial revocation of the full powers given to it or the decision to break off or suspend the negotiations; but all such actions can apply only to future acts of the special mission. The question of the parallel existence of permanent and special missions, and the problem of overlapping authority, are of considerable importance for the validity of acts performed by special missions. Some members of the Commission held that, during the existence of the special mission, its task is assumed to be excluded from the competence of the permanent diplomatic mission. The Commission decided to draw the attention of governments to this point and to ask them to decide whether or not a rule on the matter should be included in the final text of the articles, and if so to what effect.

(6) If the special mission's activity or existence comes to an end, the full competence of the permanent diplomatic mission is usually restored, even with respect to matters relating to the special mission's task, except in cases where special missions have been given exclusive competence, by treaty, to regulate relations in respect of certain matters between the states concerned.

ARTICLE 3²⁹

Appointment of the head and members of the special mission or of members of its staff

Except as otherwise agreed, the sending state may freely appoint the head of the special mission and its members as well as its staff. Such appointments do not require the prior consent of the receiving state.

Commentary

(1) In regard to the head of the special mission, the text of Article 3 differs from the rule in Article 4 of the Vienna Convention on Diplomatic Relations. Whereas the head of a permanent diplomatic mission must receive the *agrément* of the receiving state, as a general rule no *agrément*

²⁹ Introduced as Art. 3 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 760th meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

is required for the appointment of the head of a special mission. In regard to the members and staff of the special mission, Article 3 is based on the idea expressed in the first sentence of Article 7 of the Vienna Convention on Diplomatic Relations: that the sending state may freely appoint them.

(2) The Commission notes that, in state practice, consent to the sending and receiving of a special mission does not ordinarily imply acceptance of its head, members or staff. The Commission does not share the view that the declaration of acceptance of the persons forming the special mission should be included in the actual agreement to receive the mission; it considered that consent to receive a special mission and consent to the persons forming it are two distinct matters.³⁰

(3) The proposition that no *agrément* or prior consent shall be required for the head, members or staff of a special mission in no way infringes the sovereign rights of the receiving state. Its sovereign rights and interests are safeguarded by Article 4 (persons declared *non grata* or not acceptable).

(4) In practice, there are several ways in which, in the absence of prior agreement, the receiving state can limit the sending state's freedom of choice. The following instances may be quoted:

(a) Consent can be given in the form of a visa issued in response to a request from the sending state indicating the purpose of the journey, or in the form of acceptance of the notice of the arrival of a specific person on a special mission.

(b) The receiving state can express its wishes with regard to the level of the delegations.

(c) In practice the formal or informal agreement concerning the sending and reception of a special mission sometimes includes a clause specifically designating the person or persons who will form the special mission. In this case the sending state cannot make any changes in the composition of the special mission without the prior consent of the state to which it is being sent. In practice all that is done is to send notice of the change in good time, and in the absence of any reaction, the other party is presumed to have accepted the notice without any reservation.

(5) In some cases, although less frequently, it is stipulated in a prior agreement that the receiving state must give its consent. This occurs primarily where important and delicate subjects are to be dealt with through the special mission, and especially in cases where the head of the mission and its members must be eminent politicians.

(6) The question arises whether the receiving state is recognized as having the right to make acceptance of the person appointed conditional upon its own consent. In this case it sometimes happens that the state which raises the objection asks to be consulted on the selection of the person. Its refusal does not mean that it considers the person proposed *persona non grata*, being of an objective and procedural rather than a personal nature, although it is difficult to separate these two aspects in practice. The Com-

³⁰ For the contrary view, see Yearbook of the International Law Commission, 1960, Vol. II, pp. 112-117.

mission considers that this is not the general practice and that provision for such a situation should be made in a special agreement.

(7) The head of the special mission and its members are not in practice designated by name in the prior agreement, but in certain cases an indication is given of the qualifications they should possess. This applies either to meetings at a specific level (*e.g.*, meetings of Ministers for Foreign Affairs or of other eminent persons) or to missions which must be composed of specially qualified experts (*e.g.*, meetings of hydraulic engineers or other experts). In such cases, the special mission is regularly composed if its head and its members possess certain qualifications or hold certain posts, and thus the sending state is subject to certain restrictions with respect to the selection and the composition of its special mission. Even though this is a widespread practice, the Commission considered that there was no need to include a rule to that effect in Article 3, but that the situation was already covered by the proviso "except as otherwise agreed."

(8) The Commission also took into consideration the practice whereby certain states (by analogy with the provision contained in the last sentence of Article 7 of the Vienna Convention on Diplomatic Relations) require prior consent in the case of members of the armed forces and persons of similar standing. The Commission considers that this rule is out of date and not universally applied.

ARTICLE 4³¹

Persons declared non grata or not acceptable

1. The receiving state may, at any time and without having to explain its decision, notify the sending state that the head or any other member of the special mission or a member of its staff is *persona non grata* or not acceptable.

2. In any such case, the sending state shall either recall the person concerned or terminate his functions with the special mission. If the sending state refuses to carry out this obligation, the receiving state may refuse to recognize the person concerned as the head or a member of the special mission or as a member of its staff.

Commentary

(1) The text of Article 4 follows Article 9 of the Vienna Convention on Diplomatic Relations.

(2) Whether or not the receiving state has accepted the mission, it unquestionably has the right to declare the head or a member of a special mission or a member of the mission's staff *persona non grata* or not acceptable at any time. It is not obliged to state its reasons for this decision.³²

³¹ Introduced as Art. 4 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 760th meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

³² This was also the opinion of the International Law Commission in 1960. See Yearbook of the International Law Commission, 1960, Vol. II, pp. 112-115 and p. 180.

(3) It may be added that, in practice, a person is seldom declared *persona non grata* or not acceptable if the receiving state has already signified its acceptance of a particular person; but the majority of the Commission takes the view that even in that case the receiving state is entitled to make such a declaration. Nevertheless, the receiving state very rarely takes advantage of this prerogative; but in practice it may sometimes inform the sending state, through the regular diplomatic channel, that the head or a certain member of the special mission, even though consent has already been given to his appointment, represents an obstacle to the fulfilment of the mission's task.

(4) In practice, the right of the receiving state to declare the head or a member of the special mission *persona non grata* or not acceptable is not often exercised inasmuch as such missions are of short duration and have specific tasks. Nevertheless, instances do occur. In one case, the head of a special mission sent the minister of the receiving state a letter considered offensive by that state, which therefore announced that it would have no further relations with the writer. As a result, the activities of the special mission were virtually paralysed, and the sending state was obliged to recall the head of the special mission and to replace him.

(5) Where the meetings with the special mission are to be held at a specific level, or where the head or the members of the mission are required to possess certain specific qualifications and no other person in the sending state possesses such qualifications, it must be presumed that in practice the person concerned cannot be declared *persona non grata* or not acceptable, and that the only course is to break off the conversations, since the sending state is not in a position to choose among several persons with the necessary qualifications. The receiving state cannot, for instance, ask the sending state to change its Minister for Foreign Affairs because he is regarded as *persona non grata*, for that would constitute interference in the domestic affairs of the sending state. Nevertheless, it is under no obligation to enter into contact with an undesirable person, if it considers that refusal to do so is more advantageous to it than the actual contact with the other state. This, however, is not a juridical question, and the Commission therefore decided not to deal with this situation or to regulate it in the text of the article.

ARTICLE 5³³

Sending the same special mission to more than one state

A state may send the same special mission to more than one state. In that case the sending state shall give the states concerned prior notice of the sending of that mission. Each of those states may refuse to receive such a mission.

³³ Introduced as Art. 5 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 761st meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

Commentary

(1) There is no corresponding provision in the Vienna Convention on Diplomatic Relations.

(2) The International Law Commission scarcely considered this question in 1960, and it has been given scant attention in the literature. At that time the majority of the Commission took the view that it was completely unnecessary to make provision for the matter, and the previous Special Rapporteur, Mr. Sandström, believed that the question did not arise at all.³⁴ Mr. Jiménez de Aréchaga, however, expressed the view on that occasion that the situation envisaged was by no means unusual. He pointed out that special missions were sent to a number of neighbouring states when changes of government took place in the sending states and on ceremonial occasions.³⁵ Subsequently studies have shown that cases of special missions being sent to more than one state occur in practice.

(3) Observations of practice indicate that there are two cases in which the problem of the appointment of a special mission to more than one state clearly arises. They are the following:

(a) Where the same special mission, with the same membership and the same task, is sent to several states, which are usually neighbours or situated in the same geographical region. In the case of political missions (*e.g.*, goodwill missions), there have been instances of states refusing to enter into contact with a mission appointed to several other states with which they did not enjoy good relations. Thus the question is not simply one of relations between the sending and receiving states, but also of relations between the states to which the special mission is sent. Although this raises a political issue, it is tantamount, from the juridical standpoint, to a proviso that where special missions are sent to more than one state, simultaneously or successively, consent must be obtained from each of the states concerned.

(b) Although, according to the strict rule, a special mission is appointed individually, either simultaneously or successively, to each of the states with which contacts are desired, certain exceptions arise in practice. One custom is that known as circular appointment, which—rightly, in the view of the Commission—is considered discourteous by experts in diplomatic protocol. In this case a special mission or an itinerant envoy is given full powers to visit more than one country, or a circular note is sent to more than one state informing them of the intention to send a special mission of this kind. If the special mission is an important one, the general practice is to lodge a protest against this breach of courtesy. If the special mission is sent to obtain information regarding future technical negotiations, the matter is usually overlooked, although it may be observed that such special missions are placed on the level of a commercial traveller with general powers of agency. A distinction must be made between this practice of so-called circular appointment and the case of a special mission

³⁴ Yearbook of the International Law Commission, 1960, Vol. II, p. 109 and p. 180.

³⁵ *Ibid.*, p. 116.

authorized to conduct negotiations for the conclusion of a multilateral convention which is not of general concern. In this case its full powers may consist of a single document accrediting it to all the states with which the convention is to be concluded (*e.g.*, the Bulgarian-Greek-Yugoslav negotiations for a settlement of certain questions connected with their common frontier).

(4) It should also be mentioned that, in practice, a special mission of the kind referred to in paragraph 3 (a) above, having been accepted in principle, sometimes finds itself in the position of being requested, because of the position it has adopted during its contacts with the representatives of the first state visited, to make no contact with another specific state to which it is being sent. This occurs particularly in cases where it is announced that the special mission has granted the first state certain advantages which are contrary to the interests of the second state. The latter may consider that the matter to be dealt with has been prejudged, and may announce that the special mission which it had already accepted has become pointless. This is not the same as declaring the head and members of the mission *persona non grata*, since in this case the refusal to accept them is based not on their subjective qualities but on the objective political situation created by the special mission's actions and the position taken by the sending state. It is, as it were, a restriction of diplomatic relations expressed solely in the revocation of the consent of the receiving state to accept the special mission. This clearly demonstrates the delicacy of the situation created by the practice of sending the same special mission to more than one state.

(5) The Commission found that in this case the sending state is required to give prior notice to the states concerned of its intention to send such a special mission to more than one state. This prior notice is needed in order to inform the states concerned in due time not only of the task of a special mission but also of its itinerary. This information is deemed necessary in order to enable the states concerned to decide in advance whether they will receive the proposed special mission. The Commission stressed that it was essential that the states so notified should be entitled only to state their position on the receivability of the special mission, and not to request that such a mission should not be sent to another state as well.

ARTICLE 6 ³⁶

Composition of the special mission

1. The special mission may consist of a single representative or of a delegation composed of a head and other members

2. The special mission may include diplomatic staff, administrative and technical staff and service staff.

³⁶ Introduced as Art. 6, pars. (1) and (4) of Special Rapporteur's first report (A/CN.4/166). Discussed at the 761st meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

3. In the absence of an express agreement as to the size of the staff of a special mission, the receiving state may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances, to the tasks and to the needs of the special mission.

Commentary

(1) The text of Article 6, paragraphs (2) and (3), adopted by the Commission is based on Article 1 (c) and Article 11, paragraph 1, of the Vienna Convention on Diplomatic Relations. The text of paragraph 1 of Article 6 reflects the special features of the institution of special missions.

(2) In practice, a special mission may be composed of only one member or of several members. If the special mission is entrusted to only one member, the latter is then a special delegate, described by the Commission in Article 6 as a "representative." If it has two members, the sending state decides which of the two will be the head or first delegate. If the special mission consists of three or more members, the rule observed in practice is that a head of the mission (chairman of the delegation) should be designated.

(3) Precedence within the delegation is fixed, according to general practice, by the sending state, and is communicated to the receiving state or published in the manner normally adopted with respect to multilateral meetings. Neither the rank of the delegates according to the protocol of the sending state nor the title or function of the individual delegates authorizes *ex jure* any automatic change in the order of precedence established in the list communicated, without subsequent communication of an official rectification to the receiving state. However, according to international custom, a member of the government takes precedence over other officials, and the head of delegation must not have lower diplomatic rank than the members of the delegation; but, as this custom is not observed in all cases and is not regarded as obligatory, it is not reflected in the text.

(4) In practice a special mission may include, in addition to the head, his deputy, the other titular members and their deputies. The Commission considered that the composition of the special mission and the titles of its members were a matter exclusively within the competence of the sending state and that in the absence of an agreement on it by the parties it was not governed by any international rule. Accordingly, the Commission did not think it necessary to include a rule on it in the article.

(5) Whether a special mission is composed of a single representative or of a delegation, it may be accompanied by the necessary staff. The Commission accepted the designation of the staff set out in Article 1 (c) of the Vienna Convention on Diplomatic Relations, but pointed out that the staff of special missions often includes specific categories such as advisers and experts. The Commission considered that these were included in the category of diplomatic staff.

(6) In practice, even in special missions the problem of limiting the size of the mission arises. The rule relating to permanent missions is contained

in Article 11 of the Vienna Convention on Diplomatic Relations and the text of Article 6, paragraph 3, proposed by the Commission is based on that rule.

(7) With regard to the limitation of the size of the special mission, attention should be drawn not only to the general rule, but also to certain particular cases which occur in practice. On this point:

(a) It is customary for the receiving state to notify the sending state that it wishes the size of the mission to be restricted because, for example, the housing, transport and other facilities it can offer are limited.

(b) Less frequently, in practice, the agreement on the establishment or reception of the special mission limits the size of the mission; in some cases the agreement specifies a minimum number of members (joint meetings) and even calls for a mission specifically composed of members having stated qualifications (generally according to the problems to be treated).

(c) With respect to the size of the mission, attention should also be drawn to the practice of "balancing rank." It is customary, during preliminary conversations and negotiations on the sending and receiving of a mission, to designate the rank and status of the head and members of the special mission, so that the other party may act accordingly and thus avoid any disparity, for if representatives were received by a person of lower rank than their own, it might be considered an affront to their country. This, however, is a question of protocol rather than of law.

ARTICLE 7 ³⁷

Authority to act on behalf of the special mission

1. The head of the special mission is normally the only person authorized to act on behalf of the special mission and to send communications to the receiving state. Similarly, the receiving state shall normally address its communications to the head of the mission.

2. A member of the mission may be authorized either by the sending state or by the head of the special mission to replace the head of the mission if the latter is unable to perform his functions, and to perform particular acts on behalf of the mission.

Commentary

(1) Article 7 is not derived directly from the Vienna Convention on Diplomatic Relations. Its text was drawn up on the basis of contemporary international practice.

(2) The main question from the legal point of view is to determine the rules concerning authority to act on behalf of the special mission. Only the head of a special mission is normally authorized to act on behalf of

³⁷ Introduced as Art. 6, pars. (2) and (3) of Special Rapporteur's first report (A/CN.4/166). Discussed at the 761st meeting of the Commission. Drafting Committee's text, numbered 6A, discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

the special mission and to address communications to the receiving state. The Commission laid stress on the word "normally," as the parties may also make provision for other persons than its head to act on behalf of a special mission. These other possibilities are, however, exceptional.³⁸

(3) *Head of the special mission.* As explained in the commentary on the preceding article, if the mission is composed of three or more members, it must as a general rule have a head. If it is composed of only two members, the sending state decides whether one shall bear the title of first delegate or head of the special mission. Whether he is called first delegate or head of mission, he will be regarded as the head of the special mission by the receiving state, which will communicate with him and receive from him statements on behalf of the special mission. For this reason, the question of the existence of a head of mission is one of great importance, notwithstanding the fact that the International Law Commission did not deal with it in 1960. Mr. Jiménez de Aréchaga, on the other hand, considers that in practice a special mission has a head, but he does not go further into the question.³⁹ In the Commission's opinion, as expressed at its Sixteenth Session, the matter of the appointment of a head of the special mission is important from the legal standpoint.

(4) In Article 7, paragraph 1, the Commission established a mere presumption that the head of the special mission is the person who gives any authorizations that may be required, but the sending state may in addition authorize the other members of the special mission to act on its behalf by giving them full powers. There are in practice instances of special missions whose members are delegates with equal rights under collective letters of credence for performing the tasks assigned to the special mission. Practice is not, however, uniform. Some states hold that the person mentioned first in the letters of credence issued to the special mission is its head. Others, particularly states which send delegations, claim equal rights for all members of such delegations. A common example is a mission composed of several members of a coalition government or of members of parliament representing various political groups. The advocates of the *in corpore* concept of equal rank argue that the composition of the delegation is a manifestation of the common outlook and the equal standing of the members of the delegation. The practice is not uniform.

(5) There are also instances in practice where the right to act on behalf of a special mission is held to vest only in some of its members who possess a collective authority (for the head and certain members of the mission to act collectively on its behalf) or a subsidiary authority (for a member of a mission to act on its behalf if the head of the mission is unable to perform his functions or if he authorizes him to do so). The Commission considers that these are exceptional cases falling outside normal practice and are determined by the practice of the sending state. It considered that there was no need to include rules covering such cases in the body of the article.

³⁸ See pars. 4-11 of this commentary.

³⁹ Yearbook of the International Law Commission, 1960, Vol. II, pp. 116 and 179-180.

(6) The Commission did not cover in Article 7, paragraph 1, the problem of the limits of the authority given to special missions. That is a question governed by the general rules.

(7) *Deputy head of special mission.* In speaking of the composition of the special mission, it was said that sometimes a deputy head of mission was also appointed. The deputy's function is indicated by the fact that he is designated by the organ of the sending state which also appointed the head of the special mission, and that as a general rule the deputy head (who in practice is often called the vice-chairman of the delegation) acts without special appointment as head of the special mission whenever and wherever the head of mission is absent, unable to carry out his functions or recalled (in the last case, until the appointment of a new head has been notified to the other party). From the international standpoint, the rank of the deputy head in the special mission is considered to be next below that of the head of the mission. However, the deputy head does not take precedence of the members of the missions of other states with which his delegation enters into contact. His status as deputy head is effective only when he acts as head. The position of the deputy head of a special mission is referred to in Article 7, paragraph 2.

(8) From the technical standpoint, a member of the special mission whom the head of the mission himself has designated as his deputy (*i.e.*, the administrator of the mission) is not in practice regarded as the deputy head. The Commission did not, however, differentiate between these two classes of deputy head; it regarded them both as having the same status.

(9) *Chargé d'affaires ad interim of a special mission.* Very frequently the special mission arrives without its head or deputy head, that is to say, before them, since contact must be established and affairs conducted before their arrival. There may also be occasions when both its head and deputy head are absent during the course of its activities. In this case, a member of the mission provisionally assumes the duties of head of mission, acting on behalf of the head if the latter has so provided. The International Law Commission did not study this problem in 1960 and did not suggest that the rules of diplomatic law relating to *chargés d'affaires ad interim* should apply, in this connexion, to special missions.⁴⁰

(10) When a member of the mission is designated as *chargé d'affaires ad interim*, the rule in practice is for the appointment of the person to be entrusted with this function to be notified by the regular diplomatic mission of the sending state. This often occurs if the head of the mission is recalled "tacitly," if he leaves his post suddenly (as frequently happens when he returns to his country to get new instructions and remains there for some time) or if the mission arrives at its destination without its head and without his having given authorization in writing to the presumptive *chargé d'affaires*. The Commission regarded the position of such a person as comparable to that of an acting deputy and it provided that authority

⁴⁰ *Ibid.*, pp. 110 and 179-180. Mr. Sandström, the Special Rapporteur, was even of the opinion that this had no bearing on special missions.

for him to carry out his duties could be given either by the sending state or by the head of the special mission.

(11) In the case of special missions dealing with a complex task, certain members of the special mission or of its staff are in practice given power to carry out specific acts on behalf of the special mission. The Commission considered this practice to be important from the legal point of view and it included a rule on the subject in the text (paragraph 2, *in fine*).

(12) The Commission takes the view that the rules applicable to the head of the special mission also apply to a single delegate, described in the text of Article 6 as the "representative."

ARTICLE 8⁴¹

Notification

1. The sending state shall notify the receiving state of:

(a) The composition of the special mission and of its staff, and any subsequent changes;

(b) The arrival and final departure of such persons and the termination of their functions with the mission;

(c) The arrival and final departure of any person accompanying the head or a member of the mission or a member of its staff;

(d) The engagement and discharge of persons residing in the receiving state as members of the mission or as private servants of the head or of a member of the mission or of a member of the mission's staff.

2. If the special mission has already commenced its functions, the notifications referred to in the preceding paragraph may be communicated by the head of the special mission or by a member of the mission or of its staff designated by the head of the special mission.

Commentary

(1) Article 8 is modelled on Article 10, paragraph 1, of the Vienna Convention on Diplomatic Relations, with the changes required by the special features of the institution of special missions.

(2) In the case of special missions, too, the question arises to what extent the sending state is obliged to notify the composition of the special mission and the arrival and departure of its head, members and staff. As early as 1960, the International Law Commission adopted the position that in this respect the general rules on notification relating to permanent diplomatic missions are valid for special missions.⁴²

(3) In practice, however, the notification is not identical with that effected in the case of permanent diplomatic missions. In the first place, notification of the composition of a special mission usually takes place in two stages. The first is the preliminary notice, *i.e.*, an announcement of

⁴¹ Introduced as Art. 7 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

⁴² Yearbook of the International Law Commission, 1960, Vol. II, pp. 113 and 179-180.

arrival. This preliminary notice of the composition of the special mission should contain brief information concerning the persons arriving in the special mission and should be remitted in good time, so that the competent authorities of the receiving state (and the persons who, on its behalf, will maintain contact) are kept informed. The preliminary notice may in practice be remitted to the Ministry of Foreign Affairs of the receiving state or to its permanent diplomatic mission in the sending state. The second stage is the regular notification given through the diplomatic channel, *i.e.*, through the permanent mission in the receiving state (in practice, the special mission itself gives this notification directly only if the sending state has no permanent mission in the receiving state and there is no mission there of a third state to which the sending state has entrusted the protection of its interests). The Commission has not indicated these two stages of notification in the text, but has merely laid down the duty of the sending state to give the notification.

(4) Consequently, there are in practice certain special rules for notification of the composition and arrival of a special mission. They arise from the need to inform the receiving state in a manner different from that used for permanent missions. The International Law Commission did not refer to this fact in 1960.

(5) On the other hand, it is not customary to give separate notifications of the special mission's departure. It is presumed that the mission will leave the receiving state after its task has been fulfilled. However, it is customary for the head and members of the special mission to inform the representatives of the receiving state with whom they are in contact verbally, either during the course of their work or at the end of their mission, of the date and hour of their departure and the means of transport they propose to use. The Commission took the view that even in this case a regular notification should be given.

(6) A separate question is whether a head or member of a special mission who remains in the territory of the receiving state after his official mission has ended but while his visa is still valid should give notice of his extended stay. Opinion is divided on this question, and the answer depends on the receiving state's general laws governing aliens. If an extended stay of this kind does occur, however, it is an open question at what point of time the official stay becomes a private stay. Courtesy demands that the situation should be treated with some degree of tolerance. The Commission considers it unnecessary to include provisions governing this case in the text of the article.

(7) The right to recruit auxiliary staff for special missions locally is in practice limited to the recruitment of auxiliary staff without diplomatic rank or expert status, persons performing strictly technical functions (*e.g.*, chauffeurs), and service staff. The rule observed in practice is that the receiving state should ensure the availability of such services, for the performance of the functions of the special mission is often dependent on them. In 1960 the International Law Commission inclined to the view that the availability of these services to special missions should be regarded

as part of their general privileges. However, the receiving state is entitled to information on any local recruitment by special missions and, in the Commission's view, the latter must see that the authorities of the receiving state are kept regularly informed concerning the engagement and discharge of such staff, although all engagements of this kind, like the special mission itself, are of limited duration.

(8) In order to make notification easy and flexible in practice, the special mission, as soon as it begins to discharge its functions, effects notification direct, and not necessarily through the permanent diplomatic mission. The Commission has found this a sensible custom and has included a rule to that effect in the text of Article 8, paragraph 2.

ARTICLE 9⁴³

General rules concerning precedence

1. Except as otherwise agreed, where two or more special missions meet in order to carry out a common task, precedence among the heads of the special missions shall be determined by alphabetical order of the names of the states.

2. The precedence of the members and the staff of the special mission shall be notified to the appropriate authority of the receiving state.

Commentary

(1) The question of precedence among the heads of special missions arises only when several special missions meet, or when two missions meet on the territory of a third state. In practice, the rules of precedence among the heads of permanent diplomatic missions are not applied. The Commission did not consider that precedence among the heads of special missions should be governed by the provisions of the Vienna Convention, which are based on the presentation of credentials or on the date of arrival and on classes of heads of permanent missions, institutions irrelevant to special missions.

(2) The question of rank does not arise when a special mission meets with a delegation or organ of the receiving state. In practice, the rules of courtesy apply. The organ or delegation of the receiving state pays its compliments to the foreign special mission and the mission pays its respects to its hosts, but there is no question of precedence, properly so-called. The Commission has not dealt with this situation in the text of the articles, since it considers the rules of courtesy sufficient.

(3) The Commission believes that it would be wrong to include a rule that the order of precedence of heads of special missions should be determined by the diplomatic rank to which their titles would assign them under the general rules on classes of heads of permanent missions.

⁴³ Introduced as Art. 8 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 772nd meeting.

(4) Of particular significance is the fact that many heads of special missions have no diplomatic rank, and that heads of special missions are often personalities standing above all diplomatic rank. Some states make provision for such cases in their domestic law and in their practice, and give precedence to ministers who are members of the cabinet and to certain other high officials.

(5) The Commission wishes to stress that the rules of Article 9 are not valid with respect to special missions having ceremonial or formal functions. This question is dealt with in Article 10.

(6) The Commission considers that the rank of heads of special missions should be determined on the basis of the following considerations. Although in the case of *ad hoc* ceremonial diplomacy the heads of special missions are still divided into diplomatic classes (*e.g.*, special ambassador, special envoy), the current practice is not to assign them any special diplomatic title. All heads of special missions represent their states and are equal among themselves in accordance with the principle of the equality of states.

(7) The International Law Commission did not take up this question in 1960. During the Commission's debates in 1960, however, Mr. Jiménez de Aréchaga expressed the view that the rules on classes of heads of missions applied equally to special missions, and he did not restrict that conclusion to ceremonial missions.⁴⁴

(8) The practice developed in relations between states since the formation of the United Nations ignores the division of heads of special missions into classes according to their ranks, except in the case of ceremonial missions.

(9) There are two views concerning precedence among heads of special missions. According to the first, the question of rank does not arise with special missions. This follows from the legal rule laid down by Article 3 of the Regulation of Vienna of 19 March 1815. This provides that diplomatic agents on special mission shall not by this fact be entitled to any superiority of rank. Genet⁴⁵ deduces from this rule that they have no special rank by virtue of their mission, although they do have diplomatic status. However, Satow⁴⁶ takes a different view. Although the heads of special missions are not ranked in the same order as the heads of the permanent diplomatic missions, there does exist an order by which their precedence can be established. This, says Satow, is an order *inter se*. It is based on their actual diplomatic rank; and where they perform identical functions, precedence among them is determined on the basis of the order of presentation of their credentials or full powers.

(10) In his 1960 proposal,⁴⁷ Mr. A. E. F. Sandström, Special Rapporteur of the International Law Commission, took the view that although, under

⁴⁴ Yearbook of the International Law Commission, 1960, Vol. II, p. 116.

⁴⁵ Raoul Genet, *Traité de diplomatie et de droit diplomatique*, Paris, 1931, Vol. I, p. 86.

⁴⁶ Sir Ernest Satow, *A Guide to Diplomatic Practice*, 4th edition, London, 1957, p. 41.

⁴⁷ Yearbook of the International Law Commission, 1960, Vol. II, p. 109.

the Regulation of Vienna, a special mission enjoys no superiority of rank, the heads of special missions, at least ceremonial missions, nevertheless rank among themselves according to the order of the presentation of their credentials. Yet while advancing this opinion in the preliminary part of his report, he limited himself in his operative proposal (alternative I, Article 10, and alternative II, Article 3) to inserting the negative provision that the head of a special mission should not, by such position only, be entitled to any superiority of rank.

(11) Mr. Sandström took as his starting point the idea that rank was defined by membership in the diplomatic service or by diplomatic category. He therefore made a distinction between diplomatic missions, missions regarded as being diplomatic, and technical missions, which were not of a diplomatic character.

(12) In the first place, the Commission, at its Sixteenth Session, held that it is not true that the person heading a special diplomatic mission of a political character will necessarily be a member of the diplomatic service and have diplomatic rank. Such missions may be headed by other persons, so that diplomatic rank is a very unreliable criterion. Why should a high official of the state (for example, a member of the government) necessarily be ranked lower than a person bearing the title of ambassador? This would be incompatible with the current functional conception of diplomacy. On the other hand, it is considered that it would be erroneous to classify heads of mission having diplomatic rank according to their titles (for example, ambassador and minister plenipotentiary). They are all heads of diplomatic missions and have the same authority to represent their sovereign states, which, under Article 2 of the United Nations Charter, enjoy the right to sovereign equality. It follows that precedence *inter se* cannot be determined on the basis of diplomatic rank, at least in so far as juridical treatment is concerned (this does not affect the matter of courtesy towards the head of the special mission).

(13) Secondly, the Commission discarded the idea that different principles apply to so-called technical missions. Such missions are today usually headed by a career diplomat, and the task of every technical mission includes some political and representative elements.

(14) Again, precedence can hardly be established according to the order of the presentation of credentials by the heads of special missions. At most meetings of special missions the presumption, consistent with the facts, is that they arrive simultaneously,⁴⁸ and the individual and ceremonial presentation of credentials is a distinct rarity. For this reason, the date of presentation is without significance in practice.

(15) Precedence among heads of special missions, limited as it is in its effect to their relations *inter se*, is important only in the case of a multilateral meeting or of contacts among two or three states, not counting the receiving state. In contacts between the special mission and the representatives of the receiving state alone, the question of precedence does

⁴⁸ Thus, Jiménez de Aréchaga; see Yearbook of the International Law Commission, 1960, Vol. II, p. 116, par. 13.

not arise: as a matter of courtesy the host treats its guest with high consideration, and the latter is obliged to act in the same manner towards its host.

(16) The Commission considers that as a result, first, of the change which has taken place in the conception of the character of diplomacy, especially the abandonment of the theory of the exclusively representative character of diplomacy and the adoption of the functional theory,⁴⁹ and secondly, of the acceptance of the principle of the sovereign equality of states, the legal rules relating to precedence among heads of special missions have undergone a complete transformation. The principles of the Regulation of Vienna (1815) are no longer applicable. No general principle can be inferred, on the basis of analogy, from the rules of precedence governing permanent missions. For this reason, more and more use is being made of an automatic method of determining the precedence of heads of special missions, namely, the classification of delegates and delegations according to the alphabetical order of the names of the participating states. In view of the linguistic differences in the names of states, the custom is also to state the language in which the classification will be made.⁵⁰ This is the only procedure which offers an order capable of replacing that based on rank, while at the same time ensuring the application of the rules on the sovereign equality of states.⁵¹

(17) The International Law Commission did not go into the question of precedence within a special mission. It believes that each state must itself determine the internal order of precedence among the members of the special mission and that this is a matter of protocol only, the order of precedence being sent to the receiving state by the head of the special mission either direct or through the permanent diplomatic mission. This rule forms the subject of Article 9, paragraph 2.

(18) The Commission also believes that there are no universal legal rules determining the order of precedence as between members of different special missions, or as between them and members of permanent diplomatic missions, or as between them and the administrative officials of the receiving state.

(19) It frequently happens that special missions meet in the territory of a third state which is not involved in their work. In this case it is important to the receiving state that the precedence of the heads of the special missions, or rather of the missions themselves, should be fixed, so

⁴⁹ This cumulation of the functional and the representative character is confirmed by the fourth paragraph of the Preamble and by Art. 3 of the Vienna Convention on Diplomatic Relations.

⁵⁰ Mr. Sandström too used this method in dealing with the question of the participation of *ad hoc* diplomats in congresses and conferences (Chap. II, Art. 6).

⁵¹ In order to bring the practice further into line with the principle of equality, it is now customary for lots to be drawn, the initial letter of the name of the state thus chosen indicating the beginning of the *ad hoc* alphabetical order. At United Nations meetings and meetings organized by the United Nations, lots are drawn at the opening of the session, to assign seats to the participating states for the duration of the session and whenever a roll-call vote is taken.

that it does not, as host, run the risk of favouring one of them or of being guided by subjective considerations in determining their precedence.

(20) A brief comment must be made on the question of the use of the alphabetical order of names of states as a basis for determining the order of precedence of special missions. At the present time, the rule in the United Nations and in all the specialized agencies, in accordance with the principle of the sovereign equality of states, is to follow this method. While considering it to be the most correct one, the Commission concedes that the rule need not be strictly interpreted as requiring the use of the alphabetical order of the names of states in a specified language—English, for example. Some experts have drawn attention to the possibility of applying the same method but on the basis of the alphabetical order of names of states used in the official diplomatic list of the receiving state. The important thing is that the system applied should be objective and consistent with the principle of the sovereign equality of states. For this reason, the Commission adopted the principle of the alphabetical order of the names of states. The members of the Commission were divided on the question whether the order adopted should be that used by the United Nations or that used in the official diplomatic list of the receiving state.

(21) The Commission considers that everything stated in this article with regard to heads of special missions is also applicable to single representatives.

ARTICLE 10⁵²

Precedence among special ceremonial and formal missions

Precedence among two or more special missions which meet on a ceremonial or formal occasion shall be governed by the protocol in force in the receiving state.

Commentary

(1) The Vienna Convention on Diplomatic Relations confines itself to provisions concerning permanent diplomatic missions and does not take into account either special missions or diplomatic ceremonial and formal missions, which have continued to exist in practice even after the establishment of permanent resident diplomacy, and continue to exist to this day.

(2) The Commission observed that the rules governing special ceremonial and formal missions vary from state to state. The question arises whether a selection should be made among the different customs, or whether the rule universally observed in practice should be adopted, namely, that the receiving state is competent to settle the order of precedence among special missions meeting on its territory on the occasion of a ceremony or a formal manifestation. The Commission favoured the second proposal.

⁵² Introduced as Art. 9 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

(3) The different customs practiced include the following:

(a) On such occasions the representatives of states customarily bear the title of special ambassadors extraordinary. Even a regularly accredited ambassador, when assigned to represent his country on a ceremonial occasion, is given the title of *ad hoc* ambassador. This is regarded as a point of international courtesy.

(b) In accordance with the established interpretation of Article 3 of the Regulation of Vienna of 1815, the *prior tempore* rule is held to apply even to these ambassadors, who should take precedence in the order of the time of presentation of the letters of credence issued for the *ad hoc* occasion. In practice, however, it has proved almost impossible to implement this rule. The funeral of King George VI of Great Britain was a case in point. A number of special missions were unable, for lack of time, to present their letters of credence, or even copies of them, to the new Queen before the funeral ceremony. Moreover, several missions arrived in London simultaneously, so that the rule providing for the determination of precedence according to the order of arrival was also inapplicable. For this reason, it was maintained that it would be preferable to select another criterion, more objective and closer to the principle of the sovereign equality of states, while retaining the division of heads of special missions into classes.

(c) It is becoming an increasingly frequent practice to send special delegates of higher rank than ambassador to be present on ceremonial occasions. Some countries consider that to give them the title of *ad hoc* ambassador would be to lower their status, for it is increasingly recognized that heads of government and ministers rank above all officials, including ambassadors. In practice, the domestic laws of a number of countries give such persons absolute precedence over diplomats.

(d) However, persons who do not belong to the groups mentioned in subparagraph (a) above are also sent as special *ad hoc* ambassadors, but are not given diplomatic titles because they do not want them. Very often these are distinguished persons in their own right. In practice there has been some uncertainty as to the rules applicable to their situation. One school of thought opposes the idea that such persons also take precedence over *ad hoc* ambassadors; and there are some who agree with the arguments in favour of this viewpoint, which are based on the fact that, if the state sending an emissary of this kind wishes to ensure that both the head of the special mission and itself are given preference, it should appoint him *ad hoc* ambassador. Any loss of precedence is the fault of the sending state.

(e) In such cases, the diplomatic status of the head of the special mission is determined *ad hoc*, irrespective of what is called (in the French texts) the *rang diplomatique réel*. The title of *ad hoc* ambassador is very often given, for a particular occasion, either to persons who do not belong to the diplomatic career service or to heads of permanent missions who belong to the second class. This fact should be explicitly mentioned in the special letters of credence for ceremonial or formal occasions.

(f) The issuance of special letters of credence covering a specific function of this kind is a customary practice. They should be in good and due form, like those of permanent ambassadors, but they differ from the latter in their terms, since the mission's task is strictly limited to a particular ceremonial or formal function. The issuance of such letters of credence is regarded as an international courtesy, and that is why heads of permanent diplomatic missions are expected to have such special letters of credence.

(g) Great difficulties are caused by the uncertainty of the rules of law concerning the relative rank of the head of a special mission for a ceremonial and formal function and the head of the mission regularly accredited to the government of the country in which the ceremonial occasion takes place. Under the protocol instructions of the Court of St. James, the heads of special missions have precedence, the heads of regularly accredited diplomatic missions occupying the rank immediately below them, unless they are themselves acting in both capacities on the specific occasion in question. This solution is manifestly correct and is dictated by the very nature of the function, since otherwise it would be utterly pointless to send a special mission.

(h) The situation of the members of a special mission of a ceremonial or formal nature in cases where the members are designated as equals and are given collective letters of credence for the performance of the ceremonial or formal function in question is not precisely known. As stated in paragraph (4) of the commentary on Article 7, practice in this matter is not uniform.

(4) Some members of the Commission requested that, despite the Commission's unanimous decision to accept the rule incorporated in Article 10, the Special Rapporteur's original text should also be included in the present report for purposes of information.⁵³ This text is as follows:

"1. Where two or more special missions meet on a formal or ceremonial occasion (for example, a marriage, christening, coronation, installation of head of state, funeral, etc.), precedence among the heads of missions shall be determined in accordance with the class to which each head of mission belongs by virtue of his diplomatic title, and within each class in accordance with the alphabetical order of the names of the states.

"2. Heads of state, members of ruling families, chairmen of councils and ministers who are members of the government represent special classes having precedence over the class of ambassadors.

"3. Heads of special missions who do not possess the diplomatic rank of ambassador or minister plenipotentiary and who do not belong to the groups specified in paragraph 2 of this article shall constitute, irrespective of the functions they perform, a special group next following that of heads of special missions having the rank of minister plenipotentiary.

"4. The diplomatic title used in determining precedence for the purposes of this article, except in the case of persons mentioned in paragraph 2, shall be that indicated in the credentials issued for the performance of the ceremonial or protocol function.

⁵³ A/CN.4/166, Art. 9.

“5. Heads of regular diplomatic missions shall not be considered to be heads of special missions for ceremonial or formal functions unless they have presented credentials issued specially for this particular purpose.

“6. The rank of the staff of special ceremonial and formal missions shall be determined in accordance with the rank of the heads of mission.

“7. When they appear at the ceremony to which their formal or ceremonial function relates, heads of special missions shall take precedence over the heads of regular diplomatic missions.”

This text was communicated to the Commission, but the Commission did not consider it in detail because it had decided in principle to regulate the matter by reference rather than by substantive provisions.

ARTICLE 11⁵⁴

Commencement of the functions of a special mission

The functions of a special mission shall commence as soon as that mission enters into official contact with the appropriate organs of the receiving state. The commencement of its functions shall not depend upon presentation by the regular diplomatic mission or upon the submission of letters of credence or full powers.

Commentary

(1) The Vienna Convention on Diplomatic Relations contains no express provisions on the commencement of the functions of permanent diplomatic missions.

(2) The International Law Commission takes the view that, where the commencement of the functions of a special mission is concerned, the rules applicable to permanent diplomatic missions do not apply.⁵⁵

(3) In practice, this matter is governed by a special usage. The functions of the special mission which have been the subject of prior notice and acknowledgement begin when the special mission arrives in the territory of the receiving state, unless it arrives prematurely—a situation which depends on the circumstances and on the notion of what constitutes a reasonable interval of time. If there has been no prior notice, the functions are deemed to begin when contact is made with the organs of the receiving state. A further point is that, in the case of special missions, the commencement of the function need not be deemed to take place only when copies of the letters of credence or full powers are presented, although this is taken into account in the case of *ad hoc* ambassadors. Heads of special missions in general, even in cases where they must have full powers, do not now present either the original or a copy in advance, but only when

⁵⁴ Introduced as Art. 10 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 774th meeting.

⁵⁵ Yearbook of the International Law Commission, 1960, Vol. II, pp. 116 and 180.

the time comes to prove their authority to assume obligations on behalf of the sending state. Thus there is a legal difference with respect to determining when the function commences, as compared with the case of the heads of permanent missions.

(4) Almost all the instructions by states concerning the exercise of functions related to diplomatic protocol are found to contain more rules on the procedure for welcoming a ceremonial *ad hoc* mission when it arrives and escorting it when it leaves than on its reception, which consists of an audience with the Minister for Foreign Affairs to introduce the mission, or the presentation of letters of introduction or copies of credentials. There are even fewer rules on audiences by heads of state for the presentation of letters of credence. Even if the head of a special mission arrives with special letters of credence addressed to the head of state, the practice is to present them more expeditiously—*i.e.*, through the Chief of Protocol—and the functions of the mission commence immediately. An example of this custom is the case of an *ad hoc* mission sent to present the condolences of its own head of state to the head of state of another country upon the death of his predecessor or of a member of the royal family. In such a case, formal receptions are hardly in order; besides, there is usually little time. Nevertheless, missions of special importance, are treated according to the general rules of protocol, both on arrival and when they leave.

(5) Contacts between special missions appointed to conduct political negotiations also generally take place immediately following the so-called protocol visit to the competent official with whom the negotiations are to be held.

(6) In the case of special missions appointed to conduct technical negotiations, it is not the practice to have either a ceremonial reception or a ceremonial presentation of credentials. It is customary, however, to make an introductory visit or, if the parties already know each other, a visit for the purpose of establishing contact. There is a growing tendency to abandon the custom whereby the head of the special mission is accompanied on his first visit by the head of the diplomatic mission permanently accredited to the receiving state, or by some member of that mission, if the head of the special mission or his opposite number who is to receive him is of lower rank than the head of the permanent mission. In practice, however, this formality of introduction is becoming obsolete, and the Commission does not deem it essential.

(7) It should be noted that there is an essential difference between the reception of the head of a special mission and the presentation of his letters of credence or full powers on the one hand and the reception of the heads of permanent mission and the presentation of their credentials on the other. This difference relates, first of all, to the person from whom the full powers emanate, in cases other than that of a special ambassador or an *ad hoc* ceremonial mission. A special ambassador and the head of an *ad hoc* ceremonial mission receive their letters of credence from the head of state, as do the regular heads of diplomatic missions of the first and second

classes, and they are addressed to the head of the state to which the persons concerned are being sent. This procedure is not necessarily followed in the case of other special missions. In accordance with a recently established custom, and by analogy to the rules concerning the regularity of credentials in the United Nations, full powers are issued either by the head of state or of government or by the Minister of Foreign Affairs, regardless of the rank of the delegate or of the head of the special mission.

(8) Again, this difference is seen in the fact that the letters of credence of the head of a permanent diplomatic mission are always in his name, while this is not so in the case of special missions, where even for a ceremonial mission, the letters of credence may be collective, in the sense that not only the head of the mission, but the other members also are appointed to exercise certain functions (a situation which could not occur in the case of regular missions, where there is no collective accreditation). Full powers may be either individual or collective, or possibly supplementary (granting authority only to the head of the mission, or stipulating that declarations on behalf of the state will be made by the head of the mission and by certain members or by one or more persons named in the full powers, irrespective of their position in the mission). It has recently become increasingly common to provide special missions with supplementary collective full powers for the head of the mission or a particular member. This is a practical solution (in case the head of the mission should be unable to be present throughout the negotiations).

(9) In practice, the members and staff of a special mission are deemed to commence their function at the same time as the head of the mission, provided that they arrived together when the mission began its activities. If they arrived later, their function is deemed to commence on the day of their arrival, duly notified to the receiving state.

(10) It is becoming increasingly rare to accord a formal welcome to special missions when they arrive at their destination, *i.e.*, at the place where the negotiations are to be held. In the case of important political missions, however, the rules concerning reception are strictly observed but this is of significance only from the standpoint of formal courtesy and has no legal effect.

(11) Members of permanent diplomatic missions who become members of a special mission, are considered, despite their work with the special mission, to retain their capacity as permanent diplomats; consequently, the question of the commencement of their functions in the special mission is of secondary importance.

(12) In practice states complain of discrimination by the receiving state in the reception of special missions and the way in which they are permitted to begin to function even among special missions of the same character. The Commission believes that any such discrimination is contrary to the general principles governing international relations. It believes that the principle of non-discrimination should operate in this case too; and it requests governments to advise it whether an appropriate rule should be included in the article. The reason why the Commission has refrained

from drafting a provision on this subject is that very often differences in treatment are due to the varying degree of cordiality of relations between states.

ARTICLE 12⁵⁶

End of the functions of a special mission

The functions of a special mission shall come to an end, *inter alia*, upon:

- (a) The expiry of the duration assigned for the special mission;
- (b) The completion of the task of the special mission;
- (c) Notification of the recall of the special mission by the sending state;
- (d) Notification by the receiving state that it considers the mission terminated.

Commentary

(1) The Vienna Convention on Diplomatic Relations contains no rules dealing directly with the end of the functions of permanent diplomatic missions. Its treatment of the subject is limited to one provision on the end of the function of a diplomatic agent (Article 43) and the provision concerning the case of the breaking off of diplomatic relations or the recall of the mission (Article 45).

(2) In its deliberations in 1960,⁵⁷ the International Law Commission accepted the view that a special mission came to an end for the same reasons as those terminating the functions of diplomatic agents belonging to permanent missions. However, the accomplishment of a special mission's task was added, as a special reason for the termination of its functions.⁵⁸

(3) The Commission accepted the view of the majority of authors that the task of a special mission sent for a ceremony or for a formal occasion should be regarded as accomplished when the ceremony or occasion is over.

(4) In the first proposal he submitted in 1930 as the Commission's Special Rapporteur, Mr. Sandström expressed the opinion that it was desirable also to consider the functions of the special mission ended when the transactions which had been its aim were interrupted. A resumption of negotiations would then be regarded as the commencement of the functions of another special mission. Some authors adopt the same view and consider that in such cases it is unnecessary for the special mission to be formally recalled. The Commission regarded as well-founded the argument that the functions of a special mission are ended, to all practical purposes, by the interruption or suspension *sine die* of negotiations or other deliberations. It considered it preferable, however, to leave it to

⁵⁶ Introduced as Art. 11 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text discussed and adopted at the 769th meeting. Commentary adopted at the 774th meeting.

⁵⁷ Yearbook of the International Law Commission, 1960, Vol. II, pp. 179-180.

⁵⁸ This addition was proposed by Mr. Jiménez de Aréchaga; see *ibid.*, p. 115.

the sending and receiving states to decide whether they deemed it necessary in such cases to bring the mission to an end by application of the provisions of Article 12 (c) and (d).

ARTICLE 13 ⁵⁹

Seat of the special mission

1. In the absence of prior agreement, a special mission shall have its seat at the place proposed by the receiving state and approved by the sending state.

2. If the special mission's tasks involve travel or are performed by different sections or groups, the special mission may have more than one seat.

Commentary

(1) The provision of Article 13 is not identical to that contained in the Vienna Convention on Diplomatic Relations (Article 12). In the first place, permanent missions must have their seats in the same locality as the seat of the government. The permanent mission is attached to the capital of the state to which it is accredited, whereas the special mission is usually sent to the locality in which it is to carry out its task. Only in exceptional cases does a permanent mission set up offices in another locality, whereas it frequently occurs that, for the performance of its task, a special mission has to move from place to place and its functions have to be carried out simultaneously by a number of groups or sections. Each group or section must have its own seat.

(2) Very little has been written on this question, and in 1960 the Commission did not consider it necessary to deal with it at length. Its basic thought was that the rules applicable to permanent missions in this connexion were not relevant to special missions and that no special rules on the subject were needed. Some members of the Commission did not entirely agree, however, because the absence of rules on the subject might encourage special missions to claim the right to choose their seat at will and to "open offices in any part of the territory of the receiving state."⁶⁰

(3) In practice, special missions normally remain at the place designated by mutual agreement, which in most cases, is not formally established by the sending state and the receiving state. Under that agreement the special mission generally establishes its offices near the locality where its functions are to be performed. If the place in question is the capital city of the receiving state and there are regular diplomatic relations between the two states, the official offices of the special mission are usually on the premises of the sending state's regular diplomatic mission, which (unless otherwise indicated) is its official address for communication purposes. Even

⁵⁹ Introduced as Art. 12 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

⁶⁰ Yearbook of the International Law Commission, 1960, Vol. II, p. 116 and pp. 179-180.

in this case, however, the special mission may have a seat other than the embassy premises.

(4) It is very rare, in practice, for the seat of a special mission not to be chosen by prior agreement. In the exceptional case where the special mission's seat is not established in advance by agreement between the states concerned, the practice is that the receiving state proposes a suitable locality for the special mission's seat, chosen in the light of all the circumstances affecting the mission's efficient functioning. Opinion is divided on whether the sending state is required to accept the place chosen by the receiving state. It has been held that such a requirement would conflict with the principle of the United Nations Charter concerning the sovereign equality of states if the receiving state were to impose the choice of the seat. The Commission has suggested a compromise, namely, that the receiving state should have the right to propose the locality, but that in order to become effective, that choice should be accepted by the sending state. That solution would have certain shortcomings in cases where the proposal was not accepted. The Commission has left the question open.

(5) The Commission did not go into the details of rules to determine the difference between the main seat and other seats where the special mission's task makes it necessary for it to have more than one seat. Usage varies in practice. One solution proposed to the Commission was that the main seat should be in the locality in which the seat of the Ministry of Foreign Affairs of the receiving state is situated, or in some other locality chosen by mutual agreement, and that the other seats should be established with a view to facilitating the work of the sections or teams. However, the Commission preferred to leave this question to be settled by agreement of the parties.

ARTICLE 14⁶¹

Nationality of the head and the members of the special mission and of members of its staff

1. The head and members of a special mission and the members of its staff should in principle be of the nationality of the sending state.

2. Nationals of the receiving state may not be appointed to a special mission except with the consent of that state, which may be withdrawn at any time.

3. The receiving state may reserve the right provided for in paragraph 2 with regard to the nationals of a third state who are not also nationals of the sending state.

Commentary

(1) Article 14 corresponds to Article 8 of the Vienna Convention on Diplomatic Relations.

⁶¹ Introduced as Art. 13 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

(2) In 1960 the International Law Commission did not consider it necessary to express an opinion on the question whether the rules concerning the nationality of diplomatic agents of permanent missions should also apply to special missions. It even formulated the rule that the relevant article of its 1958 draft—Article 7—did not apply directly to special missions.⁶²

(3) The relevant literature, on the other hand, does not consider it impossible for nationals of a country to be admitted by that country as members of special missions, but stresses that the problem has been dealt with differently by various countries at various times.⁶³

(4) In the Commission's view, there is no reason why nationals of the receiving state should not be employed as *ad hoc* diplomats of another state, but for that purpose, the consent of the receiving state has to be obtained.

(5) Apart from the question whether a national of the receiving state can perform the functions of *ad hoc* diplomat of another state, the problem arises whether an *ad hoc* diplomat must possess the nationality of the state on whose behalf he carries out his mission. Here again, the International Law Commission expressed no opinion in 1960. Recent practice shows that nationals of third states, and even stateless persons, may act as *ad hoc* diplomats of a state, although some members of the Commission held it to be undesirable that they should do so. Practical reasons sometimes make it necessary to adopt this expedient, and in practice it is for the receiving state alone to decide whether or not such persons should be recognized as *ad hoc* diplomats.

(6) The Commission has not specifically referred in the text to the possibility that the head of a special mission or one of its members or staff might have dual nationality. It believes that, in the case of a person who also possesses the nationality of the receiving state, that state has the right, in accordance with the existing rules on nationality in international law and with the practice of some countries, to consider such a person on the basis of the characterization theory, exclusively as one of its own nationals. In most states, the idea still prevails that nationality of the receiving state excludes any other nationality, and the argument that effective nationality excludes nominal nationality is not accepted in this case. The case of a person possessing more than one foreign nationality is juridically irrelevant, since it would be covered by paragraph 3 of this article.

(7) The Commission has also not considered whether persons possessing refugee status who are not natives of the receiving state can be employed, without the special approval of the receiving state, as heads or members of special missions or of their staffs.

(8) As regards nationals of the receiving state engaged locally by the special mission as auxiliary staff, and persons having a permanent domicile in its territory, the Special Rapporteur believes that they should not be

⁶² Yearbook of the International Law Commission, 1960, Vol. II, pp. 179-180.

⁶³ Sir Ernest Satow, *A Guide to Diplomatic Practice*, 4th edition, London, 1957, pp. 138-141.

subject to the provisions of this article, but rather to the régime applicable in this respect under the domestic law of the receiving state. The Commission did not deem it necessary to adopt a special rule on the subject.

(9) Nor did the Commission express any views on the question whether, in this respect, aliens and stateless persons having a permanent domicile in the territory of the receiving state should be treated in the same way as nationals of that state.

ARTICLE 15⁶⁴

Right of special missions to use the flag and emblem of the sending state

A special mission shall have the right to display the flag and emblem of the sending state on the premises of the mission, on the residence of the head of the mission and on the means of transport of the mission.

(1) Article 15 is modelled on Article 20 of the Vienna Convention on Diplomatic Relations.

(2) The Commission reserves the right to decide at a later stage whether Article 15 should be placed in the section of the draft dealing with general matters or in the special section concerning facilities, privileges and immunities.

(3) In 1960, the International Law Commission recognized the right of special missions to use the national flag of the sending state upon the same conditions as permanent diplomatic missions.⁶⁵ In practice, the conditions are not identical, but nevertheless there are some instances where this is possible. The Commission's Special Rapporteur, Mr. Sandström, cited the case of the flying of the flag on the motor vehicle of the head of a ceremonial mission. During the discussion which took place in the Commission in 1960, Mr. Jiménez de Aréchaga expressed the view that all special missions (and not only ceremonial missions) have the right to use such flags on the ceremonial occasions where their use would be particularly appropriate.⁶⁶

(4) Current practice should be based on both a wider and a narrower approach: wider, because this right is not restricted to ceremonial missions but depends on the general circumstances (*e.g.*, special missions of a technical nature moving in a frontier zone and all special missions on certain formal occasions); and narrower, because this usage is now limited in fact to the most formal occasions or to circumstances which warrant it, in the judgement of the mission. In practice, however, such cases are held within reasonable limits, and the tendency is towards restriction.

⁶⁴ Introduced as Art. 15 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text, numbered 14, discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

⁶⁵ Yearbook of the International Law Commission, 1960, Vol. II, p. 108, p. 180.

⁶⁶ *Ibid.*, p. 116.

(5) All the rules applicable to the use of the national flag apply equally to the use of the nation emblem, both in practice and in the opinion of the International Law Commission.

(6) In practice, some receiving states assert that they have the right to require that the flag of the sending state should be flown on all means of transport used by the special mission when it is travelling in a particular area. It is claimed in support of this requirement that measures to protect the special mission itself will be easier to carry out if the attention of the authorities of the receiving state is drawn by an external distinguishing mark, particularly in frontier security zones and military zones and in special circumstances. Some states, however, object to this practice on the grounds that it very often causes difficulties and exposes the special mission to discrimination. The Commission holds that this practice is not universally recognized and it has therefore not included a rule regarding it in the text of Article 15.

ARTICLE 16 ⁶⁷

Activities of special missions in the territory of a third state

1. Special missions may not perform their functions in the territory of a third state without its consent.
2. The third state may impose conditions which must be observed by the sending state.

Commentary

(1) There is no corresponding rule in the Vienna Convention on Diplomatic Relations, but Article 7 of the Vienna Convention on Consular Relations of 1963 provides that a consular post established in a particular state may not exercise consular functions in another state if the latter objects.

(2) Very often, special missions from different states meet and carry on their activities in the territory of a third state. This is a very ancient practice, particularly in the case of meetings between *ad hoc* missions or diplomats belonging to states which are in armed conflict. The International Law Commission did not take note of this circumstance in 1960; nor have writers paid much attention to it, but some of them do mention it, particularly where the contact takes place through the third state. Whether or not the third state engages in mediation or extends its good offices, courtesy undoubtedly requires that it should be informed, and it is entitled to object to such meetings in its territory.

(3) Thus, the states concerned are not entitled to make arbitrary use of the territory of a third state for meetings of their special missions, if this is contrary to the wishes of that state. However, if the third state has been duly informed and does not express any objection (its formal

⁶⁷ Introduced as Art. 14 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text, numbered 15, discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

consent is not necessary), it has a duty to treat special missions sent in these circumstances with every consideration, to assure them the necessary conditions to carry on their activities, and to offer them every facility, while the parties concerned, for their part, must refrain from any action which might harm the interests of the third state in whose territory they carry on their activities.

(4) In practice, the prior approval of the third state is often simply a matter of taking note of the intention to send a special mission to its territory (such intention may even be notified orally). If the third state makes no objection to the notification and allows the special mission to arrive in its territory, approval is considered to have been given.

(5) The Commission regards as correct the practice of some states—for example, Switzerland during the war—in imposing certain conditions which must be observed by parties sending special missions. The duty to comply with these conditions is without prejudice to the question whether, objectively, the mission's activities are considered to be prejudicial to the interests of the third state in whose territory they are carried on.

(6) A question which arises in practice is whether the third state must not only behave correctly and impartially towards the states whose missions meet in its territory by according them equal treatment, but must also respect any declarations it may itself have made in giving its prior approval. Since such approval can be given implicitly, it must be considered that a third state which goes even further by taking note, without objection, of a request for permission to use its territory is, in accordance with the theory of unilateral juridical acts in international law, bound by the request of the parties concerned, unless it has made certain reservations.

(7) Intercourse between a special mission of one state and the permanent diplomatic mission of another state accredited to the receiving state must be accorded the same treatment as the intercourse and activities of special missions in the territory of the third state. Such contacts are frequent, and they are referred to by legal writers as irregular means of diplomatic communication. They make direct intercourse possible between states which do not maintain mutual diplomatic relations, even when the states concerned are in armed conflict.

(8) The right of the third state, at any time and without being obliged to give any reason, to withdraw its hospitality from special missions in its territory and to prohibit them from engaging in any activity is recognized. In such cases, the sending states are obliged to recall their special missions immediately, and the missions themselves are required to cease their activities as soon as they learn that hospitality has been withdrawn. The exercise of this right by the third state does not mean that diplomatic relations with the states in question are broken off or that the head of the mission or its members are declared *persona non grata*. It merely means that the third state's consent to the activities of special missions in its territory has been revoked. The Commission held that Article 16, paragraph 1, was sufficient and that the word "consent" means that the consent of the third state continues to be required throughout the period dur-

ing which the activities of the special missions of the other states are taking place.

PART II

FACILITIES, PRIVILEGES AND IMMUNITIES ⁶⁸

ARTICLE 17 ⁶⁹

General facilities

The receiving state shall accord to the special mission full facilities for the performance of its functions, having regard to the nature and task of the special mission.

Commentary

(1) This article is based on Article 25 of the Vienna Convention on Diplomatic Relations.

(2) Proceeding from the fundamental idea that the facilities due to special missions depend on the nature, task and level of the special mission in question, the Commission considers that what must be ensured is the regular functioning of special missions with due regard to their nature and task. The Commission has not adopted the view expressed in 1960 that, in this respect, all the provisions applicable to permanent diplomatic missions should be applied to special missions. It was inclined to follow the fundamental idea underlying the resolution adopted by the Vienna Conference on Diplomatic Intercourse and Immunities, namely, that the problem of the application of the rules governing permanent missions to special missions deserves detailed study. This means that the application of these rules cannot be uniform and that each case must be considered separately.

(3) It is undeniable that the receiving state has a legal obligation to provide a special mission with all facilities necessary for the performance of its functions. In the literature, this rule is generally criticized on the ground that it is vague. The Commission is convinced that its content changes according to the task of the mission in question, and that the facilities to be provided by the receiving state vary. Consequently, the assessment of the extent and content of the above-mentioned obligation is not a question of fact; the obligation is an *ex jure* obligation, whose extent must be determined in the light of the special mission's needs, which depend on the circumstances, nature, level and task of the specific special mission. There remains the legal question whether the extent is determined fairly by the receiving state and thus matches what is due.

(4) The Commission is of the opinion that the difficulties which arise in practice are due to the fact that some special missions consider the re-

⁶⁸ Title adopted at 819th meeting.

⁶⁹ Introduced as Art. 17 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 804th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 820th meeting.

ceiving state obliged to provide them with all the facilities normally accorded to permanent diplomatic missions. The right approach is that of the states which offer to special missions only such facilities as are necessary, or at least useful, according to some objective criterion, for the performance of their task, whether or not they correspond to the list of facilities granted to permanent diplomatic missions as set forth in the Vienna Convention on Diplomatic Relations. Special missions may, however, in some exceptional cases, enjoy more facilities than permanent diplomatic missions, when this is necessary for the performance of their particular tasks, for example in the case of high-level special missions or frontier-demarcation special missions. This approach is consistent with the resolution on special missions adopted by the Vienna Conference on Diplomatic Intercourse and Immunities.

ARTICLE 18⁷⁰

Accommodation of the special mission and its members

The receiving state shall assist the special mission in obtaining appropriate premises and suitable accommodation for its members and staff and, if necessary, ensure that such premises and accommodation are at their disposal.

Commentary

(1) This article is based on Article 21 of the Vienna Convention on Diplomatic Relations.

(2) However, Article 18 is not identical with the said Article 21. The Commission is of the opinion that it is not necessary to provide that the state sending a special mission has in all cases the right to acquire land for the construction of accommodation for the special mission or to acquire the premises required for accommodating it, as is provided for by the corresponding provisions of the Vienna Convention in regard to regular, permanent diplomatic missions. The Commission considers that in this connexion it is sufficient to ensure the provision of accommodation for special missions, which are temporary in character.

(3) Special missions should, however, have their accommodation guaranteed, and the accommodation should be adequate for the special mission in question. On this point, the same rules should in principle apply as in the case of permanent diplomatic missions. But it is held that there is no obligation upon the receiving state to permit the acquisition of the necessary premises in its territory, a proposition which does not rule out the possibility—though this is an exceptional case—of some states purchasing or leasing the premises necessary for the accommodation of successive special missions which they send to the same country.

⁷⁰ Introduced as Art. 18 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 804th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 820th meeting.

(4) The task of special missions may be such that they need more than one seat. This is clear from paragraph (5) of the commentary to Article 13. In particular, cases occur in practice where either the special mission as a whole or a section or group of the mission has to travel frequently in the territory of the receiving state. Such travel often involves a swift change in the seat of the special mission or the arrival of groups of the special mission at specific places, and the mission's or group's stay in a particular locality is often very brief. These circumstances sometimes make it impossible for the sending state itself to arrange accommodation for its special mission or a section thereof. In this case, it is the authorities of the receiving state which arrange accommodation.

ARTICLE 19⁷¹

Inviolability of the premises

1. The premises of a special mission shall be inviolable. The agents of the receiving state may not enter the premises of the special mission, except with the consent of the head of the special mission or of the head of the permanent diplomatic mission of the sending state accredited to the receiving state.

2. The receiving state is under a special duty to take all appropriate steps to protect the premises of the special mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the special mission, their furnishings, other property used in the operation of the special mission and its means of transport shall be immune from search, requisition, attachment or execution by the organs of the receiving state.

Commentary

(1) This article is based on Article 22 of the Vienna Convention on Diplomatic Relations. However, the text has had to be adapted to the requirements imposed by the nature and practice of special missions.

(2) In 1960 the Commission considered that in this matter the rules applicable to permanent diplomatic missions should also apply to special missions. The previous Special Rapporteur, in his first draft, had held that "the official premises of . . . a special mission . . . shall enjoy . . . inviolability . . ." ⁷²

(3) In 1965 the Commission took the view that the provisions of the Vienna Convention on Diplomatic Relations concerning accommodation

⁷¹ Pars. 1 and 2 introduced as Art. 19 of the Special Rapporteur's second report (A/CN.4/179). Discussed at the 804th and 805th meetings of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Par. 3 introduced as Art. 24 of the Special Rapporteur's second report. Discussed at the 806th meeting of the Commission. Drafting Committee's text discussed and referred back to Drafting Committee at the 817th meeting. Re-submitted and adopted at the 820th meeting. Commentary adopted at the 820th meeting.

⁷² Yearbook of the International Law Commission, 1960, Vol. II, p. 112.

should be applied to special missions, with due regard for the circumstances of such missions. It should also be noted that the premises of a special mission are often combined with the living quarters of the members and staff of the special mission.

(4) The offices of special missions are often located in premises which already enjoy the privilege of inviolability. That is so if they are located in the premises of the permanent diplomatic mission of the sending state, if there is one at the place. If, however, the special mission occupies private premises, it must equally enjoy the inviolability of its premises, in order that it may perform its functions without hindrance and in privacy.

(5) The Commission discussed the situation which may arise in certain exceptional cases where the head of a special mission refuses to allow representatives of the authorities of the receiving state to enter the premises of the special mission. It has provided that in such cases the Ministry of Foreign Affairs of the receiving state may appeal to the head of the permanent diplomatic mission of the sending state, asking for permission to enter the premises occupied by the special mission.

(6) As regards the property used by the special mission, the Commission considers that special protection should be accorded to such property, and accordingly it has drafted paragraph 3 of this article in terms granting such protection to all property, by whomsoever owned, which is used by the special mission.

ARTICLE 20⁷³

Inviolability of archives and documents

The archives and documents of the special mission shall be inviolable at any time and wherever they may be.

Commentary

(1) This article reproduces *mutatis mutandis* Article 24 of the Vienna Convention on Diplomatic Relations and Article 33 of the Vienna Convention on Consular Relations.

(2) Here, too, the Commission took the view in 1960 that the rules applicable to permanent diplomatic missions apply also to special missions, which otherwise would scarcely be able to function normally.

(3) Because of the controversies which arise in practice, the Commission considers it necessary to stress the point concerning documents in the possession of the members or of the staff of a special mission, especially in the case of a special mission which does not have premises of its own and in cases where the special mission or a section or group of the special mission is itinerant. In such cases, the documents transported from place to place in the performance of the special mission's task are mobile archives rather than part of the baggage of the persons concerned.

⁷³ Introduced as Art. 20 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 805th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

ARTICLE 21 ⁷⁴*Freedom of movement*

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving state shall ensure to all members of the special mission such freedom of movement and travel on its territory as is necessary for the performance of its functions, unless otherwise agreed.

Commentary

(1) This article is based on Article 26 of the Vienna Convention on Diplomatic Relations and Article 34 of the Vienna Convention on Consular Relations. However, changes have been made in the text to take account of the special circumstances in which the task of special missions is performed. The article thus includes certain provisions which apply neither to permanent diplomatic missions nor to consulates.

(2) Special missions have limited tasks. It follows that they should be guaranteed freedom of movement only to the extent necessary for the performance of these tasks (this does not mean that they cannot go also to other parts of the territory of the receiving state, subject to the normal conditions applicable to other aliens).

(3) Guaranteed freedom for special missions to proceed to the seat of the sending state's permanent diplomatic mission to the receiving state or to a consular post of the sending state and to return to the place where the special mission performs its task is in practice not only a daily occurrence but also a necessity.

(4) One of the peculiarities of special missions is that they may operate through persons or teams situated in different places or responsible for specific tasks in the field. Because of the need for constant liaison between the different sections of a special mission there should be wide freedom of movement.

ARTICLE 22 ⁷⁵*Freedom of communication*

1. The receiving state shall permit and protect free communication on the part of the special mission for all official purposes. In communicating with the government and the other missions and consulates of the sending state, wherever situated, the special mission may employ all appropriate means, including couriers and messages in code or cipher. However, the special mission may install and use a wireless transmitter only with the consent of the receiving state.

⁷⁴ Introduced as Art. 21 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 805th meeting of the Commission. Drafting Committee's text discussed and adopted at the 816th meeting. Commentary adopted at the 821st meeting.

⁷⁵ Introduced as Art. 22 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 805th and 806th meetings of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

2. The official correspondence of the special mission shall be inviolable. Official correspondence means all correspondence relating to the special mission and its functions.

3. The bag of the special mission shall not be opened or detained.

4. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

5. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the receiving state in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending state or the special mission may designate couriers *ad hoc* of the special mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the special mission's bag in his charge.

7. The bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the special mission. By arrangement with the appropriate authorities, the special mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Commentary

(1) This article is based on Article 27 of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the Commission took the position that special missions enjoy the same rights as permanent diplomatic missions in this respect.

(3) It should be noted, however, that in practice special missions are not always granted the right to use messages in code or cipher. The Commission considered that special missions should be granted this right, since the use of messages in code or cipher is often necessary for the proper functioning of such missions.

(4) The Commission did not think that it should depart from the practice whereby special missions are not allowed to use wireless transmitters, unless there is a special agreement or a permit is given by the receiving state.

(5) The Vienna Convention on Diplomatic Relations (Article 27, paragraph 3) lays down the principle of the absolute inviolability of the diplomatic bag. Under that provision, the diplomatic bag may not be opened or detained by the receiving state. The Vienna Convention on Consular Relations, on the other hand, confers limited protection on the consular bag (Article 35, paragraph 3). It allows the consular bag to be detained if there are serious reasons for doing so and provides for a procedure for

the opening of the bag. The question arises whether absolute inviolability of the special mission's bag should be guaranteed for all categories of special missions. The Commission considered this question and decided to recognize the absolute inviolability of the special mission's bag.

(6) The Commission adopted the rule that the special mission's bag may be entrusted to the captain of a commercial aircraft (Article 27, paragraph 7, of the Vienna Convention on Diplomatic Relations; Article 35, paragraph 7, of the Vienna Convention on Consular Relations) or to the captain of a ship (Article 35, paragraph 7, of the Vienna Convention on Consular Relations). It has been observed recently that in exceptional cases special missions use the services of such persons for the transport of the bag. The Commission considers that the captains of commercial inland waterway vessels may also be used for this purpose.

ARTICLE 23 ⁷⁶

Exemption of the mission from taxation

1. The sending state and the head of the special mission and the members of its staff shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the special mission, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving state by persons contracting with the sending state or the head of the special mission.

Commentary

(1) This article reproduces *mutatis mutandis* Article 23 of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the Commission expressed the view that in this respect the legal rules applicable to permanent diplomatic missions should be applied to special missions. At its Seventeenth Session, the Commission reaffirmed that view.

(3) On the other hand, the Commission is of the opinion that Article 28 of the Vienna Convention on Diplomatic Relations cannot be applied to special missions. It is the rule that special missions have no authority to levy any fees, dues or charges in foreign territory except in the cases specially provided for by international agreements. This does not, however, rule out the possibility that in certain exceptional cases provided for in international agreements special missions may be authorized to charge such dues. The Commission therefore decided not to include in the article any rule of law concerning the levying by special missions of fees, dues or charges in the territory of the receiving state, and to refer to the matter only in the commentary.

⁷⁶ Introduced as Art. 23 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 806th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

ARTICLE 24⁷⁷*Personal inviolability*

The person of the head and members of the special mission and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The receiving state shall treat them with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

Commentary

(1) This article reproduces *mutatis mutandis* Article 29 of the Vienna Convention on Diplomatic Relations.

(2) The Commission discussed the advisability of a provision granting to the members of special missions only a personal inviolability limited to the performance of their functions. The majority of the Commission did not consider such a provision acceptable.

ARTICLE 25⁷⁸*Inviolability of the private accommodation*

1. The private accommodation of the head and members of the special mission and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the special mission.

2. The papers, correspondence and property of the persons referred to in paragraph 1 shall likewise enjoy inviolability.

Commentary

(1) This article reproduces *mutatis mutandis* Article 30 of the Vienna Convention on Diplomatic Relations.

(2) The word "residence" used in the Vienna Convention on Diplomatic Relations has been replaced by the word "accommodation" because of the temporary nature of special missions.

(3) The inviolability of the accommodation of the members of special missions should be guaranteed, regardless of whether they live in a separate building or in parts of another building, or even in a hotel. It was considered necessary to add this paragraph of the commentary because some states do not recognize this protection in cases where the mission is accommodated in a building accessible to the public.

⁷⁷ Introduced as Art. 25 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 806th and 807th meetings of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

⁷⁸ Introduced as Art. 26 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 807th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

ARTICLE 26 ⁷⁹*Immunity from jurisdiction*

1. The head and members of the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving state.

2. Unless otherwise agreed, they shall also enjoy immunity from the civil and administrative jurisdiction of the receiving state, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving state, unless the head or member of the special mission or the member of its diplomatic staff holds it on behalf of the sending state for the purposes of the mission;

(b) An action relating to succession in which the person referred to in sub-paragraph (a) is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state;

(c) An action relating to any professional or commercial activity exercised by the person referred to in sub-paragraph (a) in the receiving state outside his official functions.

3. The head and members of the special mission and the members of its diplomatic staff are not obliged to give evidence as witnesses.

4. No measures of execution may be taken in respect of the head or of a member of the special mission or of a member of its diplomatic staff except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 2 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

5. The immunity of the head and members of the special mission and of the members of its diplomatic staff from the jurisdiction of the receiving state does not exempt them from the jurisdiction of the sending state.

Commentary

(1) This article is based on Article 31 of the Vienna Convention on Diplomatic Relations.

(2) The Commission discussed the question whether members of special missions should or should not be granted complete and unlimited immunity from criminal, civil and administrative jurisdiction. Some members of the Commission took the view that, in principle, only functional immunity should be granted to all special missions. There should be no deviation from this rule, except in the matter of immunity from criminal jurisdiction; for any limitation of the liberty of the person prevents the free accomplishment of the special mission's tasks. Disagreeing with that opinion, the majority of the Commission decided that full immunity from the jurisdiction of the receiving state in all matters (criminal, civil and administrative) should be granted to the members of special missions.

⁷⁹ Introduced as Art. 27 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 807th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

(3) However, the Commission added in paragraph 2 the phrase "Unless otherwise agreed" to indicate that it is open to the states concerned to limit the immunity from *civil and administrative* jurisdiction. In short, the ordinary rule proposed by the Commission is complete immunity from civil and administrative jurisdiction, the states concerned being at liberty to agree on a limited form of immunity in this respect.

ARTICLE 27⁸⁰

Waiver of immunity

1. The immunity from jurisdiction of the head and members of the special mission, of the members of its staff and of the members of their families, may be waived by the sending state.

2. Waiver must always be express.

3. The initiation of proceedings by one of the persons referred to in paragraph 1 of this article shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

Commentary

(1) This article reproduces *mutatis mutandis* Article 32 of the Vienna Convention on Diplomatic Relations.

(2) The Commission considers that the purpose of immunity is to protect the interests of the sending state, not those of the person enjoying the immunity.

ARTICLE 28⁸¹

Exemption from social security legislation

1. The head and members of the special mission and the members of its staff shall be exempt, while in the territory of the receiving state for the purpose of carrying out the tasks of the special mission, from the social security provisions of that state.

2. The provisions of paragraph 1 of this article shall not apply:

(a) To nationals or permanent residents of the receiving state regardless of the position they may hold in the special mission;

(b) To locally recruited temporary staff of the special mission, irrespective of nationality.

⁸⁰ Introduced by the Drafting Committee as Art. 27 bis. Discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

⁸¹ Introduced as Art. 28 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

3. The head and members of the special mission and the members of its staff who employ persons to whom the exemption provided for in paragraph 1 of this article does not apply shall observe the obligations which the social security provisions of the receiving state impose upon employers.

Commentary

(1) This article is based on Article 33 of the Vienna Convention on Diplomatic Relations.

(2) In practice, it is found necessary not to exempt from the social security system of the receiving state persons locally employed for the work of the special mission, for a number of reasons: the short duration of the special mission; the risk to life and health presented by the difficulty of the special mission's tasks in certain cases, especially in the case of special missions working in the field; and the still unsettled question of insurance after the termination of the special mission's task, if the employee was not engaged through and on the responsibility of the permanent diplomatic mission.

ARTICLE 29 ⁸²

Exemption from dues and taxes

The head and members of the special mission and the members of its diplomatic staff shall be exempt from all dues and taxes, national, regional or municipal, in the receiving state on all income attaching to their functions with the special mission and in respect of all acts performed for the purposes of the special mission.

Commentary

(1) This article is based on Article 34 of the Vienna Convention on Diplomatic Relations.

(2) The Commission was of the opinion that the exemption of the members of special missions from dues and taxes should apply only to income attaching to their functions with the mission and in respect of all acts performed for the purposes of the mission. Accordingly, the Commission decided to omit from Article 29 all the exceptions enumerated in the said Article 34.

ARTICLE 30 ⁸³

Exemption from personal services and contributions

The receiving state shall exempt the head and members of the special mission and the members of its diplomatic staff from all personal serv-

⁸² The proposal to introduce this article was made by the Special Rapporteur at the 808th meeting. Drafting Committee's text, numbered 28 bis, submitted and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

⁸³ Introduced as Art. 29 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

ices, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Commentary

(1) This article reproduces *mutatis mutandis* Article 35 of the Vienna Convention on Diplomatic Relations.

(2) In drafting Article 30 the Special Rapporteur had started with the ideas underlying the said Article 35, but had expanded the article in the following way:

(a) He had extended these exemptions to the entire staff and not merely to the head and members of the special mission. In his view, it was not possible otherwise to ensure the special mission's smooth operation;

(b) It was also his view that exemption from personal services and contributions ought to be accorded to locally recruited staff regardless of nationality and domicile. Otherwise, the special mission would be placed in a difficult position and would not be able to carry out its task until it succeeded in finding other staff exempt from such services and contributions. Calling on such locally recruited staff to render such services or contributions could be used as a powerful weapon by the receiving state to harass the special mission. On the other hand, the receiving state would not be imperilled by these exemptions, special missions generally being of very short duration and their staff very small.

(3) The Commission considered that the rules of law corresponding to these needs of the special mission would involve an excessive derogation from the sovereign rights of the receiving state, but it decided to mention in the commentary the arguments put forward by the Special Rapporteur.

ARTICLE 31⁸⁴

Exemption from customs duties and inspection

1. The receiving state shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of the special mission;

(b) Articles for the personal use of the head and members of the special mission, of the members of its diplomatic staff, or of the members of their family who accompany them.

2. The personal baggage of the head and members of the special mission and of the members of its diplomatic staff shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law

⁸⁴ Introduced as Art. 30 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

or controlled by the quarantine regulations of the receiving state. Such inspection shall be conducted only in the presence of the person concerned, of his authorized representative, or of a representative of the permanent diplomatic mission of the sending state.

Commentary

(1) This article is based on Article 36 of the Vienna Convention on Diplomatic Relations.

(2) The question of applying to special missions the rules exempting permanent diplomatic missions and their members from the payment of customs duties on articles imported for the establishment of the mission, its members or its staff seldom arises, although it may do so. In view of the rarity of such cases, the Commission considers that a special provision on this point should not be included in the text but that this eventuality should be mentioned in the commentary, in order to inform governments that such situations occur and that they ought to settle them by specific decisions in individual cases.

(3) The claims of certain special missions, for themselves or for their members, to exemption from the payment of customs duties on the importation of consumer goods, have been challenged in practice. The Commission has refrained from proposing a solution for this case.

ARTICLE 32 ⁸⁵

Administrative and technical staff

Members of the administrative and technical staff of the special mission shall, if they are not nationals of or permanently resident in the receiving state, enjoy the privileges and immunities specified in Articles 24 to 31, except that the immunity from civil and administrative jurisdiction of the receiving state specified in paragraph 2 of Article 26 shall not extend to acts performed outside the course of their duties.

Commentary

(1) This article is based on Article 37, paragraph 2, of the Vienna Convention on Diplomatic Relations.

(2) The two texts differ in that Article 32 omits two clauses which appear in the said Article 37, paragraph 2:

(a) It omits any mention of members of the family, for these are dealt with in a separate article (Article 35);

(b) It does not provide for customs exemption in respect of articles imported at the time of first installation, as the Commission considered that this privilege should not be granted to the members of special missions (see Article 31, paragraph (2) of the commentary).

⁸⁵ Introduced as Art. 32 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 31, discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

ARTICLE 33 ⁸⁶*Members of the service staff*

Members of the service staff of the special mission who are not nationals of or permanently resident in the receiving state shall enjoy immunity in respect of acts performed in the course of their duties, and exemption from duties and taxes on the emoluments they receive by reason of their employment.

Commentary

(1) This article is based on Article 37, paragraph 3, of the Vienna Convention on Diplomatic Relations.

(2) The Commission considers that the text adopted is sufficient to provide the guarantees necessary for the members of the service staff of special missions.

(3) The Special Rapporteur suggested that the Commission should provide for the grant of the following additional privileges to members of the service staff:

(a) Exemption from personal services and contributions, for he is convinced that, unless members of the service staff are guaranteed this exemption, the authorities of the receiving state could paralyse the proper functioning of the special mission;

(b) Full immunity from the criminal jurisdiction of the receiving state, for the exercise of that jurisdiction in respect of members of the service staff could paralyse the functioning of the special mission entirely—a possibility which does not arise in the case of permanent diplomatic missions.

(4) The Commission did not accept the Special Rapporteur's suggestions, and it decided not to go further than the Vienna Convention on Diplomatic Relations in the matter. It decided to draw attention in the commentary to the Special Rapporteur's suggestions set out in paragraph (3) above.

ARTICLE 34 ⁸⁷*Private staff*

Private staff of the head and members of the special mission and of members of its staff who are authorized by the receiving state to accompany them in the territory of the receiving state shall, if they are not nationals of or permanently resident in the receiving state, be exempt

⁸⁶ Introduced as Art. 32 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 32, discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

⁸⁷ Introduced as Art. 32 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 33, discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

from dues and taxes on the emoluments they receive by reason of their employment. In all other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving state. However, the receiving state must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the special mission.

Commentary

(1) This article is based on Article 37, paragraph 4, of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the Commission took as the premise the proposition that the head, members and members of the staff of the special mission should be allowed to bring private staff with them, for such staff might be essential to their health or personal comfort.

(3) However, it is a moot point whether there is a right *de jure* to bring such staff. This matter is thought to lie within the discretionary power of the receiving state, which may therefore impose restrictions. However, where there are no restrictions or where the receiving state grants permission, the question arises in practice whether the privileges and immunities extend to private staff.

(4) The Special Rapporteur is of the opinion that this staff should be guaranteed functional immunity from criminal jurisdiction in respect of acts performed in the course of the duties they normally carry out on the orders of their employers. The Commission did not wish to go further than the Vienna Convention on this point.

ARTICLE 35 ⁸⁸

Members of the family

1. The members of the families of the head and members of the special mission and of its diplomatic staff who are authorized by the receiving state to accompany them shall, if they are not nationals of the receiving state, enjoy the privileges and immunities specified in Articles 24 to 31.

2. Members of the families of the administrative and technical staff of the special mission who are authorized by the receiving state to accompany them shall, if they are not nationals of or permanently resident in the receiving state, enjoy the privileges and immunities specified in Article 31.

Commentary

(1) This article is based on Article 37 of the Vienna Convention on Diplomatic Relations, but some major changes were necessary to make it applicable to special missions.

⁸⁸ Introduced as Art. 31 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 34, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

(2) In practice, the question arises whether privileges and immunities also attach to family members accompanying the head and members of the special mission or members of its staff. One school of thought maintains that there can be no grounds for limiting privileges exclusively to the head and members of the special mission and members of its staff unless, owing to the nature of the work to be performed or by prior arrangement, the presence of family members in the territory of the receiving state is ruled out in advance.

(3) The Commission realized that the attempt to specify what persons are covered by the expression "members of the family" had at both the Vienna Conferences (in 1961 and 1963) ended in failure, but it believes that in the case of special missions the number of such persons should be limited. However, in the case of temporary residence it is a matter of no great consequence whether the relative concerned is a regular member of the household of the person whom he or she is accompanying.

(4) In practice, restrictions are sometimes general, sometimes limited in the sense that they except a specified number of family members, or else they may apply to certain periods of the special mission's visit or to access to certain parts of the territory. The Commission merely recognized, without going into details, that it is within the receiving state's power to impose restrictions in this respect.

ARTICLE 36⁸⁹

Nationals of the receiving state and persons permanently resident in the territory of the receiving state

1. Except insofar as additional privileges and immunities may be recognized by special agreement or by decision of the receiving state, the head and members of the special mission and the members of its diplomatic staff who are nationals of or permanently resident in that state shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the special mission and private staff who are nationals of or permanently resident in the receiving state shall enjoy privileges and immunities only to the extent admitted by the receiving state. However, the receiving state must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the special mission.

Commentary

(1) This article is based on Article 38 of the Vienna Convention on Diplomatic Relations, but the two texts are not identical. The starting-

⁸⁹ Introduced as Art. 33 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 35, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

point is the idea that the receiving state is not obliged to admit, as head, member or member of the staff of the special mission, its own nationals or persons permanently resident in its own territory. This idea is set forth in Article 14 concerning the nationality of the head and members of the special mission and of members of its staff.

(2) The difference between the aforesaid Article 14 and the present article is that, in the latter, persons permanently resident in the territory of the receiving state are treated in the same manner as nationals of the receiving state.

(3) During the discussion of Article 14, the Commission did not adopt the view that nationals of the receiving state and persons permanently resident in its territory should be treated in identical fashion. In adopting that decision, the Commission took account of the fact that Article 8 of the Vienna Convention on Diplomatic Relations does not treat these persons in identical fashion. However, in regard to the enjoyment of privileges and immunities, the Vienna Convention on Diplomatic Relations accepts identical treatment of these two groups in Article 38. The Commission considers that the same course should be adopted in the present article. It accepts the argument that the rules on special missions should not reduce the staff of special missions to a status lower than that resulting from the provisions of the Vienna Convention on Diplomatic Relations. However, it was also argued in the Commission that in settling the status of special missions the Commission should take care not to establish any further limitations on the sovereignty of receiving states. It is held that it would not be logical for certain members of special missions or of their staff to be favoured to the detriment of the interests of the receiving state.

(4) The Commission stresses that, in its view, it is better that this question should be settled by mutual agreements rather than that general international rules should be laid down on the subject.

ARTICLE 37⁹⁰

Duration of privileges and immunities

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving state for the purpose of performing his functions in a special mission, or, if already in its territory, from the moment when his appointment is notified to the competent organ of that state.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in the

⁹⁰ Introduced as Art. 34 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 36, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the special mission, immunity shall continue to subsist.

Commentary

(1) This article reproduces *mutatis mutandis* Article 39, paragraphs 1 and 2, of the Vienna Convention on Diplomatic Relations. In the present draft the subject matter of the other two paragraphs (3 and 4) of the said Article 39 is dealt with in a separate article (Article 38).

(2) In adopting Article 37 the Commission based itself on the same reasons as determined the adoption of Article 39 of the Vienna Convention on Diplomatic Relations.

ARTICLE 38⁹¹

Case of death

1. In the event of the death of the head or of a member of the special mission or of a member of its staff, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

2. In the event of the death of the head or of a member of the special mission or of a member of its staff, or of a member of their families, if those persons are not nationals of or permanently resident in the receiving state, the receiving state shall facilitate the collection and permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death.

3. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving state was due solely to the presence there of the deceased as the head or member of the special mission or member of its staff, or as a member of their families.

Commentary

(1) This article is based on paragraphs 3 and 4 of Article 39 of the Vienna Convention on Diplomatic Relations. It contains no more than is needed in the case of special missions, which are not of the same nature as permanent diplomatic missions.

(2) The Commission takes the view that in addition to the provisions applicable to permanent diplomatic missions an obligation should be placed on the receiving state to take whatever measures of protection are necessary with regard to the movable property of members of special missions. It

⁹¹ Introduced as Art. 35 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 37, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

may be that members of special missions and their families are far from the seat of the sending state's permanent mission when death occurs, and the assistance of the local authorities is then necessary for the purpose of collecting and protecting the deceased's movable property. This situation does not arise in the case of the staff of diplomatic and consular missions.

ARTICLE 39 ⁹²

Transit through the territory of a third state

1. Subject to the provisions of paragraph 4, if the head or a member of the special mission or a member of its diplomatic staff passes through or is in the territory of a third state, while proceeding to take up his functions in a special mission performing its task in a foreign state, or when returning to his own country, the third state shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the person referred to in this paragraph, or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third states shall not hinder the transit of members of the administrative and technical or service staff of the special mission, and of members of their families, through their territories.

3. Third states shall accord to official correspondence and other official communication in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving state. Subject to the provisions of paragraph 4, they shall accord to the couriers and bags of the special mission in transit the same inviolability and protection as the receiving state is bound to accord.

4. The third state shall be bound to comply with the obligations mentioned in the foregoing three paragraphs only if it has been informed in advance, either in the visa application or by notification of the transit of the special mission, and has raised no objection to it.

5. The obligation of third states under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in these paragraphs, and to the official communications and bags of the special mission, whose presence in the territory of the third state is due to *force majeure*.

Commentary

(1) This article is based on Article 40 of the Vienna Convention on Diplomatic Relations. The difference is that, whereas facilities, privileges

⁹² Introduced as Art. 36 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 38, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

and immunities must be granted to the head and the staff of the permanent diplomatic mission in all circumstances, in the case of special missions the duty of the third state is restricted to cases where it does not object to the transit through its own territory of the special mission.

(2) The Commission considers that a third state is not bound to accord to its nationals who form part of a foreign special mission passing through its territory the privileges and immunities which the receiving state is not bound to guarantee to its nationals who are members of a foreign special mission (see Article 36 of the draft).

ARTICLE 40⁹³

Obligation to respect the laws and regulations of the receiving state

1. Without prejudice to their privileges and immunities, it is the duty of all persons belonging to special missions and enjoying these privileges and immunities to respect the laws and regulations of the receiving state. They also have a duty not to interfere in the internal affairs of that state.

2. The premises of the special mission must not be used in any manner incompatible with the functions of the special mission as laid down in these articles or by other rules of general international law or by any special agreements in force between the sending and the receiving state.

Commentary

(1) Paragraph 1 of this article reproduces *mutatis mutandis* paragraph 1 of Article 41 of the Vienna Convention on Diplomatic Relations and of Article 55 of the Vienna Convention on Consular Relations. The rule in question is at present a general rule of international law. The Special Rapporteur considered, furthermore, that this rule should be amplified by a proviso stating that the laws and regulations of the receiving state are not mandatory for the organs of the sending state if they are contrary to the general rules of international law or to the contractual rules which exist between the states. Such a proviso was discussed at both the Vienna Conferences (1961 and 1963) but was not inserted in the relevant articles, for it was presumed that as a general rule the receiving state would observe its general international obligations and its duties arising out of international agreements. In addition, it was pointed out that it would be undesirable to refer the diplomatic or consular organs to the general rules of international law and that in each specific case they had the right to enter into discussions with the government of the receiving state about the conformity of its internal law with the rules of inter-

⁹³ Introduced as Art. 38, pars. (1) and (4) of Special Rapporteur's second report (A/CN.4/179). Discussed at the 309th meeting of the Commission. Drafting Committee's text, numbered 39, discussed and adopted at the 319th meeting. Commentary adopted at the 321st meeting.

national law. Accordingly, the Commission adopted the rule in question for special missions, but omitted the proviso mentioned above.

(2) Paragraph 2 of this article reproduces *mutatis mutandis* paragraph 3 of Article 41 of the Vienna Convention on Diplomatic Relations.

ARTICLE 41⁹⁴

Organ of the receiving state with which official business is conducted

All official business with the receiving state entrusted to the special mission by the sending state shall be conducted with or through the Ministry for Foreign Affairs of the receiving state or such other organ, delegation or representative as may be agreed.

Commentary

(1) This article is based on paragraph 2 of Article 41 of the Vienna Convention on Diplomatic Relations. No such provision appears in the Vienna Convention on Consular Relations for the simple reason that consuls are allowed in principle to communicate direct with all the organs of the receiving state with which they have dealings in the performance of their tasks. Special missions are in a special position. As a general rule, they communicate with the Ministry of Foreign Affairs of the receiving state, but frequently the nature of their tasks makes it necessary for them to communicate direct with the competent special organs of the receiving state in regard to the business entrusted to them. These organs are often but not always local technical organs. It is also the practice for the receiving state to designate a special delegation or representative who establishes contact with the special mission of the sending state. The question is generally settled by mutual agreement between the states concerned, or else the Ministry of Foreign Affairs of the receiving state informs the organs of the sending state with which organ or organs the special mission should get in touch. A partial solution to this problem has already been provided in the commentary on Article 11 of the draft. Consequently, the article as adopted is merely an adaptation of Article 41, paragraph 2, of the Vienna Convention on Diplomatic Relations.

(2) Although the range of organs of the receiving state with which the special mission may establish contact in the conduct of its business has been widened in the article as adopted, special missions are not being placed in a position analogous to that of consuls. The relations of special missions are confined to those with the organs which have been specified by agreement or to which they are referred by the Ministry of Foreign Affairs of the receiving state. It should be noted that the term "organ" also applies to liaison officers.

⁹⁴ Introduced as Art. 38, pars. (2) and (3) of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 40, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

ARTICLE 42⁹⁵*Professional activity*

The head and members of the special mission and the members of its diplomatic staff shall not practise for personal profit any professional or commercial activity in the receiving state.

Commentary

(1) This article reproduces *mutatis mutandis* Article 42 of the Vienna Convention on Diplomatic Relations.

(2) With regard to the possibility of including in the article a clause stating that the right of the persons concerned to carry on a professional or commercial activity in the receiving state on behalf of the sending state is subject to the prior consent of the receiving state, some members contested the validity of the argument that prior consent should not be required in the case of special missions because it is not required in the case of permanent diplomatic missions. The other members took the view that such activity was permitted if in conformity with the law of the receiving state and that the question was settled by Article 40, paragraph 1, of the draft (obligation to respect the laws and regulations of the receiving state). The Commission decided not to include a clause on this question in the text, but to mention this difference of opinion in the commentary.

ARTICLE 43⁹⁶*Right to leave the territory of the receiving state*

The receiving state must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving state, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Commentary

(1) This article reproduces *mutatis mutandis* Article 44 of the Vienna Convention on Diplomatic Relations.

(2) The Commission considered that persons who had entered the receiving state's territory in order to form part of a special mission (other than nationals of the receiving state) had the right to leave that territory. The receiving state would be contravening the principle of personal inviolability if it prevented them from leaving.

⁹⁵ Introduced as Art. 37 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 41, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

⁹⁶ Text, numbered 42, submitted by Drafting Committee and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

ARTICLE 44⁹⁷*Cessation of the functions of the special mission*

1. When a special mission ceases to function, the receiving state must respect and protect its property and archives, and must allow the permanent diplomatic mission or the competent consular post of the sending state to take possession thereof.

2. The severance of diplomatic relations between the sending state and the receiving state shall not automatically have the effect of terminating special missions existing at the time of the severance of relations, but each of the two states may terminate the special mission.

3. In case of absence or breach of diplomatic or consular relations between the sending state and the receiving state and if the special mission has ceased to function,

(a) The receiving state must, even in case of armed conflict, respect and protect the property and archives of the special mission;

(b) The sending state may entrust the custody of the property and archives of the mission to a third state acceptable to the receiving state.

Commentary

(1) This article is based on Article 45 of the Vienna Convention on Diplomatic Relations, but it was necessary to take into account the fact that the cessation of a special mission's functions does not always coincide with the severance of diplomatic or consular relations between the sending state and the receiving state.

(2) Paragraph 1 covers the case in which the functions of a special mission cease while diplomatic or consular relations exist between the states concerned. In this case, the diplomatic mission or consular posts of the sending state are authorized to take possession of the property and archives of the special mission; they are responsible for the protection of the property of the sending state, including that of the special mission.

(3) Paragraph 2 provides, first, that the severance of diplomatic relations between the sending state and the receiving state does not automatically have the effect of terminating special missions existing at the time of the severance. This is consequential on the rule in Article 1, paragraph 2, of the draft that the existence of diplomatic or consular relations between the states is not necessary for the sending and reception of special missions (see also paragraph (5) of the commentary on Article 1). If the existence of diplomatic or consular relations is not necessary for the sending or reception of special missions, then, *a fortiori*, the severance of such relations does not automatically have the effect of terminating special missions.

(4) Secondly, in conformity with practice, the Commission has recognized in paragraph 2 the right of each of the states concerned to terminate

⁹⁷ Text, numbered 43, submitted by Drafting Committee and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

by unilateral act special missions existing at the time when diplomatic relations are severed.

(5) Where diplomatic or consular relations between the two states concerned are non-existent or are severed, the property and archives of the special mission which has ceased its functions are governed, in conformity with practice, by the rules of diplomatic law relating to the severance of diplomatic relations (Article 45 of the Vienna Convention on Diplomatic Relations).

C. OTHER DECISIONS, SUGGESTIONS AND OBSERVATIONS BY THE COMMISSION

46. The Commission instructed the Special Rapporteur to prepare and submit to the Commission an introductory article on the use of terms in the draft, in order that the text may be simplified and condensed.

47. The Commission decided that it would review the articles provisionally adopted during its Sixteenth and Seventeenth Sessions after receiving the observations and comments of the governments.

48. The Commission considered whether special rules of law should or should not be drafted for so-called "high-level" special missions, whose heads hold high office in their states. It would appreciate the opinion of governments on this matter and hopes that their suggestions will be as specific as possible. The Special Rapporteur prepared a draft on such missions. This draft, which the Commission did not discuss, is reproduced as an annex to this chapter.

49. The Special Rapporteur suggested to the Commission that a provision on non-discrimination (Article 47 of the Vienna Convention on Diplomatic Relations and Article 72 of the Vienna Convention on Consular Relations) should be included among the draft articles. The Commission did not accept that suggestion, on the ground that the nature and tasks of special missions are so diverse that in practice such missions have inevitably to be differentiated *inter se*.

50. Nor did the Commission accept for the time being the Special Rapporteur's proposal that the draft should contain a provision on the relationship between the articles on special missions and other international agreements (Article 73 of the Vienna Convention on Consular Relations).

ANNEX

DRAFT PROVISIONS CONCERNING SO-CALLED HIGH-LEVEL SPECIAL MISSIONS, PREPARED BY THE SPECIAL RAPPORTEUR

(not discussed by the Commission)

[Original: French]

At its Sixteenth Session the International Law Commission decided to ask its Special Rapporteur to submit at its succeeding session articles dealing with the legal status of so-called high-level special missions, in

particular special missions led by heads of states, heads of governments, Ministers for Foreign Affairs and Cabinet Ministers.

Despite all his efforts to establish what are the rules specially applicable to missions of this kind, the Special Rapporteur has not succeeded in discovering them either in the practice or in the literature. The only rules he has found are those relating to the treatment of these distinguished persons in their own state, not only as regards the courtesy accorded to them but also as regards the scope of the privileges and immunities. Accordingly, the Special Rapporteur is prepared to propose the following rules:

Rule 1

Except as otherwise provided hereinafter, the rules contained in the foregoing articles are likewise applicable to special missions led by heads of state, heads of government, Ministers for Foreign Affairs and Cabinet Ministers.

Rule 2

A special mission which is led by a head of state shall be governed by the provisions of the said articles, subject to the following exceptions:

(a) In giving its approval to the special mission being led by the head of state, the receiving state admits in advance that such a mission may perform the tasks to be agreed upon by the two states concerned in the course of their contacts (exception to Article 2 as adopted);

(b) The head of state, as head of the special mission, cannot be declared *persona non grata* or not acceptable (exception to Article 4);

(c) The members of the staff of a special mission which is led by a head of state may also be members of his personal suite. Such persons shall be treated as diplomatic staff (supplement to Article 6);

(d) In the case of the simultaneous presence of several special missions, heads of state who lead special missions shall have precedence over the other heads of special missions who are not heads of state. Nevertheless, in the case of the simultaneous presence of several special missions led by heads of state, precedence shall be determined according to the alphabetical order of the names of the states (supplement to Article 9);

(e) In cases where a head of state acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving state (special rule replacing Article 11);

(f) The function of a special mission which is led by a head of state comes to an end at the time when he leaves the territory of the receiving state, but the special mission may, if the sending state and the receiving state so agree, continue in being after his departure; in this case, however, the level of the special mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to Article 12);

(g) A special mission which is led by a head of state shall have the right to display, in addition to the flag and emblem of the sending state, the flag and emblem peculiar to the head of state under the law of the sending state (supplement to Article 15);

(h) The receiving state has the duty to provide a head of state who leads a special mission with accommodation that is suitable and worthy of him;

(i) The freedom of movement of a head of state who leads a special mission is limited in the territory of the receiving state in that an agreement on this matter is necessary with the receiving state (guarantee of the personal safety of the head of state);

(j) A head of state who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving state;

(k) A head of state who leads a special mission enjoys full customs exemption and exemption from customs inspection by an agency of the receiving state;

(l) A head of state who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the head of state;

(m) On his arrival in the territory of the receiving state and on his departure, a head of state who leads a special mission shall receive all the honours due to him as head of state according to the rules of international law;

(n) If a head of state who leads a special mission should die in the territory of the receiving state, then the receiving state has the duty to make arrangements in conformity with the rules of protocol for the transport of the body or for burial in its territory.

Rule 3

A special mission which is led by a head of government shall be governed by the provisions of the said articles, subject to the following exceptions:

(a) In giving its approval to the special mission being led by the head of government, the receiving state admits in advance that such a mission may perform the tasks to be agreed upon by the two states concerned in the course of their contacts (exception to Article 2 as adopted);

(b) The head of government, as head of the special mission, cannot be declared *persona non grata* or not acceptable (exception to Article 4);

(c) In cases where a head of government acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving state (special rule replacing Article 11);

(d) The function of a special mission which is led by a head of government comes to an end at the time when he leaves the territory of the re-

ceiving state, but the mission may, if the sending state and the receiving state so agree, continue in being after his departure; in this case, however, the level of the special mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to Article 12);

(e) A head of government who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving state;

(f) A head of government who leads a special mission enjoys full customs exemption and exemption from customs inspection by an agency of the receiving state;

(g) A head of government who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the head of government.

Rule 4

A special mission which is led by a Minister for Foreign Affairs shall be governed by the provisions of the said articles, subject to the following exceptions:

(a) In giving its approval to the special mission being led by the Minister for Foreign Affairs, the receiving state admits in advance that such a mission may perform the tasks to be agreed upon by the two states concerned in the course of their contacts (exception to Article 2 as adopted);

(b) The Minister for Foreign Affairs, as head of the special mission, cannot be declared *persona non grata* or not acceptable (exception to Article 4);

(c) The members of the staff of a special mission which is led by a Minister for Foreign Affairs may also be members of his personal suite. Such persons shall be treated as diplomatic staff (supplement to Article 6);

(d) In cases where a Minister for Foreign Affairs acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving state (special rule replacing Article 11);

(e) The function of a special mission which is led by a Minister for Foreign Affairs comes to an end at the time when he leaves the territory of the receiving state, but the mission may, if the sending state and the receiving state so agree, continue in being after his departure; in this case, however, the level of the mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to Article 12);

(f) A Minister for Foreign Affairs who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving state;

(g) A Minister for Foreign Affairs who leads a special mission enjoys full customs exemption and exemption from customs inspection by an agency of the receiving state;

(h) A Minister for Foreign Affairs who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Minister for Foreign Affairs.

Rule 5

A special mission which is led by a Cabinet Minister other than the Minister for Foreign Affairs shall be governed by the provisions of the said articles, subject to the following exceptions:

(a) The members of the staff of a special mission which is led by a Cabinet Minister may also be members of his personal suite. Such persons shall be treated as diplomatic staff (supplement to Article 6);

(b) In cases where a Cabinet Minister acts as head of a special mission, the function of the mission is deemed to commence at the time when he arrives in the territory of the receiving state (special rule replacing Article 11);

(c) The function of a special mission which is led by a Cabinet Minister comes to an end at the time when he leaves the territory of the receiving state, but the special mission may, if the sending state and the receiving state so agree, continue in being after his departure; in this case, however, the level of the special mission changes, and its level shall be determined according to the rank of the person who becomes head of the special mission (supplement to Article 12);

(d) A Cabinet Minister who leads a special mission enjoys complete inviolability as to his person, property and residence and full immunity from the jurisdiction of the receiving state;

(e) A Cabinet Minister who leads a special mission enjoys full customs exemption and exemption from customs inspection by an agency of the receiving state;

(f) A Cabinet Minister who leads a special mission has the right to bring with him members of his family and persons attached to his personal service, who shall, for so long as they form part of his suite, be entitled to the same immunities as the Cabinet Minister.

Rule 6

The sending state and the receiving state may, by mutual agreement, determine more particularly the status of the special missions referred to in Rule 1 and, especially, may make provision for more favourable treatment for special missions at this level.

The Special Rapporteur is putting forward the foregoing rules as a suggestion only, in order that the Commission may express its opinion on the exceptions enumerated above. In the light of the Commission's de-

cision he will submit a final proposal; he thinks he will be able to do so during the Commission's Seventeenth Session.

CHAPTER IV

PROGRAMME OF WORK AND ORGANIZATION OF FUTURE SESSIONS

51. The Commission considered questions relating to its programme of work and the organization of future sessions at four private meetings held on 18 and 31 May and 2 and 4 June 1965. These questions were also considered by the officers of the Commission and the Special Rapporteurs, whose proposals were adopted by the Commission at its 799th meeting on 10 June 1965.

52. At its Sixteenth Session in 1964, the Commission decided to complete the study of the law of treaties and of special missions before the end of 1966, that is, before the end of the term of office of the present members of the Commission. For the accomplishment of this aim, the Commission believed it essential to hold a four-week winter session in 1966.⁹⁸ At its present session the Commission was even more firmly convinced that a considerable number of additional meetings would be necessary to complete the work programme it had adopted, even if, as seemed necessary, all items but the law of treaties and special missions were for the present left aside. The Commission considered the question whether the proposed winter session could be replaced by extensions of the regular summer sessions of 1965 and 1966, but concluded that an extension in 1965 was not possible, and that an extension in 1966 would not by itself permit the completion of even the draft on the law of treaties.

53. The Commission, therefore, reaffirmed its recommendation of 1964 to the General Assembly that arrangements should be made for the Commission to meet for four weeks from 3–28 January 1966. These meetings would constitute the second part of the Seventeenth Session of the Commission.⁹⁹ The report on the work of the second part of the Seventeenth Session would be submitted to the General Assembly at its Twenty-First regular Session in 1966. The records and documents of the January meetings would be published in the *Yearbook of the International Law Commission, 1966*.

54. The Commission cannot at the present stage of its work be certain that even the meetings of January 1966 would be sufficient to enable it to complete its programme, and hence wishes to reserve the possibility of a two-week extension of its 1966 summer session. In the course of the winter meetings the Commission would decide, in the light of the progress made up to that time, whether an extension of the summer session will be necessary or not.

55. The meetings of January 1966 will be entirely devoted to reviewing certain portions of the Commission's draft on the law of treaties in the

⁹⁸ Official Records of the General Assembly, 19th Sess., Supp. No. 9 (A/5809), Ch. IV, pars. 36–38.

⁹⁹ The decision on this point was taken on an *ad hoc* basis, without prejudice to the question of the numbering of sessions if winter meetings are held in years after 1966.

light of the comments of governments. The remainder of the draft will be completed at the regular summer session of 1966. Moreover, the Commission, pursuant to Articles 16 and 21 of its Statute, has requested the Secretary-General to send its draft articles on special missions, completed at the present session, to governments for their comments, and has requested that such comments be submitted by 1 April 1966. At the summer session, the draft will be reviewed and a text adopted in the light of those comments.

56. The Government of the Principality of Monaco has kindly invited the Commission to hold its meetings of January 1966 in Monaco. Article 12 of the Commission's Statute provides:

"The Commission shall sit at the European Office of the United Nations at Geneva. The Commission shall, however, have the right to hold meetings at other places after consultation with the Secretary-General."

In accordance with this provision, the Commission consulted the Secretary-General, who replied that, if the General Assembly at its twentieth session provided funds for a winter session in Geneva and if the Government of Monaco undertook to pay all expenses over and above such appropriation, there would be no objection to holding the meetings in Monaco. On these understandings, the Commission decided in principle to accept the invitation of the Government of Monaco, and requested the Secretary-General to make the necessary arrangements in accordance with General Assembly Resolution 1202 (XII) of 13 December 1957, which provides in operative paragraph 2 (e):

"Meetings may be held away from the established headquarters of any body in other cases where a Government issuing an invitation for a meeting to be held within its territory has agreed to defray, after consultation with the Secretary-General as to their nature and possible extent, the additional costs involved."

CHAPTER V

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Co-operation with Other Bodies

57. At its 801st and 819th meetings on 14 June and 7 July 1965, the Commission considered the item concerning co-operation with other bodies. In this connexion, it desired to stress the importance which it attaches to consultation with the bodies with which it co-operates under Article 26 of its Statute.

INTER-AMERICAN COUNCIL OF JURISTS

58. The Commission took note of the report by Mr. Eduardo Jiménez de Aréchaga (A/CN.4/176) on the work of the Fifth Meeting of the Inter-American Council of Jurists, held at San Salvador from 25 January to 5

February 1965, which he had attended as an observer on behalf of the Commission.

59. The Inter-American Juridical Committee, the standing organ of the Inter-American Council of Jurists, was represented by Mr. Elbano Provenzali Heredia, who addressed the Commission.

60. A standing invitation has been extended to the Commission to send an observer to the Inter-American Council of Jurists. The Commission took note that the next meeting of the Council would be held in Caracas, Venezuela, but that the date had not yet been set. If the meeting is held before the next session of the Commission, the Commission requested its Chairman, Mr. Milan Bartoš, to attend it, or, if he were unable to do so, to appoint another member of the Commission or its Secretary to represent the Commission.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

61. The Commission took note of the report by Mr. Roberto Ago (A/CN.4/180) on the work of the Seventh Session of the Asian-African Legal Consultative Committee held at Baghdad from 22 March to 1 April 1965, which he had attended as an observer on behalf of the Commission.

62. The Asian-African Legal Consultative Committee was represented by Mr. Hasan Zakariya, who addressed the Commission.

63. The Commission considered the standing invitation addressed to it to attend the sessions of the Asian-African Legal Consultative Committee. The Commission considered it useful to send an observer to the Eighth Session of the Committee in 1966, at which comments on the Commission's draft articles on the law of treaties will be prepared. It therefore requested its Chairman, Mr. Milan Bartoš, to attend that session, or, if he were unable to do so, to appoint another member of the Commission or its Secretary to represent the Commission.

B. Exchange and Distribution of Documents of the Commission

64. At its 819th meeting on 7 July 1965, the Commission approved the report (A/CN.4/L.110) of a committee which it had established¹⁰⁰ to study the exchange and distribution of the documents of the Commission. The conclusions of the report were as follows:

(a) All the mimeographed and printed documents and records of the Commission should be distributed to all members of the Commission, and to all of the former members of the Commission and members and former members of the International Court of Justice who so request. The Commission desired to stress the need of its members to receive Volume II, as well as Volume I, of the printed *Yearbooks of the International Law Commission*, for the purposes of study and research in connexion with their functions.

(b) Apart from the above-mentioned persons, the *Yearbooks* and documents should not normally be sent to individuals by name, but should

¹⁰⁰ See Chapter I, par. 7 of the present report.

rather be confined to organizations, institutes and libraries, in particular, law school libraries, which should be placed on the mailing list at the request of members of the Commission or of permanent missions to the United Nations; the Secretariat should review the present list in the light of these principles.

(c) When scientific institutions such as the *Institut de Droit international* and the International Law Association are studying questions related to those before the International Law Commission, a limited number of the relevant documents and records of the Commission should be placed at their disposal if their Secretariats so request; they should be asked in exchange to supply a limited number of their documents and records for the use of the Commission.

(d) While it was recognized that the sending of review copies of the Commission's publications is the responsibility of the Secretariat in connexion with the promotion of sales, nevertheless it is desirable that the number of review copies sent out should be increased to a minimum of 100, so as to allow one copy for each of the principal legal periodicals of the world, and thus, by making the work of the Commission better known, to serve the basic objectives of General Assembly Resolution 1968 (XVIII) on Technical Assistance to promote the teaching, study, dissemination and wider appreciation of international law.

(e) When bodies with which the Commission co-operates in pursuance of Article 26 of its Statute are working on topics related to those before the Commission, it is desirable in principle that sufficient copies of the documents and reports of the Commission and of the other body should be exchanged to permit distribution of one copy to each member of the Commission and to each member of the other body; the Secretariat was requested to explore the possibility of making such arrangements with those bodies.

C. Dates and Places of Next Meetings

65. As stated in the preceding chapter of this report, the Commission finds it necessary to hold a four-week series of meetings from 3 to 28 January 1966, and has decided in principle to accept the invitation of the Government of the Principality of Monaco to hold those meetings in Monaco.

66. The Commission further decided to hold its next regular session at the European Office of the United Nations from 4 May to 8 July 1966, but wishes, for the reasons explained in the preceding chapter, to reserve the possibility of a two-week extension of the session until 22 July 1966, the question of extension to be decided during the January meetings.

D. Representation at the Twentieth Session of the General Assembly

67. The report of the Commission on the work of its Sixteenth Session recorded its decision¹⁰¹ that it would be represented at the Nineteenth

¹⁰¹ Official Records of the General Assembly, 19th Sess., Supp. No. 9 (A/5809), par. 51.

Session of the General Assembly by Mr. Roberto Ago, Chairman of the Commission at the Sixteenth Session. The 1964 report of the Commission was not discussed at the Nineteenth Session of the General Assembly but will presumably be discussed at the Twentieth Session. At its present session the Commission continued to consider it important that it be represented, at the discussion by the General Assembly of its work in 1964, by Mr. Ago.

68. The Commission further decided that it would be represented, in respect of the work of its Seventeenth Session, by Mr. Milan Bartoš, its Chairman, at the Twentieth Session of the General Assembly.

E. Yearbook of the International Law Commission

69. The Commission examined certain suggestions concerning the presentation of its records in the *Yearbooks of the International Law Commission*, made for the purpose of facilitating the use of the *Yearbooks*. A number of suggestions were adopted and will be reflected in the volumes for 1965.

F. Seminar on International Law

70. The European Office of the United Nations organized a Seminar on International Law for advanced students of the subject and young government officials responsible in their respective countries for dealing with questions of international law, to take place during the present session of the Commission. The general subject of the discussions was the law of treaties. The Seminar, which held ten meetings between 10 and 21 May 1965, was attended by sixteen students from thirteen different nationalities. They heard lectures by seven members of the Commission, two members of the Secretariat and one professor from the Geneva University, held discussions with the lecturers, and attended meetings of the Commission. The Seminar was held without cost to the United Nations, which undertook no responsibility for the travel or living expenses of the participants.

71. The Commission considers that the Seminar was well organized and well administered. The excellent qualifications of the participants made it possible to maintain a high level of discussion. The course turned out to be a useful experience for those who attended it. The Commission recommends that further Seminars should be organized in conjunction with its future sessions. In setting the dates for future Seminars, the work programme of the Commission is the primary consideration; but so far as possible, the dates should be co-ordinated with those of other international law activities in Europe, so that participants coming from distant countries can profit by those activities as well.

72. Several members of the Commission stressed the desirability of including among the participants in the Seminar a reasonable proportion of nationals of the developing countries. To achieve this, the General Assembly may wish to consider the possibility of granting fellowships, which might cover travel and subsistence expenses, to enable the nationals of

such countries to attend. Such a measure would be in accord with the aims of General Assembly Resolution 1968 (XVIII) on technical assistance to promote the teaching, study, dissemination and wider appreciation of international law.

INTERNATIONAL LEGAL MATERIALS

The following documents are reproduced in Volume IV, No. 6 (November, 1965), of *International Legal Materials: Current Documents*.¹

VOLUME IV, NUMBER 6 (NOVEMBER, 1965)

JUDICIAL AND SIMILAR PROCEEDINGS	PAGE
United States: Foreign Claims Settlement Commission Decision in <i>Koerber Case</i> (nationality of claimants)	1011
Executive Branch Statement in <i>Sabbatino Case</i>	1018
LEGISLATION AND REGULATIONS	
Portugal: Foreign Investment Law	1019
Rwanda: Investment Code	1031
United States: Amendment of Cuban Claims Act (Repeal of Pro- vision for Sale of Cuban Government Property) and Depart- ment of State Statements.....	1037
Foreign Assistance Act of 1965 and Conference Report	1043
REPORTS	
European Free Trade Association: Annual Report	
Comment on British Import Surcharge.....	1056
United Nations: Report on Financing U.N. Peace-Keeping Opera- tions and Voting in General Assembly	1058
TREATIES AND AGREEMENTS	
Afghanistan and People's Republic of China: Boundary Protocol.	1059
Agreement on Cultural Cooperation.....	1070
Agreement on Economic and Technical Cooperation	1072
Ceylon: Compensation Agreements for Oil Nationalizations	1074
China, Republic of, and United States: Agreement on Status of U. S. Forces in the Republic of China	1090
Commonwealth of Nations: Agreement to Establish Secretariat ..	1108
Cuba and United States: Agreement on Refugees	1118

¹ The annual subscription for six numbers of *International Legal Materials* is \$24.00; there is a concessionary rate of \$18.00 for members of the American Society of International Law. Inquiries and orders should be directed to *International Legal Materials*, American Society of International Law, 2223 Massachusetts Avenue, N. W., Washington, D.C. 20008.

	PAGE
Japan and Korea: Fisheries Agreement	1128
Kuwait and Saudi Arabia: Agreement to Partition the Neutral Zone	1134
Saudi Arabia and United Arab Republic: Agreement on Self-Determination in Yemen	1139
U.S.S.R.: Draft Treaty on Non-Proliferation of Nuclear Weapons	1141
United Nations: Charter Amendments (representation in Security Council and Economic and Social Council)	1144
United States: Draft Treaty to Prevent Spread of Nuclear Weapons	1149

OTHER DOCUMENTS

Dominican Republic: Act of Dominican Reconciliation and Institutional Act	1150
International Committee of the Red Cross: Letter on Application of Geneva Conventions in Viet-Nam, and Replies of the United States and Republic of Viet-Nam	1171
Organization of the Petroleum Exporting Countries: Statute	1175
United Nations: Security Council Resolutions on Kashmir	1190

SUPPLEMENT—JUDICIAL AND SIMILAR PROCEEDINGS

United States: Additional District Court Decision on Remand of <i>Sabbatino</i> Case (act-of-state doctrine: effect of Congressional legislation)	1209
INDEX TO VOLUME IV	1211

AMERICAN SOCIETY OF INTERNATIONAL LAW

ANNOUNCEMENT OF NEW PUBLICATIONS

Legal Advisers and Foreign Affairs

A report of a conference, sponsored by the Society, on the rôle of legal advisers in the conduct of foreign affairs, with descriptions of the organization of their offices in eleven governments. Edited by H. C. L. Merillat. Published for the Society by Oceana Publications, Inc., 40 Cedar Street, Dobbs Ferry, New York. 162 pp. \$4.00.

Three Books on the Legal Context for Foreign Investment in Selected Countries

A series of volumes analyzing the legal aspects of foreign private investment in selected countries, in the context of official policies and economic, political, and social trends. Written on research fellowships from the Society for studies in investment and economic development. All published by the University of North Carolina Press, Chapel Hill, North Carolina.

FOREIGN ENTERPRISE IN INDIA: LAWS AND POLICIES. By Matthew J. Kust. 488 pp. and Index. \$10.00.

FOREIGN ENTERPRISE IN COLOMBIA: LAWS AND POLICIES. By Seymour W. Wurfel. 552 pp. and Index. \$10.00.

FOREIGN ENTERPRISE IN NIGERIA: LAWS AND POLICIES. By Paul O. Proehl. 238 pp. and Index. \$7.50.

The Socialist Commonwealth of Nations: Organizations and Institutions

A study of arrangements among Soviet-bloc countries for coordinating policies and settling disputes. Prepared under the Society's research program on movements toward federation and other forms of regional association. By Kazimierz Grzybowski. Published by the Yale University Press, New Haven, Connecticut. 287 pp. and Index. \$7.50.

East African Unity Through Law

A study of efforts by former British territories in East Africa to establish regional institutions to provide common services and to advance common interests. Another in the Society's series of studies in federalism. By Thomas M. Franck. Published by the Yale University Press, New Haven, Connecticut. 173 pp. and Index. \$5.50.

Aden and the Federation of South Arabia The Constitution of the Congo

Two separate papers written by J. Y. Brinton in the program on federalism. The first is a review of the development of the Federation of South Arabia and the accession of Aden; the second a translation into English, with Commentary, of the Congolese Constitution of August 1, 1964. Both published by the Society. \$2 each.

Other Occasional Publications

The Society has published the following reports; single copies are available upon request, without charge:

A Survey of the Teaching of International Law in Political Science Departments. Report of a survey carried out by the Society with the cooperation of the American Political Science Association. 115 pp.

Teaching of International Law and Related Courses in American Law Schools. Report of a conference organized by the Society in 1964. 28 pp.

International Legal Studies: A Survey of Teaching in American Law Schools, 1963-64. Report of a survey carried out by the Society with the cooperation of the Association of American Law Schools. By Richard W. Edwards, Jr. 292 pp.



In a single volume . . .

a comprehensive study of the
International Law Commission,
incorporating information
previously found only in
hundreds of scattered
documents, some unpublished.

THE INTERNATIONAL LAW COMMISSION

By HERBERT W. BRIGGS

*Member of the International Law Commission
Membre de l'Institut de Droit International
Goldwin Smith Professor of International
Law, Cornell University*

IN this first comprehensive legal and political study of the International Law Commission, a distinguished Commission member examines its origins, purpose, operation, and achievements. Each of the articles of the Commission's Statute is analyzed individually: drafting procedure, the legal meanings of the terms used in it, and its application and evolution in practice. The volume is designed to facilitate an institutional study of the Commission and its important responsibilities in the codification and progressive development of international law.

395 pages. Index. \$7.50

Cornell University Press

ITHACA, NEW YORK

The Procedural Aspects of International Law Series

Just published—Volume V

THE PROTECTION OF FOREIGN INVESTMENT SIX PROCEDURAL STUDIES

Richard B. Lillich

In most instances today, Americans sustain extensive losses if their property abroad is confiscated. Protective and remedial measures are inadequate under international law and under the national system of protection developed to date by the United States.

This is the first systematic attempt to appraise promising existing protective measures and to assess their strengths and weaknesses in relation to the comprehensive program needed to protect private foreign investment.

Professor Lillich's fully documented findings and carefully considered recommendations for action deserve the closest attention in the courts and in Congress, by government officials, international lawyers, and private businessmen.

The Contents: Protection in Municipal Courts: Sovereign Immunity; Act of State.

Protection by the Government: The Hickenlooper Amendment; The Investment Guaranty Program.

Protection for the Future: Pre-adjudication of International Claims; A New Look at Old Problems.

Appendixes, bibliography, index. \$7.50

Volume IV—

THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS

Gillian White

"The only source book now existing on the subject."—*Fordham Law Review*

\$8.95

Volume III—

THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER

Richard A. Falk

"Reading Mr. Falk's book is certain to be a very rewarding experience. It should not be delayed."—*Harvard Law Review*

\$6.50

Volume II—

INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION

Richard B. Lillich and Gordon A. Christenson

"To any lawyer engaged in representing such claimants the present book will be indispensable."—*American Journal of Comparative Law*

\$6.60

Volume I—

INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS

Richard B. Lillich

"The best available short text on the procedural aspects of American national claims commissions."—*American Bar Association Journal*

\$5.00

Syracuse University Press Syracuse, New York 13210

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 60

April, 1966

NO. 2

CONTENTS

	PAGE
COMMUNIST CHINA'S ATTITUDE TOWARD INTERNATIONAL LAW. <i>Hungdah Chiu</i> ...	245
THE LOGAN ACT: PAPER TIGER OR SLEEPING GIANT? <i>Detlev F. Vagts</i>	268
LEGAL ASPECTS OF PIRATE BROADCASTING. <i>H. F. van Panhuys and Menno J. van Emde Boas</i>	303
EDITORIAL COMMENT:	
Technical Assistance in the New International Law. <i>John N. Hazard</i>	342
NOTES AND COMMENTS:	
Friendly Relations and Co-operation among States. <i>Edward McWhinney</i>	356
Washington World Conference on World Peace through Law. <i>Charles S. Ehyne</i>	361
Seminar on Problems of International Law and Economic Development. <i>Wolf-</i>	
<i>gang Friedmann</i>	367
Tibet's Declarations of Independence. <i>David A. McCabe</i>	369
The 1963/1965 Amendments to the Charter of the United Nations. <i>Egon Schwelb</i>	371
Academy of American and International Law. <i>E. H. F.</i>	378
Regional Meetings of the Society. <i>Eleanor H. Finch</i>	379
60th Annual Meeting of the Society	382
Professor Bishop's Appointment to the Edwin DeWitt Dickinson Professorship	
of Law. <i>Brunson MacChesney</i>	384
U. S. CONTEMPORARY PRACTICE RELATING TO INTERNATIONAL LAW	385
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW. <i>John R.</i>	
<i>Stevenson</i>	400
BOOK REVIEWS AND NOTES. <i>Leo Gross</i> :	
Bishop, <i>The Roosevelt-Litvinov Agreements</i> , 419; <i>Canadian Yearbook of Inter-</i>	
<i>national Law</i> , 1964, 421; Wolfrom, <i>L'Utilisation à des Fins Autres que la</i>	
<i>Navigaton des Eaux des Fleuves, Lacs et Canaux Internationaux</i> , 424; Suy,	
<i>Les Actes Juridiques Unilatéraux en Droit International Public</i> , 426; Brinton,	
<i>Aden and the Federation of South Arabia</i> , 427; —, <i>Federations in the Middle</i>	
<i>East</i> , 427; Kovar, <i>Le Pouvoir Réglementaire de la Communauté Européenne</i>	
<i>du Charbon et de l'Acier</i> , 428; Van Bekelen, <i>Indian Foreign Policy and the</i>	
<i>Border Dispute with China</i> , 431; Wright, <i>American Support of Free Elections</i>	
<i>Abroad</i> , 432; Šahović, <i>Nuklearna Energija i Međunarodno Pravo</i> , 433.	
Briefier Notices: Feld, 434; Aufrecht, 435; Domke, 436; Guerry, 436; Lasala	
Samper, 437; <i>Annals, Chinese Society of International Law</i> , 437; Chang, 438;	
Kahng, 438; Nial, 439; Faust, 440; Góralczyk, 440; Bulgarian Academy of	
Sciences, 411.	
Books Received	442
OFFICIAL DOCUMENTS	
SECOND SPECIAL INTER-AMERICAN CONFERENCE. <i>Rio de Janeiro, November 17-30,</i>	
<i>1965. Resolutions adopted November 30, 1965:</i>	
I. Act of Rio de Janeiro—Amendments of the Charter of Bogotá	445
II. Economic and Social Act of Rio de Janeiro	447
III. Annual Meetings of Ministers of Foreign Affairs	454
IV. Coordination of the Activities of International and Inter-American	
Organizations	455
X. Convocation of a Specialized Conference	456
XIII. Strengthening the Means for Peaceful Settlement	456
XVIII. Inter-American Peace Committee	457
XXI. Asylum for Cuban Political Refugees	457
XXII. Expanded Functions of the Inter-American Commission on Human Rights	
458	
XXVI. Informal Procedure on the Recognition of <i>De Facto</i> Governments	460
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW:	
Statute. <i>October 31, 1951</i>	461
Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil	
or Commercial Matters. <i>October 28, 1964</i>	464
INTERNATIONAL LEGAL MATERIALS. Contents, Vol. V, Nos. 1 (<i>January</i>) and 2	
(<i>March</i>), 1966.	472



Editor-in-Chief

WILLIAM W. BISHOP, JR., University of Michigan Law School

RICHARD R. BAXTER
Harvard Law School

HERBERT W. BRIGGS
Cornell University

HARDY C. DILLARD
University of Virginia Law School

RICHARD A. FALK
Princeton University

ALWYN V. FREEMAN
Detroit, Michigan

LEO GROSS
Fletcher School of Law and Diplomacy

JOHN N. HAZARD
Columbia University

JAMES NEVINS HYDE
New York, N. Y.

OLIVER J. LISSITZYN
Columbia University

BRUNSON MACCHESNEY
Northwestern University Law School

MYRES S. McDOUGAL
Yale Law School

H. C. L. MERILLAT
Washington, D. C.

STANLEY D. METZGER
Georgetown University Law Center

STEFAN A. RIESENFELD
University of California Law School

OSCAR SCHACHTER
New York, N. Y.

LOUIS B. SOHN
Harvard Law School

ERIC STEIN
University of Michigan Law School

JOHN R. STEVENSON
New York, N. Y.

RICHARD YOUNG
Van Hornesville, N. Y.

Honorary Editors

PHILIP MARSHALL BROWN
Washington, D. C.

CHARLES G. FENWICK
Washington, D. C.

HANS KELSEN
University of California

JOSEF L. KUNZ
University of Toledo

PITMAN B. POTTER
American University

JOHN B. WHITTON
Princeton University

ROBERT R. WILSON
Duke University

QUINCY WRIGHT
University of Virginia

Secretary of the Board of Editors

ELEANOR H. FINCH

The object of The American Society of International Law is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. For this purpose it co-operates with similar societies in this and other countries.

Membership in the Society is open to all persons of good moral character interested in the objectives of the Society. Membership dues are: Regular, \$15.00 for residents of the United States, \$10.00 for non-residents; professional, \$25.00; intermediate, \$10.00; student, \$5.00. Application forms and further information may be obtained from the Membership Secretary of the Society at the address given below.

The JOURNAL is published quarterly and is supplied to all members of The American Society of International Law without extra charge. The annual subscription to non-members of the Society is \$15.00 and includes subscription to the *Proceedings* of the Society. Available single numbers of the current volume of the JOURNAL will be supplied at \$3.50 per copy; other available back numbers at \$4.50 per copy.

The views expressed in the articles, editorial comments, book reviews and notes, and other contributions which appear in the JOURNAL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

Subscriptions, orders for back numbers, correspondence with reference to the JOURNAL, manuscripts, and books for review should be sent to the Secretary of the Board of Editors, 2223 Massachusetts Avenue, N.W., Washington, D. C. 20008.



COMMUNIST CHINA'S ATTITUDE TOWARD INTERNATIONAL LAW

BY HUNGDAH CHIU *

*Associate Professor of International Law,
National Taiwan University*

I. INTRODUCTION

Despite the growing interest in Chinese studies in this country, little, if any,¹ attention has been paid to the study of Communist China's view of international law. Some persons may feel that Communist China, as a Socialist country, cannot do other than to adhere to the Soviet concept of international law or that of Socialist countries in general. There may be some truth in this view, but it does not disclose the whole picture. Communist China does accept many principles of international law proclaimed or applied by the Soviet Union or by Soviet jurists, but in view of the growing differences of views between the two countries in handling many international problems and in conducting the international Communist movement, it is reasonable to infer that Communist China may have developed different views toward international law in some aspects. In this connection, it may be noted that Wu Tê-feng, a prominent jurist in Communist China and President of the China Political Science and Law Association, not long ago severely criticized the Soviet concept of international law in a report delivered on October 8, 1964, to the general meeting of the Association. He said:

Imperialism is the basic source of modern war, and American imperialism, moreover, is the most ferocious and ambitious aggressor ever to exist in the history of mankind, and it is the most flagrant violator of the principles of modern international law. Naturally, democratic legal workers in various countries should engage in the thorough exposure of, and determined struggle against it. However, modern revisionists nevertheless make great efforts to propagandize the carrying out of "peaceful co-existence" with imperialism without being subject to any principles, disseminating the view that con-

* S.J.D. (Harvard). This study was undertaken at Harvard Law School by the author in his capacity as an Associate in Research of the East Asian Research Center of Harvard University in 1964-1965. The author wishes to express his sincere thanks to Professor J. A. Cohen of Harvard Law School for suggesting the field of research and arranging research support under funds provided by the Ford Foundation. He is also grateful to Professor R. R. Baxter of the same School for having read this manuscript and offering many valuable criticisms. The views expressed in this paper are exclusively those of the author. At present the author and Professor Cohen are preparing a book of readings on this subject.

¹ The United States Joint Publication Research Service (JPRS) has translated into English a number of articles on international law published in various Communist Chinese periodicals. Besides JPRS materials, the author does not know of any systematic study in this field.

temporary international law is the "law of peaceful co-existence," and to propagandize the carrying out of "full co-operation" with American imperialism.²

This paper examines Communist China's attitude toward some basic problems of international law such as the rôle, definition, nature, systems and sources of international law, the relation between international law and municipal law, and the science of international law in Communist China.

II. THE RÔLE OF INTERNATIONAL LAW

It is, of course, beyond doubt that Communist China recognizes the existence of international law. This fact is shown in a number of ways in the conduct of foreign relations by Communist China: by reference to principles of international law in the text of a number of international treaties;³ by condemning the actions of another country as violations of international law in diplomatic statements or notes;⁴ by justifying its position in an international dispute in terms of international law;⁵ and by teaching international law in universities and colleges.⁶ One should not assume that merely because Communist China has acknowledged the existence of international law, its view on the rôle of international law in adjusting international relations is the same as that of Western countries. A study of the relevant materials indicates that there do exist major differences between the Communist Chinese and Western views on the rôle of international law. To study this question, we should begin our analysis with Communist China's view of the rôle of law in general.

In the Soviet Union, law is viewed as an instrument of policy of the state. Law must be the servant of the state. This point may be illustrated by a quotation from an essay by Professor Romashkin, corresponding member of the Academy of Sciences of the U.S.S.R.:

² "China Political Science and Law Association Held Its Fourth General Meeting," (1964) *Cheng-fa yen-chiu* (Studies in Political Science and Law) [hereinafter cited as *CFYC*], No. 4, at 28.

³ *E.g.*, the United Nations Charter, which sets forth many of the important principles of international law, is cited as follows in the preamble to the Sino-Afghanistan Treaty of Friendship and Mutual Non-aggression, Aug. 26, 1960: "... conclude the present treaty in accordance with the fundamental principles of the United Nations Charter . . ." 3 *Peking Review*, No. 51, at 18 (1960). See also Art. 1 of the Sino-Hungarian Treaty of Friendship and Co-operation, May 6, 1959, 2 *ibid.*, No. 19, at 23 (1959).

⁴ *E.g.*, in the Statement by the Chinese Embassy in Indonesia on the Forceful House Arrest of the Chinese Consul, May 13, 1960, it is stated that "[t]he forcible house arrest of Consul Chiang Yen, the crude encroachment upon the functions and rights, the personal safety and freedom of the consul . . . have violated the universally acknowledged international norms. . . ." 3 *Peking Review*, No. 20, at 34, 35 (1960).

⁵ *E.g.*, Communist China justifies its position in the border dispute with India in terms of international law, maintaining that, since China had never ratified the 1914 Simla Convention, the boundary had thus never been formally fixed by any treaty. See Note of the Ministry of Foreign Affairs of the People's Republic of China to the Indian Embassy in China, Dec. 26, 1959, in *The Sino-Indian Boundary Question* 57-58 (Peking, enlarged ed., 1962).

⁶ See p. 263 below.

Soviet law is a system of rules established by the state to promote the consolidation of the social order which helps society advance towards Communism.⁷

Similarly, law in Communist China is considered to be an instrument of the state, undergoing successive adaptations to make it conform to Communist-party-dictated policies.⁸ Shen Chün-ju, President of the Supreme People's Court, made the following statement which is representative of Communist China's view on the rôle of law:

Our judicial work must serve political ends actively and must be brought to bear on current political tasks and the mass movement.⁹

If one had doubts on this point, they would vanish upon reading the words of Chairman Mao quoted below:

The state apparatus, including the army, the police and the courts, is the instrument by which one class oppresses another. It is an instrument for the oppression of antagonistic classes; it is violence and not "benevolence."¹⁰

Law in the West is often thought of as an objective body of authoritative rules which can be understood and relied upon by the people, or at least by their lawyers. The formulation of these rules depends upon political processes, but their application should, ideally, be divorced from political considerations. In Communist China such a view of law constitutes "rightist" heresy.¹¹

⁷ "The Soviet State and Law at the Contemporary Stage," in Romashkin (ed.), *Fundamentals of Soviet Law* 20 (Moscow) (published by the Institute of State and Law of the Academy of Sciences of the U.S.S.R.). The *Small Soviet Encyclopedia* also states: "Socialist law expresses the sovereignty and the totality of rights of the urban and rural workers and serves the building of a Communist society. It is a powerful weapon in the struggle against the enemies of the people, against the dis-organizers of Socialist society." Vol. 7, at col. 494 [passed for publication on Dec. 1, 1959] (3d ed.); quoted in Vallat, "International Law—A Forward Look," 18 *Year Bk. of World Affairs* 248, 250 (1964).

⁸ *E.g.*, it was stated in an article entitled "Some Questions of the People's Democratic Legal System in Our Country" that "since the policy of the party is the soul of the legal system, legal work is merely the implementation and execution of party policy. . . . The law of our country is a changing law, adapted to the perpetual revolution." (1959) *CFYC*, No. 2, at 3. See also "Political and Legal Work Must Follow Absolutely the Guideline of the Party," *ibid.* 9.

⁹ Report on Judicial Work, New China News Agency, Oct. 31, 1951.

¹⁰ "On the People's Democratic Dictatorship," 4 *Selected Works of Mao Tse-tung* 411, 418 (Peking, 1961) [English version]. For a study of this question, see also Lu Chih and Chang Hao, "The Position and Function of Socialist Laws in People's Democratic Dictatorship," (1962) *CFYC*, No. 4, at 26; Szu Chin, "Chinese Socialist Law," *ibid.* 5; Chou Hsin-min, "Law is a Sharp Weapon of Class Struggle," *Jen min jih pao* (People's Daily), Oct. 28, 1964.

¹¹ *E.g.*, Shen Chün-ju declared that: "Not a small number of cadres look upon the nation's judicial work (a work of the strongest political nature) as a purely technical matter, and fail to consider it as a weapon to protect democracy and enforce dictatorship." Report on Judicial Work, *op. cit.* note 9 above. During the period of the 1957-1958 rectification campaign, this view was severely criticized. See several articles in (1957) *Fa hsieh* (Science of Law), Nos. 5 and 6.

With respect to the rôle of international law, while the standard Soviet textbook on international law considers it "as a special form of law [which] has all the general features characteristic of the conception of law," it also concedes that it has, *inter alia*, "special features as regards the fulfilment of its rôle as aid or weapon." Thus, international law does not "express the will of the ruling class of any particular State," but "the agreed will of a number of States." The present-day rôle of international law is "to promote [the Soviet foreign policy of] peaceful co-existence and co-operation between all States regardless of their social systems."¹²

Writers in Communist China appear generally to agree with the Soviet view that the rôle of international law, like that of municipal law, is to act as an instrument of a state's foreign policy.¹³ This view is clearly stated by Chou Fu-lun in his article entitled "An Inquiry into the Nature of Modern International Law":

International law, in addition to being a body of principles and norms which must be observed by every country, is also, just as any law, a political instrument; whether a country is socialist or capitalist, it will to a certain degree utilize international law in implementing its foreign policy.¹⁴

Another writer, Chu Li-lu, however, goes beyond the current Soviet view by arguing that:

International law is one of the instruments of settling international problems. If this instrument is useful to our country, to socialist enterprise, or to the peace enterprise of the people of the world, we will use it. However, if this instrument is disadvantageous to our country, to socialist enterprises or to peace enterprises of the people of the

¹² Kozhevnikov (ed.), *International Law, A Textbook for Use in Law School* 10, 11 (Moscow, 1957, English version, 1961) (Published by the Institute of State and Law of the Academy of Sciences of the U.S.S.R.).

¹³ The fact that both the Soviet Union and Communist China consider that international law should serve a state's foreign policy does not mean that they agree on the present-day rôle of international law. Thus, despite the fact that both countries advocate the foreign policy of peaceful coexistence, they differ in the contents or scope of this policy. For instance, Communist China considers that this policy is not applicable to "imperialism and its lackeys" nor does it exclude the use of force in a "national liberation war." For details see *The Polemic on the General Line of the International Communist Movement* (Peking, 1965).

¹⁴ (1958) Chiao hsüeh yü yen chiu (Teaching and Research), No. 3, at 52. The main theme of Chou's article was that there is only one universal system of international law which adjusts relations among various countries, Socialist or capitalist. It is interesting to note that Lin Hsin, who held the view that there are now two systems of international law—Socialist and capitalist, also maintained a similar view on the rôle of international law. See his "A Discussion of the Post World War II Systems of International Law," *ibid.*, No. 1, at 34. See also Shih *et al.*, "An Initial Investigation into the Old Law Viewpoint in the Teaching of International Law," *ibid.*, No. 4, at 14. Shih and other co-authors attack rightist influence in the teaching of international law, condemning certain teachers for "emphasizing that the main purpose of the course was to give students a systematic knowledge of international law. . . . These comrades do not recognize that international law is the legal instrument serving our country's foreign policy." *Ibid.*, 15.

world, we will not use it and should create a new instrument to replace it. Today we have a majority of the old international law jurists who still adhere to the purely legalistic viewpoint by restricting themselves to the limited area of international law and thus they subject themselves to the disposal of imperialism.¹⁵

Although no one would deny that every country, in pursuing its foreign policy objectives, seeks to justify its actions in terms of international law, few Western writers could afford to admit publicly that they regard international law as an "instrument." Thus, Judge Jessup writes:

The function of international law is to provide a legal basis for the orderly management of international relations.¹⁶

Writers in Communist China, however, are not impressed by such statements. They believe that such a view is an attempt to camouflage the naked fact that

bourgeois international law as a "science" . . . is . . . a theoretical instrument to defend the aggressive or colonial policy of the strong capitalist countries, to do its best to maintain the capitalist "world order" and to oppose legal principles of socialism.¹⁷

¹⁵ "Refute the Absurd Theory Concerning International Law by Ch'en T'i-ch'iang," *People's Daily*, Sept. 18, 1957. Chen T'i-chiang was educated at the University of London (Ph.D. in International Law) and his book, *International Law of Recognition*, was published in England in 1951. Before he was purged in 1958, he held the position of Head of Division of International Law of the Institute of International Relations of the Chinese Academy of Sciences.

¹⁶ A Modern Law of Nations 20 (1948). Another writer explains more clearly: "The main object of international law has been to produce an ordered rather than a just system of international relations, yet in later developments . . . there has been evidence of some striving to ensure that, objectively, justice be done between States." Starke, *An Introduction to International Law* 3 (5th ed., 1963). A few Western writers, however, also advocate a theory on the rôle of law which is essentially the same as that of Communist (Soviet or Communist Chinese) writers. For instance, Professor McDougal and his followers have consistently argued that law is an instrument of policy. Professor Falk has summarized McDougal's view as follows: "First of all, for McDougal, the cold war represents a value conflict between Communist totalitarian myths and the Western defense of human dignity and liberal democracy; thus the outcome of the struggle has a crucial significance for all that we cherish as nontotalitarians. Second, the Communist strategists are fully aware that law is really a process for the promotion of policies and are adept at manipulating legal doctrine to serve Communist policies. Third, a mechanical subservience to legal restraint by Western nations, independent of policy implications, handicaps our side in the cold war and gives the Sino-Soviet bloc a pervasive and unnecessary advantage that may prove to be decisive. In view of this situation it is a matter of moral and political survival, as well as jurisprudential integrity, to acknowledge that a public official probably applies the law only when he promotes the policies of the moral community which he serves. There is no existing universal moral order. Without such universality the world exhibits contending systems as its primary characteristic and it is up to those on our side to help it prevail." Book review of McDougal and Feliciano, *Law and Minimum World Public Order* (1961), 8 *Natural Law Forum* 171, 176-177 (1963). It is interesting to note that no writer in Communist China has ever either cited McDougal's writings or commented on his view.

¹⁷ Ho Wu-shuang and Ma Chün, "A Criticism of the Reactionary Viewpoint of Ch'en T'i-ch'iang on the Science of International Law," (1957) *CFYC*, No. 6, at 35.

III. DEFINITION OF INTERNATIONAL LAW

Before the 1950's, there was a general tendency among Western writers to define international law as a body of legally binding rules governing relations among *civilized* countries. Even in the seventh edition of Oppenheim's renowned *International Law* published in 1948, international law is defined as "the name for the body of customary and conventional rules which are considered legally binding by *civilized States* in their intercourse with each other." (Emphasis added.)¹⁸ The limitation of the application of international law to "civilized states" is severely criticized by writers in Communist China. Such a definition, in their view, excludes weak and small countries in the oriental world or even in the Western world from the protection of international law by classifying them as "uncivilized states." The result, as described by one writer, would be:

In the Western capitalist world, suppression of the weak by the strong and the eating of small fish by big fish are not only tacitly condoned by bourgeois international law but also are cloaked with a mantle of "legality."¹⁹

In recent years, treatises published in Western countries have generally omitted the reference to "civilized states" in their definition of international law.²⁰ However, most of these treatises have departed from the old formula also to include international organizations and individuals in their definition. For instance, the second edition of Professor Schwarzenberger's *Manual of International Law* defines international law as "the body of legal rules which apply between sovereign States and such other entities as have been granted international personality."²¹ And he considers that international organizations and individuals in certain aspects have been granted international personality and thereby are subjects of international law.²² This tendency is quite unacceptable to writers in Communist China, who have continued to maintain that international law is a law among states. The Western theory that individuals or international organizations may be subjects of international law is nothing but an attempt to provide a "legal basis for imperialists' intervention in the

¹⁸ Vol. I, at 4 (ed. Lauterpacht).

¹⁹ Ying T'ao, "Recognize the True Face of Bourgeois International Law from a Few Basic Concepts," (1960) Kuo-chi wen-t'i yen-chiu (Studies in International Problems) [hereinafter cited as KCWTYC], No. 1, at 42, 44. The article says: "... their [*i.e.*, bourgeoisie] criterion for the so-called 'civilized' or 'uncivilized' is neither long history nor culture. Even though China has 5,000 years of excellent culture, she was not included in the group of 'civilized states.'" *Ibid.*

²⁰ *E.g.*, the eighth edition of Oppenheim's *International Law* omits the adjective "civilized" before states in its definition of international law. Vol. I, at 4-5 (ed. Lauterpacht, 1955).

²¹ At 3 (2d ed., 1952). See also Starke, *An Introduction to International Law* 3 (2d ed., 1950). The first edition of Starke's book published in 1947 accepted Hyde's definition of international law as a law among *states*.

²² Schwarzenberger, *op. cit.* note 21 above, at 38-39. For a discussion of individuals and international organizations as subjects of international law, see generally Jessup, *op. cit.* note 16 above.

internal affairs of other countries or to facilitate the establishment of the world hegemony of the United States.”²³

At present, writers in Communist China appear to accept the definition of international law given in the Soviet standard textbook on international law:

the aggregate of rules governing relations between States in the process of their conflict and co-operation, designed to safeguard their peaceful coexistence, expressing the will of the ruling classes of these States and defended in case of need by coercion applied by States individually or collectively.²⁴

It should be observed that this definition strictly limits the subjects of international law to states. But, according to Triska and Slusser, the prevalent Soviet view is to consider international organizations as subjects of international law, albeit limited ones.²⁵ Be that as it may, there does not appear to be any writer in Communist China who advocates the new Soviet doctrine.²⁶

On the other hand, it may be interesting to note that at least one writer in Communist China interprets the term “subjects of international law” as including not only existing states but also nations in the course of struggling for independence or establishing their own states.²⁷

IV. THE NATURE OF INTERNATIONAL LAW AND THE DILEMMA OF THE SUPERSTRUCTURE

A cardinal principle of Communist theory is that the state superstructure, including all laws, reflects the economic base of the society and serves the interests of the ruling class. All laws, in its view, must possess class character. It is impossible, however, to apply this principle literally to a system of international law which purports to govern the relations between states with fundamentally different social systems. Yet it is undeniable that the recognition of the existence of such a system of binding international legal rules is necessary to the relationships between

²³ K'ung Meng, “A Criticism of the Theories of Bourgeois International Law on the Subjects of International Law and the Recognition of States,” (1960) KOWTYO, No. 2, at 44, 46-49.

²⁴ Kozhevnikov, *op. cit.* note 12 above, at 7. The definition is cited in Chou, *loc. cit.* note 14 above, at 53. In an article by Ho and Ma, *loc. cit.* note 17 above, they cited a similar definition given by Vyshinsky as the correct definition of international law.

²⁵ See their Theory, Law, and Policy of Soviet Treaties 49-52 (1962).

²⁶ It is not clear whether the lack of response to the new Soviet doctrine is due to ignorance of the recent Soviet development or to disagreement with it. Despite the fact that the eighth edition of Oppenheim's International Law, published in 1955, has omitted the adjective “civilized” in its definition of international law, some writers in Communist China continued, as late as 1960, to rely on the seventh edition (published in 1948), which was translated into Chinese, in evaluating the Western definition of international law. *E.g.*, see Ying T'ao, *loc. cit.* note 19 above, at 43. Similarly, many writers in Communist China appear to rely heavily on a book entitled Fundamental Principles and Problems in Modern International Law (Peking, 1956), which is a collection of translations of 21 articles of Soviet writers all published before 1955.

²⁷ K'ung Meng, *loc. cit.* note 23 above, at 49. *Cf.* Kozhevnikov, *op. cit.* note 12 above, at 90, where a similar view, though not in such a radical form, is expressed.

Western and Communist countries. This contradiction between Marxist-Leninist dogma and the practical requirements of participation in international affairs presents a troublesome dilemma for the Communist theoretician.

In the Soviet Union, theoretical difficulties have led some jurists to deny the existence of a general international law binding all countries, Communist or non-Communist. For instance, Professor Korovin once concluded that "an intercourse on the basis of intellectual unity (ideological solidarity) between countries of bourgeois and Socialist cultures, cannot exist as a rule, and hence the rules of international law covering this intercourse become pointless."²⁸ Since 1956, the Soviet Union, being interested in strengthening its relations with the West, has taken a theoretically weak but practically wise stand in regard to the dogma-reality dilemma, maintaining that:

*Although International Law, like any other branch of law, has a class character and pertains to the superstructure, it cannot express the will of the ruling class of any particular State. It is the expression of the agreed will of a number of States in the form of an international agreement or custom which has grown up over a period. The purpose of present-day International Law is to promote peaceful co-existence and co-operation between all States regardless of their social systems. (Emphasis added.)*²⁹

It believes that there is a single international legal system, which consists of rules created primarily by treaties and secondarily by international custom.³⁰ While they do insist that the influence of Socialist countries has been responsible for the addition of new progressive principles to international law,³¹ Soviet jurists concede that at the present time there is only one system of international law employed by both capitalist and Socialist countries.³²

There does not seem to be a clear consensus among writers in Communist China concerning this question. Early in 1957, Professor Ch'iu Jih-ch'ing of Fu-tan University at Shanghai writes, in an article entitled "Systems of International Law at the Present Stage,"³³ that there are

²⁸ Quoted in Chakste, "Soviet Concepts of the State, International Law and Sovereignty," 43 A.J.I.L. 26, 27 (1949). But this group of jurists recognizes that certain rules of law could apply in areas of practical common interest, such as postal communication, health regulations, etc. According to Tunkin, Korovin himself afterwards recognized such opinions as erroneous and the overwhelming majority of Soviet jurists never shared the views expressed by Professor Korovin. "Co-existence and International Law," 95 Hague Academy Recueil des Cours 5, 60 (1958). For a criticism of Professor Korovin's view by Soviet jurists, see (1952) Soviet State and Law (in Russian), No. 7, at 67-77.

²⁹ Kozhevnikov, *op. cit.* note 12 above, at 11.

³⁰ *Ibid.* 12.

³¹ *Ibid.* 20. It is there stated that: "The Soviet socialist state from the very outset repudiated all unequal treaties and abolished consular jurisdiction. It proclaimed the principles of self-determination of nations, peaceful coexistence. . . ."

³² *Ibid.* 88. They explain that Socialist international law is still in the stage of development.

³³ (1957) Science of Law, No. 3, at 16-19.

two systems of international law—one Socialist and the other general. Socialist international law adjusts relations among Socialist countries, while general international law adjusts relations between Socialist countries and bourgeois countries and among bourgeois countries themselves. With respect to the class character of general international law, he maintains:

We know that international law is the same as municipal law in that they all constitute part of the superstructure. The only difference is that international law as a superstructure does not directly relate to production relations [*i.e.*, economic relations], nor does it directly reflect that base. It must produce a connection and reflect the base through international relations. . . . This generally recognized international law possesses neither the character of the bourgeoisie nor that of socialism; it is the type of international law possessing a transitional character. Therefore, it may concurrently constitute part of the superstructure of different countries with various social systems and be used by them.

In his view, such a general international law is inappropriate to adjust relations among Socialist countries, because

the basic principles of general international law are the five principles of peaceful coexistence. They only include those Leninist principles relating to the equality of nations, but not those principles of proletarian internationalism [which is the foundation of relations among socialist countries].

In 1958, another writer, Lin Hsin, submitted a different view by arguing that there are two separate systems of international law, one bourgeois and the other Socialist, which exist side by side.³⁴ He views international law as a reflection of common ideological values shared by the states subject to its rules. Since no common values exist between Socialist and capitalist countries, there can accordingly be no uniform rules of international law binding equally upon both. He also cites the rôle of international law as a tool of foreign policy to deny the existence of a general international law. He asked: "How can socialist and capitalist countries, whose foreign policies are fundamentally opposed, share one system of international law?" Admitting that relations do exist between Socialist and capitalist countries, Lin still manages to avoid conceding the existence of a common system of international law adjusting such relations. He states that all treaties and agreements concluded between capitalist and Socialist countries are reached only after a fierce struggle between the two parties resulting in a compromise which reflects not common values but the realities of the power balance between them. The degree to which agreements are possible depends upon the extent to which the two systems of international law are capable of incorporating the new rule. The situation is one of "sleeping in the same bed but dreaming different dreams." By this he means that the two interpretations of the same document of international law are radically different. When it comes to implementing this

³⁴ *Loc. cit.* note 14 above, at 34-38.

joint document of international law, there is a "dispute from first to last,"³⁵

Lin's article drew severe criticism by Chou Fu-lun in an article published a few months later.³⁶ Chou gives an affirmative answer to the question as to whether or not there is a single system of international law exerting binding force upon all countries alike. He arrives at this conclusion by first stating that during a period of peace, political, economic and cultural relationships are bound to arise among all countries, whatever their social system may be. He insists that "a certain degree of agreement must be reached in order to resolve international questions. In other words, international law is needed to regulate relations between countries." Chou avoids the dilemma created by a strict application of Marxist-Leninist dogma concerning the state superstructure by distinguishing international law from municipal law. Whereas Lin, in holding that all laws, including international law, reflect ideological values, was forced to propound a two-system theory of international law, Chou sets forth a different theory as to the nature and formation of international law:

International law should not be confused with municipal law. The major unique trait of international law is that its standards are formulated not by a super-legislature, but through agreement reached by the process of struggle, co-operation, compromise, and consultation.

He feels that the common system of international law is constantly undergoing changes as a result of the growth of new centers of power whose policies must be accommodated within the framework of international law.

³⁵ A few Western writers also have expressed their doubt on the question of whether a universal (general) international law can still exist under the current global ideological conflict between the Communist bloc and the Western bloc. Professor Wilk of Wells College, for instance, writes that: "In the contemporary state of division on fundamentals, the growth of bodies of rules of particular international law over wide areas, each with common interests and values which hold it together and separate it from areas outside, is both challenging and disturbing. . . . What remains of universal international law may thus come to shrink in content, not only proportionately to the growth of particular international law, but even absolutely, as interest is given up in the survival of much of its content and understanding of its standards is correspondingly lost. Universal agreement would no longer survive on matters that used to be governed by universal international law. Carried to its extreme, such a development could break up the universal system of international law, as it has come down to us, into regional or other partial systems, with no international legal rules to govern the actions of states across the frontiers of the various systems." "International Law and Global Ideological Conflict," 45 A.J.I.L. 648, 669 (1951). See also Smith, *The Crisis of the Law of Nations* 1-32 (1947). Such a denial of the existence of a universal international law is severely criticized by Tunkin. He considers that the "thesis about the impossibility of the existence of general international law leads objectively to a justification of the 'position of strength' policy and of the 'cold war'." *Loc. cit.* note 28 above, at 60. Professor Chou Keng-sheng of Peking University seems to agree with Tunkin's comment. See his *Trends in Thought of Modern English and American International Law* 9 (Peking, 1963). It may be interesting to observe that while Professor Wilk's article received little attention by Western international jurists, both Tunkin and Chou made lengthy comments on his view.

³⁶ *Loc. cit.* note 14 above, at 52-56.

Consequently, he declares that current international law is neither bourgeois nor Socialist, but instead reflects the transition from capitalism to Socialism.³⁷ Chou is especially critical of Lin's assertion that "when interpreting a joint document of international law, the interpretations given by socialist and capitalist countries are fundamentally opposed." He writes:

If one adopts Lin's position of two systems of international law, the end result would be "they say they are right, we say we are right." This approach is detrimental to our foreign struggle and is the height of error. For Socialist countries would not have a legal right to complain of the infraction of international law by capitalist countries.

³⁷ Chou considers that there is only one international law which is applicable to all states. Another writer, Chu Ch'i-wu, also shares Chou's view on the single system of international law. He expresses the view that after the establishment of the Soviet Union in 1917 and the people's democracies after World War II, the previous bourgeois international law was transformed into modern international law. "The transformation from bourgeois international law to modern international law is not only a historical development, but also a change of essence." However, such a transformation does not exclude modern international law from succeeding some progressive norms of bourgeois international law in the sense that "all progressive norms of international law which have already been formulated in human society can be criticized, reformed and absorbed upon a new basis." He does not deny that modern international law also possesses a class character, but he points out that its class character does not express the will of the ruling class of a single state, but the will of the ruling class of states with differing systems. His conclusion is that, with respect to international law "[Stalin's theory that] the superstructure is created together with the creation of the base, and is extinguished together with the extinction of the base, must be restricted and supplemented." "[M]any norms of international law last longer than the base from which they were created; moreover, they continue to develop on the new base. The principle of sovereignty, the principle of equality and the principle of non-intervention were all originally proposed by the bourgeoisie, although they have never practiced these principles. The Socialist states have not only accepted those principles but also have infused new democratic substance into them. Although these norms of international law have changed together with the change of the social economic base, yet they have continued to exist as the superstructure. Therefore, we cannot generally hold all the superstructure is created by the base, and exclude all the elements created by historical development." "Looking at the Class Character and Succession Character of Law from the Point of View of International Law," Kuang Ming jih pao, May 13, 1957. The question of the succession character of international law discussed by Chu is a controversial question among Communist Chinese writers. Professor Chou Tzu-ya of the East China Institute of Political Science and Law advocates a theory similar to that of Chu by arguing that even norms of *Socialist international law* do succeed many progressive norms formulated in the old epoch. See his "The Question of the Nature of Modern International Law—The Class, Specialty, Compulsion and Succession Character of International Law," (1957) Hsüeh shu yüeh k'an (Academic Monthly), No. 7, at 67, 71-72. Liu Chia-chi, however, denies that Socialist international law has the character of succession. He argues that, regardless of which norms are applied in relations between Socialist countries, they are all lined up by the proletarian internationalism which can never have its existence in the old epoch. Liu cites Korovin's "Some Basic Problems of the Current Theory of International Law" ((1954) Soviet State and Law, No. 6) to support his argument. But whether general international law has the character of succession, he does not explain. See his "Some Questions Concerning the Nature and Systems of International Law," (1958) Science of Law, No. 3, at 43, 44-45.

In February, 1958, the Shanghai Law Association and the East China Institute of Political Science and Law jointly organized a conference on the question of the systems of international law.³⁸ The majority of the participants opposed Lin Hsin's view,³⁹ but they could not agree among themselves whether two systems of international law (Socialist and general) or three systems of international law (Socialist, general and bourgeois) exist. Some participants felt that, although bourgeois international law has gradually declined and is on its way to the grave, it still plays the rôle of adjusting relations among bourgeois countries. They cite the North Atlantic Treaty as an example. To say that bourgeois international law does not exist would be to lose the Socialist countries' alertness.⁴⁰ Others, however, hold that the term "bourgeois international law" is nothing but a synonym for "illegality" which cannot even adjust relations among bourgeois countries. In their view, the relations among bourgeois countries should also be adjusted by general international law.⁴¹

The official position of the government of Communist China is far from clear, but it *seems*, at least, to act on the assumption that rules of general international law are not sufficient to adjust the relations among Socialist countries. This is expressed in its treaties concluded with Socialist countries and bourgeois countries. In the former case, the treaty always provides that the basis of the relations of the parties is the principle of proletarian internationalism⁴² and the five principles of peaceful co-

³⁸ Most of the participants published their views in (1958) *Science of Law*, No. 3, under the general heading of "A Discussion of the Question Concerning Contemporary Systems of International Law."

³⁹ Only Keng Fu-ch'eng supports Lin Hsin's view. See his "Talks on Current Systems of International Law," *ibid.* 52-54.

⁴⁰ Hu Wen-chih, "On the Three Systems of International Law at the Present Stage," *ibid.* 49-51.

⁴¹ *E.g.*, see Ch'iu Jih-ch'ing, "Second Discussion on the Systems of International Law at the Present Stage," *ibid.* 40-43.

⁴² What is meant by the term "proletarian internationalism" is an interesting question. Although this term has been used officially or unofficially so often in Communist China, only a few writers try to explain or define it. Professor Ch'iu once quotes a few passages from Tunkin's article entitled "Socialist Internationalism and International Law" (in (1957) *New Times*, No. 51, and translated into Chinese in (1958) *Collected Translations of International Problems*, No. 2), which states: "As a principle of international law, socialist internationalism implies that each socialist state has definite rights and obligations. For instance, the right to assistance from other socialist states, and, conversely, the obligation to render such assistance." Quoted in Ch'iu, *loc. cit.* note 41 above, at 40. With respect to the relation between Socialist internationalism and proletarian internationalism, Tunkin gives the following explanation in the same article: "Relations between the countries of the socialist camp rest on Marxism-Leninism, on the principle of proletarian internationalism—on the principles, in other words, that underlie the policy of working-class parties. The roots and aims of the struggle waged by workers in different countries are identical, and that struggle is against a common enemy, the bourgeoisie, in the interests of the workers of the whole world. This has impelled the working class of different countries to form a fraternal union for joint struggle to liberate all working folk and create a new social system free from exploitation. . . . With the appearance of many socialist states, proletarian internationalism, while continuing to remain the guiding principle of the international movement, becomes, at the same time, the principle

existence⁴³ or the United Nations Charter;⁴⁴ while in the latter case, the treaty does not mention proletarian internationalism.⁴⁵

V. SOURCES OF INTERNATIONAL LAW

The term "sources" as used by Western students of international law refers to the actual materials from which an international lawyer determines the rule applicable to a given situation. Western writers are in general agreement that the sources of international law are those expressed in Article 38 of the Statute of the International Court of Justice: treaties, customs, general principles of law, and judicial decisions and writings of publicists as subsidiary sources. In recent years, there has been an increasing tendency to recognize the decisions of international organizations as also being sources of international law.⁴⁶

This exposition of the sources of international law is criticized by a Communist Chinese writer as "a circumlocution around terminology which avoids touching on the deeper social causes."⁴⁷ In his view, "the substantive sources of bourgeois international law are the external policy of the bourgeoisie which is also the will of the ruling class of those big capitalist powers."⁴⁸ The so-called treaties, customs and other sources

underlying *inter-governmental* relations—relations between the socialist states. This is what [is meant] . . . by the term socialist internationalism." New Times, *loc cit.* above. Another writer, Chiang Yang, gives the following explanation: "Proletarian patriotism and internationalism are the idea for the unity, cooperation and common fight of the proletariat and toiling people of various countries. This idea is one of the fundamental principles of the international Communist movement. In order to be liberated, the working class of various countries must exterminate the exploiting class of their respective countries, overthrow the rule of their respective reactionary classes, and establish the dictatorship of the proletariat. The struggle of the working class proceeds under their concrete national conditions, and their own country is the stage for their direct struggle. However, the working class of various countries have common interests and face a common class enemy—the international bourgeoisie. The latter's plunder and exploitation are also international; therefore, the revolutionary struggle of the working class of various countries is also international. In view of this, the proletariat the world over and all the oppressed nations and people must unite and render mutual support in the course of their struggle." "The Reactionary Thought of 'Universalism' in American Jurisprudence," People's Daily, Dec. 17, 1963.

⁴³ *E.g.*, see Sino-Mongolian Treaty of Friendship and Mutual Assistance, May 31, 1960, 3 Peking Review, No. 23, at 10 (1960). Foreign Minister Chen Yi once said: "Relations between our socialist countries are international relations of an entirely new type. Socialist countries have the principles of Marxism-Leninism and proletarian internationalism as their common ideological foundation and the building of socialism and communism as their common goal; our fundamental interests are completely identical." 5 *ibid.*, No. 37, at 11 (1962).

⁴⁴ See Sino-Czechoslovakian Treaty of Friendship and Cooperation, March 27, 1957, 6 Compilation of Treaties of the People's Republic of China 40 (Peking, 1958).

⁴⁵ *E.g.*, see Sino-Afghanistan Treaty of Friendship and Mutual Non-Aggression, Aug. 26, 1960, *loc cit.* note 3 above, at 18.

⁴⁶ See Tamme, "Decisions of International Organs as a Source of International Law," 94 Hague Academy Recueil des Cours 265 (1958); Starke, *op. cit.* note 16 above, at 30-31. For a discussion of Western views on the sources of international law, see generally Parry, The Sources and Evidences of International Law (1965).

⁴⁷ Ying T'ao, *loc cit.* note 19 above, at 46. ⁴⁸ *Ibid.* 47.

are only the form in which international law is expressed; they can only be called *formal* sources of international law. The emphasis on formal sources of international law by bourgeois writers is viewed as an intentional measure to deceive the people into believing that international law does not possess class character.

With respect to the formal sources of international law, the Soviet doctrine and that of Communist China are not entirely the same. In the early period, the Soviet Union emphasized treaties as the most important source of international law, although custom was not excluded as an important source.⁴⁹ Gradually, the Soviet Union has come to recognize general principles of law and even the decisions of international organizations as sources of international law. It also now accepts judicial decisions and writings of publicists as subsidiary sources of international law.⁵⁰ As a consequence, the Soviet doctrine on the sources of international law has come to resemble quite closely the generally accepted Western doctrine.⁵¹ The early Soviet emphasis on treaties as the principal source of international law is understandable: being the first Socialist country in the world, unless it emphasized the rôle of treaties as the principal source, it would immediately be subject to a large number of existing norms or customs which had been formulated without its participation and might be detrimental to its interests.

While the exact attitude of Communist China toward the sources of international law is not clear, its recognition of treaties and customs as the principal sources of international law seems beyond any doubt. The fact that Communist China has shown great interest in incorporating the five principles of peaceful coexistence as guiding principles of mutual relations in many treaties with other countries seems to indicate that it places great emphasis on the rôle of treaties as sources of international law. Writers in Communist China also seem to consider that the growing number of such treaties has transformed these principles into principles of general international law,⁵² despite the fact that these principles are by no means novel and seem already to have been accepted as principles of international law.⁵³ The recognition of custom as a source of international law can be implied from the invocation of international custom

⁴⁹ See Triska and Slusser, *op. cit.* note 25 above, at 9-31.

⁵⁰ See Kozhevnikov, *op. cit.* note 12 above, at 12-14.

⁵¹ Triska and Slusser, *op. cit.* note 25 above, at 29.

⁵² *E.g.*, see Ting Ku, "Firmly Maintain the Five Principles of Peaceful Coexistence," (1959) KCWTC, No. 2, at 1, 2. Chao Yüeh writes: "In many important treaties concluded with . . . other countries, our country proposed a series of democratic principles which have produced great influence and become commonly observed principles among various countries." "A Preliminary Criticism of Bourgeois International Law," *ibid.*, No. 3, at 1, 8. Wei Liang writes: "Treaties are an important source of international law and an important form of expressing international law." "On the Post Second World War International Treaties," in International Treaty Series, 1953-1955, at 660 (Peking, 1961).

⁵³ See Starke, *op. cit.* note 16 above, at 103. Even Chou Keng-sheng, a prominent Communist Chinese jurist, expressed a similar view. See his "The Principles of Peaceful Co-existence from the Viewpoint of International Law," (1955) CFYC, No. 6, at 37-41.

in diplomatic notes or in writings of Communist Chinese writers.⁵⁴ It is not clear whether Communist China accepts judicial decisions and the writings of publicists as subsidiary sources.⁵⁵ As to the decisions of international organizations as sources of international law, there does not appear to be any indication of acceptance of the current Soviet doctrine. Professor Chou Keng-sheng's view seems illustrative:

The United Nations Organization is one form of international organization of sovereign states. Its resolutions in general have only the character of a recommendation (with the exception of Security Council decisions to maintain peace, taken under Chapter VII of the Charter). Such resolutions cannot *ipso facto* bind member countries. The United Nations definitely does not possess legislative power. Even the legal drafts prepared by the International Law Commission and adopted by the General Assembly must still go through the procedure of an international conference and the conclusion of a treaty before they acquire binding force.⁵⁶

VI. THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

Except to criticize Western theories on the relationship between international law and municipal law,⁵⁷ literature concerning international law in Communist China rarely discusses such relations. The orthodox Soviet view on this question is as follows:

Proceeding from one and the same supreme authority, both the rules of International Law and those of domestic origin should have the

⁵⁴ See note 4 above. See also Chou Keng-sheng, "The Persecution of Chinese Personnel by Brazilian Coup d'Etat Authority Is a Serious International Illegal Act," People's Daily, April 24, 1964. Chou argues that such a persecution is in violation of "international custom."

⁵⁵ Writers in Communist China rarely cite judicial decisions (except in citing Western judicial decisions to criticize the conduct of Western countries) in their writings. The citing of the Anglo-Norwegian Fishery Case decided by the International Court of Justice in 1951 in Fu Chu's On the Question of the Territorial Sea of Our Country (1959) is among the few examples known to this writer. But it may be noted that, in a book of selected documents on international law edited by the Office of Teaching and Research of International Law of the Institute of Diplomacy and published in Peking in 1958, three documents selected under the heading of sources of international law are: (1) Article 38 of the Statute of the International Court of Justice; (2) Resolution of the United Nations General Assembly on Progressive Development of International Law and Its Codification (Dec. 11, 1946); and (3) Resolution of the United Nations General Assembly on Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal (Dec. 11, 1946). Reference Documents of International Law 11-12.

⁵⁶ Trends in the Thought of Modern English and American International Law 67 (Peking, 1963). But the resolutions of the United Nations have been occasionally cited to prove or disprove the existence of a rule of international law. *E.g.*, Li Hao-pei, Research Fellow of the Institute of International Relations of the Chinese Academy of Sciences, cites General Assembly Resolution 626 (VII) on permanent sovereignty over natural resources as one of the evidences that no rule of international law requires the nationalizing state to make compensation to foreigners. See his "Nationalization and International Law," (1958) CFYC, No. 2, at 10.

⁵⁷ *E.g.*, see Ying T'ao, *loc. cit.* note 19 above, at 47-48; Chou, *op. cit.* note 56 above, at 29-34.

same binding force for all organs and nationals of the countries concerned. By concluding an international agreement a governing authority undertakes, if necessary, to bring its domestic legislation into line with the international commitments it has assumed. On the other hand, by promulgating a law clearly contrary to International Law, the government concerned commits a violation of International Law, for which the State concerned is responsible under International Law.

Therefore, International Law and Municipal Law must not in their very nature either contradict each other or have primacy one over the other.⁵⁸

There does not appear to be any reason why Communist China could not accept such a doctrine.⁵⁹ Moreover, it may be noted that the Military Tribunal of the Supreme People's Court of Communist China did invoke "international law standards and humanitarian principles" in sentencing Japanese war criminals⁶⁰ and some treaties such as the 1955 Sino-Indonesian Dual Nationality Treaty are included in the official publication entitled "Compilation of Laws and Regulations of the People's Republic of China."⁶¹

VII. THE SCIENCE OF INTERNATIONAL LAW

A. *The Nature of the Science of International Law*

Although many writers in Communist China do agree on the existence of a general international law applicable to both Socialist and bourgeois countries, they all deny the existence of a common science of international law. Published opinions appear to concur that there are two different sciences of international law—the bourgeois science of international law and the proletarian science of international law. According to Ho Wu-

⁵⁸ Kozhevnikov, *op. cit.* note 12 above, at 15. For a survey of this problem, see Ginsburgs, "The Validity of Treaties in the Municipal Law of the 'Socialist' States," 59 A.J.I.L. 523 (1965). One may observe that among Socialist countries there can be no conflict between norms of *Socialist* international law and municipal law because both reflect the same values and implement the same policies. There can therefore be no problem of "primacy" of international law, and the problem of "incorporation" virtually vanishes. However, such a problem becomes significant with respect to rules of international law governing relations between Socialist countries and bourgeois countries, as those rules do not entirely reflect values of Socialist countries.

⁵⁹ It should be noted that writers in Communist China have consistently emphasized that international law is a law *between* (not *above*) states. See Chou, *op. cit.* note 56 above, at 66. It is thus unlikely that Communist China would accept the theory of the supremacy of international law over municipal law. On the other hand, the supremacy of municipal law over international law once advocated by some German writers is criticized as an "absurd theory" fabricated to provide legal justification for imperialist external aggression. Ying T'ao, *loc. cit.* note 19 above, at 48. In view of this, the author of this paper concludes that the current Soviet doctrine would be acceptable to Communist Chinese writers.

⁶⁰ 2 Collection of Documents on the Problem of Japan 126 (Peking, 1958).

⁶¹ Chung-hua jên-min kung-ho kuo fa-kwei hui-pien. Up to 1963, 13 volumes have been published.

shuang and Ma Chun,⁶² these two sciences are established on different economic bases and respectively serve the policy of different classes. They argue that despite the voluminous publications reflecting the bourgeois science of international law, it has never become scientific. Only the proletarian science of international law established on the base of Marxism-Leninism is a genuine science. In their view, it is beyond doubt that the science of international law possesses a class character,⁶³ that is to say, "every student of international law starts from the interests and practical necessity of his own class and attempts to make international law serve the foreign policy of his own class." Does this mean that rules of international law can be interpreted at will? Ho and Ma give a negative answer. However, they think that only students of the proletarian science of international law can correctly apply or interpret rules of international law. The reasons are:

[I]n the course of enacting and at the time of reaching agreement, norms of international law do possess generally recognized and definite contents. However, bourgeois students cannot always correctly interpret the genuine contents of rules of international law. The reason is that the limited nature and metaphysical methodology have made it impossible for them to reach correct conclusions. But a more important reason is that the monopoly capitalists demand that their students of international law interpret international law in accordance with the diplomatic activities of the imperialist countries which are violating international law. In order to fulfill their duty, bourgeois students must engage in distorted interpretation of the various systems of international law, otherwise they cannot defend the violations of international law by their masters. With respect to the proletarian science of international law, since its mission does not contradict the generally recognized fundamental principles of international law, it is unnecessary for [students of the proletarian science of international law] to make any distorted interpretation of rules of international law.

B. Criticism of Various Schools of Bourgeois International Law

Since the rôle of the science of international law is, as stated above, to serve the interest of a particular class, the various schools of bourgeois international law are, in the eyes of Communist Chinese writers, formulated to meet the need of the bourgeoisie in various stages of history. "The bourgeoisie at one time used the theory of the Naturalists to oppose the bondage of feudal force in order to seek their free development during the period of bourgeois revolution [*i.e.*, 16th-18th centuries] . . . and the theory of Positivists to deal with their new opponents in order to keep

⁶² *Loc. cit.* note 17 above. The standard Soviet textbook on international law also emphasizes the characteristics of the Soviet science of international law. "For the first time in the history of International Law its study was in Soviet legal literature founded on a genuinely scientific basis, on the unshakable foundation of Marxism-Leninism." Kozhevnikov, *op. cit.* note 12 above, at 88. It does not expressly say that the Soviet science of international law is different from the bourgeois science of international law, though such an intention may be implied. See *ibid.* 59-88.

⁶³ See also Chao Yüeh, *loc. cit.* note 52 above, at 4.

the latter from breaking the rules prescribed by them." The theory of Grotians is that

when one's own treaties and customs are sufficient to serve the purpose of defending aggressive acts, treaties and customs will be invoked. When they are inadequate, then one may borrow such natural law principles as "justice," "reason," or "human nature" to defend aggressive acts. By so doing, imperialism's external aggression can in any case be justified by one or the other theory.⁶⁴

The theories of the Normativists (Kelsen) and the Social Solidarists (Duguit) which emerged in this century are criticized as reflecting the "expanded aggressive desire of the interest of the monopoly bourgeoisie represented by imperialism." The doctrine advocated by Normativists for supremacy of international law over municipal law, leading to the abolition of sovereignty and the establishment of "world government," is viewed as an attempt "to clear the road for imperialism's encroachment upon other states' independence and establishment of world domination."⁶⁵ Similarly, writers in Communist China view the theory that individuals are subjects of international law, advocated by followers of the School of Social Solidarity, and their criticism of sovereignty, as only serving the imperialist attempt to establish world domination.⁶⁶

Since the Second World War, many jurists in the United States have begun to speak of "world law," "world government," "transnational law," and "supranational law." All these ideas are nothing, in the eyes of Communist Chinese writers, but an expression of the reactionary thought of "universalism" in the service of American imperialism. The objective of universalism, in their view, is to destroy state sovereignty so as to facilitate the establishment of a world government under the domination of American imperialism.⁶⁷ In this connection, Chiang Yang writes:

The "supra-national" and "supra-state" "universalism" proposed by American reactionary jurists is in fact a variation of the reactionary bourgeois nationalism. The bourgeoisie have always used the pretense of the "common character of nations" to spread the "theory of class harmony," to camouflage the resistance of the internal national proletariat against the bourgeoisie, to paralyze the revolutionary will of the proletariat, and to attempt to cause the working class to be divorced from the class struggle and to abandon the revolution. The purposes of American reactionary jurists' description of "law" or "government" as "supra-class," "supra-national" and "supra-state" in propagandizing "the unification of world economy," "the unification of world politics," and "the common character of world spirit"

⁶⁴ Ying T'ao, *loc. cit.* note 19 above, at 50.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* 50-51. See also Chao Chen-chiang, "The Reactionary Essence of the Legal Theory of Social Solidarity," *People's Daily*, Dec. 20, 1962.

⁶⁷ See Chiang Yang, *loc. cit.* note 42 above; Yang Hsin and Ch'en Chien, "Expose and Criticize the Absurd Theory of Imperialists Concerning the Question of State Sovereignty," (1964) *CFYC*, No. 4, at 6-11. See also Modrzhinskaia, *Kosmopolitizm-imperialisticheskaiia ideologiia pravoishcheniia natsii* (Universalism is the imperialist thought of enslaving peoples of various countries) (1958) (Translated into Chinese by Tsai Hua-wu, Peking, 1962).

are not only to camouflage the contradiction between the proletariat and the bourgeoisie within capitalist countries and to shift the object of the people's revolutionary struggle within the states, but also to attempt to use the "theory of class harmony" in international relations. They try to camouflage the fundamental contradictions between the oppressed nations and imperialism, between the Socialist camp and the imperialist camp, and among imperialist countries or monopoly capitalist blocs themselves; they also try to wipe out the class struggle in the international scene, so as to facilitate American imperialism's fishing in troubled waters and realizing its reactionary political objective.⁶⁸

As there are many schools of the bourgeois science of international law, one may ask how different schools with differing or opposing ideas can all serve the same purpose—the interest of the bourgeoisie. To this one writer, Ying T'ao, gives an ingenious answer:

[I]t is not surprising at all that there are many schools of the science of bourgeois international law which advocate different theories on some questions. . . . The bourgeoisie of various countries all plan their own interest. As their situations are different, their interests are also different, and hence contradictions frequently arise. Since bourgeois international law students speak for the interest of the bourgeoisie of their respective countries, the various theories in the science of bourgeois international law are the exact reflections of these contradictions. . . . However, it must be particularly pointed out that despite the difference of opinions and views, these differences exist only on questions of secondary importance which do not go beyond or depart from the general interest and demands of the bourgeoisie. The difference of opinions and views among them not only does not obscure the international strategic objective of the bourgeoisie, but, on the contrary, provides them with mobility within which they may use different theories in different situations to achieve their aggressive objectives. To the bourgeoisie, the more theories which exist, the more it is to their advantage, and not to their disadvantage.⁶⁹

C. *The Study of International Law in Communist China*

In Communist China the course on international law is offered in the department of law and department of diplomacy of a university. It is also offered in the Institute of Diplomacy in Peking and other institutes of political science and law such as the East China Institute of Political Science and Law in Shanghai. There is no academic society which is *exclusively* devoted to the study of international law, but there are several academic societies where international law is among their major interests. The most important one is the China Political Science and Law Association which represented Communist China in the International Law Association before 1960.⁷⁰ The Chinese People's Institute of Foreign Affairs is another important academic society which, *inter alia*, promotes the study of inter-

⁶⁸ Chiang Yang, *loc. cit.* note 42 above. ⁶⁹ *Loc. cit.* note 19 above, at 51.

⁷⁰ In 1960, this Association withdrew from the International Law Association in protesting the admission of the Republic of China to the latter Association. 3 *Peking Review*, No. 32, at 24-25 (1960). See also International Law Association, Report of the Forty-Ninth Conference (Hamburg) xciii (1960).

national law and diplomacy. A few regional societies such as the Shanghai Law Association have also shown their interest in the field of international law.⁷¹ None of the above societies publishes a periodical *exclusively* in the field of international law. The periodicals, *Studies in Political Science and Law*,⁷² *Studies in International Problems*,⁷³ and *Science of Law*,⁷⁴ published respectively by the China Political Science and Law Association, the Institute of International Relations of the Chinese Academy of Sciences and the Shanghai Law Association, have occasionally published articles on international law. Academic journals published by universities or colleges also occasionally publish articles on international law. Moreover, a number of short articles on international law (chiefly on current events) were published in *People's Daily*, *People's China*, and *Peking Review*.⁷⁵

In addition to periodical articles, literature on international law can be classified into three categories: The first category is an original study of international law in the form of books or pamphlets; the amount of literature within this category is surprisingly limited. Up to the time of writing this paper, Communist China has not yet published a single textbook of international law.⁷⁶ The books or pamphlets which deserve mention here are three: The first is Professor Chou Keng-sheng's *Trends in the Thought of Modern English and American International Law* (1963);⁷⁷ the second one is Ni Cheng-ao's *The Question of Judicial Jurisdiction in International Law* (1964);⁷⁸ and the last one is Fu Chu's *On the Question of the Territorial Sea of Our Country* (1959).⁷⁹

⁷¹ See note 38 above and accompanying text.

⁷² First published in 1954 as a bi-monthly and since 1960 as a quarterly.

⁷³ First published in 1959 as a bi-monthly. It is not clear whether the publication was suspended between 1961 and 1963. Since 1964, it has appeared as a bi-monthly.

⁷⁴ First published under the title of Hua-tung cheng-fa hsüeh-pao (East China Journal of Political Science and Law) in 1956 by the Shanghai Law Association. In 1957 it was renamed under the present title and published as a bi-monthly. In 1958 it became a monthly, but the publication appears to have been suspended since 1959.

⁷⁵ *People's China* (in English) was first published in 1950 as a fortnightly, but the publication was discontinued in 1958 when it was replaced by the weekly periodical, *Peking Review* (in English). Both occasionally include some articles on international law, official documents on foreign relations, texts of treaties, etc. English versions of important articles or editorials of *People's Daily* are also published in *Peking Review*.

⁷⁶ China People's University did edit a monograph entitled "Lectures on International Law," but it does not appear to have been published. The author knows only one writer who has cited these Lectures. See Liu Chia-chi, *loc. cit.* note 37 above, at 44. At least until 1958, some teachers in Communist China still used Western textbooks such as Oppenheim's *International Law* in their teaching. See Shih *et al.*, *loc. cit.* note 14 above, at 14-16.

⁷⁷ Hsien-tai ying-mei kuo-chi fa ti szu-hsiang tung-hsiang (46,000 words), reviewed by this writer in 59 A.J.I.L. 170 (1965).

⁷⁸ Kuo-chi fa chung t'i shih-fa kuan-hsia wen-t'i (88,000 words). The book deals with the question of the state's jurisdiction both in criminal and civil cases involving foreign elements. To be reviewed by this writer in the *American Journal of Comparative Law*.

⁷⁹ Wo-kuo ti ling-hai wen-t'i (about 20,000 words).

The second category of literature is comprised of translations of articles published in the Soviet Union or Western countries. A number of articles published in the Soviet Union or other Socialist countries were translated into Chinese and published in the periodical, *Collected Translations of International Problems*.⁸⁰ Among the important books translated into Chinese are Lunz's *Private International Law* (1949),⁸¹ Kozhevnikov's *International Law* (1957),⁸² Tunkin's *Fundamentals of Contemporary International Law* (1956),⁸³ and Krylov's *International Court of Justice of the United Nations* (1958)⁸⁴ and *Lenin on International Politics and International Law* (1958).⁸⁵ Among the important Western books which have been translated into Chinese are Oppenheim's *International Law* (1948),⁸⁶ Higgins and Colombos' *International Law of the Sea* (1951),⁸⁷ Nicholson's *Diplomacy* (1950),⁸⁸ and Labeyrie-Ménahem's *Les Institutions Spécialisées, problèmes juridiques et diplomatiques de l'administration internationale* (1953).

The third category of literature consists of compilations of treaties and diplomatic documents. This category constitutes the largest proportion of literature on international law published in Communist China. Communist China has published its own treaty series and diplomatic documents respectively in *Compilation of Treaties of the People's Republic of China*⁸⁹ and *Collected Foreign Relations Documents of the People's Republic of China*.⁹⁰ An ambitious project to translate all important in-

⁸⁰ Kuo-chi wen-t'i yi-ts'ung (monthly). It was first published in 1953, but it is not clear whether the publication continued after 1959. The articles on international law were mainly translated from New Times, International Affairs, and Sovetskoe gosudarstvo i pravo (Soviet State and Law). Communist China also published several books comprising selected essays on international law by Soviet jurists. The most important two are Hsien-tai kuo-chi fa shang ti chi-pen yuan-tse ho wen-t'i (Fundamental Principles and Problems in Modern International Law) (Peking, 1956) (310,000 words); and Kuo-chi ssu-fa lun-wen chi (Collected Essays of Private International Law) (Peking, 1959) (202,000 words).

⁸¹ Mezhdunarodnoe chastnoe pravo.

⁸² Mezhdunarodnoe pravo. English translation published in 1961. Reviewed by R. R. Baxter in 56 A.J.I.L. 1131 (1962).

⁸³ Osnovy sovremennogo mezhdunarodnogo prava; uchebnoe posobie.

⁸⁴ Mezhdunarodnyi sud organizatsii obedinennykh natsii.

⁸⁵ Lenin o mezhdunarodnoi politike i mezhdunarodnom prave.

⁸⁶ Vol. I (7th ed., Lauterpacht). Translated into Chinese by the Chinese People's Institute of Foreign Affairs.

⁸⁷ 2d ed. Translated from the Russian version.

⁸⁸ 2d ed.

⁸⁹ Chung-hua jên-min kung-ho kuo tiao-yü chi. The book is edited each year by the Ministry of Foreign Affairs of Communist China. Up to 1964, 13 volumes have been published. Vols. I and II comprise treaties concluded respectively in 1949-1951 and 1952-1953, and since 1954 each volume comprises treaties concluded in one year only. There is an index at the end of Vol. X (1961) for treaties concluded between 1949 and 1961.

⁹⁰ Chung-hua jên-min kung-ho kuo tui wai kwain-hsi wen-chien chi. Edited by Shih-chieh chih-shih ch'u-pan shê. Vols. I to IV comprise documents issued respectively in 1949-1950, 1951-1953, 1954-1955, 1956-1957, and since 1958 each volume comprises documents issued in one year only. Up to 1963, ten volumes have been pub-

ternational treaties concluded after 1914 has been undertaken recently and so far has resulted in the publication of 8 volumes of the *International Treaty Series*.⁹¹ In 1962 another project of collecting all treaties between China and foreign states in the period 1689-1949 in three convenient volumes was completed.⁹² In addition, many collections of documents of international conferences or problems have been published in the last fifteen years.⁹³ In 1958, the Office of Teaching and Research of International Law of the Institute of Diplomacy published a book of selected documents of international law.⁹⁴

VIII. CONCLUSIONS

This study permits the following conclusions: (1) Differences do exist between the Soviet view and the Communist Chinese view of international law. In general, Communist China is more dogmatic in applying Marxist-Leninist theory to international law and less responsive to the recent development of international law in the Western world. Many writers in Communist China consider that a separate system of Socialist international law has already been formulated, whereas the current Soviet view is that such a system is still in the course of development. The Soviet view that present-day international law is a law of "peaceful coexistence" is also criticized by Communist Chinese scholars. Their differences seem, to a certain extent, to result from their different foreign policies. The Soviet Union, being interested in improving relations with the West, would naturally be more responsive to the Western view of international law and favor a common system of international law, binding and applicable to all countries. This is, however, not the case of Communist China, which favors a more belligerent policy toward the West, particularly toward "American imperialism." (2) One should realize that China's past experience also has some influence on the views of the Communist Chinese toward international law.⁹⁵ The bitter attack on the Western view that international law is a law among *civilized* countries is obviously a reaction to the oppressive measures (such as consular jurisdiction) which China has suffered in the past. (3) The science of interna-

lished. The information office of the China Ocean Transport Company also edited a collection of treaties entitled "Hai-shang Kuo-chi Kung-yüeh hui-pien" (Compilation of International Maritime Conventions) (Peking, 1963) (472,000 words).

⁹¹Kuo-chi t'iao-yüeh chi. The 8 volumes cover treaties concluded respectively in the periods 1917-1923, 1924-1933, 1934-1944, 1945-1947, 1948-1949, 1950-1952, 1953-1955, and 1956-1957. Each volume is approximately 600,000 words.

⁹²Chung wai chiu yüeh chang hui-pien (A Collection of Old Agreements, Regulations and Treaties Between China and Foreign Countries). The three volumes cover respectively the periods 1689-1901, 1901-1919, and 1919-1949.

⁹³To the knowledge of this writer, twelve collections have been published which respectively comprise documents relating to the Geneva Conference, Indo-China question, Japanese question, German question, Disarmament, European Security, Suez Canal, Prohibition of Atomic Weapons, etc.

⁹⁴Kuo-chi kung-fa ts'an-k'ao wen-chien hsuian-chi.

⁹⁵The writer proposes to discuss this question in a separate paper.

tional law in Communist China is still in a very primitive stage.⁹⁶ Its contribution to this science, if any, is mainly in the field of compiling or editing documents. The published works of Communist Chinese writers generally show a lack of interest in original studies of international law problems. The majority of published works analyze or criticize Western views or acts relating to international law.

⁹⁶ Ch'en T'i-ch'iang, Head of the Division of International Law of the Institute of International Relations of the Chinese Academy of Sciences until 1958, when he was purged, also once expressed his concern about the poor quality of research work done in Communist China. People's Daily, Sept. 18, 1957. Professor Wang Tieh-yeh of Peking University also expressed the view that "the study of international law and the training of international lawyers has been suspended for seven years due to the fact that traditional legal science has been completely written off as of no practical value . . ." Kuang ming jih pao, June 10, 1957. Cited in MacFarquhar (ed.), *The Hundred Flowers* 116 (1960).

THE LOGAN ACT: PAPER TIGER OR SLEEPING GIANT?

BY DETLEV F. VAGTS

Professor of Law, Harvard University

For 167 years the shadow of the Logan Act¹ has fallen upon those Americans who trespass on the Federal monopoly of international negotiations which it creates. In theory, up to three years' imprisonment and a \$5,000 fine await those Americans who, without authority, communicate with a foreign government intending either (a) to influence that government with respect to a controversy with the United States or (b) to defeat the measures of the United States. Though only one indictment and no trial have taken place under the Act,² who can tell when a new Ad-

¹ In its present form the Act (18 U.S.C. §953 (1964)) reads:

"Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

"This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects."

As originally enacted in 1 Stat. 613 (1799), it read:

"[I]f any person, being a citizen of the United States, whether he be actually resident, or abiding within the United States, or in any foreign country, shall, without the permission or authority of the government of the United States, directly or indirectly, commence, or carry on, any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or defeat the measures of the government of the United States; or if any person, being a citizen of, or resident within the United States, and not duly authorized, shall counsel, advise, aid or assist in any such correspondence, with intent, as aforesaid, he or they shall be deemed guilty of a high misdemeanor, and on conviction before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment during a term not less than six months, nor exceeding three years: *Provided always*, that nothing in this act contained shall be construed to abridge the right of individual citizens of the United States to apply, by themselves, or their lawful agents, to any foreign government, or the agents thereof, for the redress of any injuries in relation to person or property which such individuals may have sustained from such government, or any of its agents, citizens or subjects."

Most of the changes were made in the 1948 codification and were not intended to be substantive.

² On the absence of actions under the statute, see 4 Moore, *Digest of International Law* 449 (1906); Representative Michel, writing to Attorney General Kennedy, asserted the absence of convictions and was not refuted. 107 Cong. Rec. 11220 (1961). For the one prosecution see p. 271 below.

ministration, thinner skinned or harder pressed than its predecessors, may in its irritation call into play this sleeping giant? Now, at a time when domestic opposition to certain aspects of our foreign policy has reached a pitch unknown for many years, it would be well to reflect upon this curious product of the confluence of criminal law and foreign relations law before we are in fact confronted by a test of its strength. All could be the losers from an unpremeditated encounter—the defendant by finding himself, perhaps to his very great surprise, the first person subjected to the Act's severe criminal penalties, the Government by finding itself stripped of its long accustomed protection by a ruling that the statute as it now reads is unconstitutionally vague or restrictive of free speech. Despite its long desuetude as a criminal statute, the Act represents a principle which I cannot help but think is, at its core, a salutary one; that America in sensitive dealings with other governments "speaks with one voice."³ It embodies the concept of bipartisanship, that quarrels about foreign relations are fought out domestically and not with the adversary. It deters sometimes very ill-advised attempts to take the conduct of foreign affairs into foolish and unauthorized hands. On the other hand, it cuts into freedoms which we regard as having the highest value, and many of the situations in which its use has been suggested clearly involve no danger that would justify such a restraint.

The first part of this study attempts to gather the scattered history of the Logan Act, the second to assess its meaning in its current form, and the third to evaluate its chances of surviving a test of its constitutionality. Finally some tentative suggestions are made as to how its utility might be preserved while lopping off those aspects which make it unduly restrictive and at times even foolish.

I. THE HISTORY OF THE ACT

Since authoritative judicial interpretations of the Act are almost nonexistent and since criminal enforcement of the statute has not been the means by which it has exerted whatever effect it may have had, there is little choice but to leave the high road marked by the digests, annotated codes and Shepard's citator and venture into the less charted tracks of history. There we can study the specific episode which gave rise to the statute and those later controversies which caused some party to charge that the opposition had violated the law. Despite the efforts of historians to gather the pre-1918 history and despite my own inquiries, I am hesitant to make sweeping claims for the completeness of the recital herein contained.⁴ In any case, considered as a sample, the following episodes illustrate the potential uses and abuses of the statute.

³ *United States v. Pink*, 315 U. S. 203, 242; 36 A.J.I.L. 309 (1942). This dictum of Mr. Justice Frankfurter there refers specifically to the disability of the States to participate in foreign affairs. Senator Fulbright adapts it to the Logan Act in 106 Cong. Rec. 8625 (1960).

⁴ The earlier history of the Logan Act was gathered in Moore, *op. cit.* note 2 above, and in Warren, *History of Laws Prohibiting Correspondence with a Foreign Govern-*

A. *The Logan Venture and the Enactment of "His" Law*

After initial American enthusiasm over the French Revolution had faded, grave difficulties developed between our Federalist Administration and the successive revolutionary regimes in Paris.⁵ Our failure to honor what France regarded as commitments to give it assistance comparable to its aid during our own struggles, plus our ratification of the Jay Treaty with Great Britain, caused the French Government to authorize more and more outrageous depredations on our merchant shipping. When the Pinckney-Marshall-Gerry mission was repulsed by Talleyrand in the infuriating circumstances of the "XYZ Affair," our relationship with France came perilously close to open warfare. At this point Dr. George Logan, a Philadelphia Quaker, a doctor and a Republican, felt called upon to take action to preserve peace. Disclosing his intentions to only a few intimates, but obtaining a private certificate of citizenship from his friend, Vice President Thomas Jefferson, he sailed on June 12, 1798, for Hamburg.⁶ Even as the Federalists at home denounced his supposedly conspiratorial activities, he proceeded to Paris. There the straightforward homespun doctor interviewed the cynical and adroit Talleyrand and other officials. The Franklinesque qualities of Logan aroused much enthusiasm in Paris; the Directoire, having come to the conclusion that it was politic to relax tensions with America, judged it good timing then to issue a decree raising the embargo and freeing American ships and seamen. Logan found a less friendly reception in his home country. Secretary of State Pickering advised him that the French decree was merely ostensible and illusory. General Washington was curt and unfriendly. President Adams, though troubled by his knowledge of Logan's honorable character and intentions, recommended that Congress take action to curb the "temerity and impertinence of individuals affecting to interfere in public affairs between France and the United States. . . ."⁷ Roger Griswold of Connecticut introduced the bill to prevent any repetition of the affair.⁸

The opposition was led by Albert Gallatin, with remarkable prescience of the problems that have since arisen. Nonetheless, Congress—the same Congress, as Gallatin noted,⁹ that passed the Alien and Sedition Acts—enacted the law which has ensured a modest legal immortality to Dr. Logan. Although his name is thus annexed to the bill, there was a curious reluctance during the debates to name names until late in the

ment and Acceptance of a Commission, Sen. Doc. No. 696, 64th Cong., 2d Sess. (1917) (hereinafter cited as "Warren, History"); Bates, *Unauthorized Diplomatic Intercourse by American Citizens with Foreign Powers* (1915). Mr. William Cheeseman of the Law School class of 1968 has checked for me the New York Times indices since Sept., 1851, and the Congressional Record indices since 1880.

⁵ The following section relies primarily on the only modern biography of Logan: Tolles, *George Logan of Philadelphia* (1953), particularly Chs. VIII and IX.

⁶ *Ibid.* at 156. Jefferson denied several times having encouraged Logan. 9 Works of Thomas Jefferson 16 (P.L. Ford ed., 1905).

⁷ 1 Messages and Papers of the Presidents 267 (Richardson ed., 1897). Adams' message came after the point was raised by a Senate address to him. *Ibid.* at 266.

⁸ 9 Annals of Congress 2583 (1799).

⁹ *Ibid.* at 2706-2707.

proceedings.¹⁰ Most historians have echoed the Federalist conclusion that this "busybody" had accomplished little or nothing by his efforts and may even have done positive harm by his interference.¹¹ Looking at the episode with a more distant dispassion, a current observer may find it difficult to see how the administration of American foreign affairs was in fact jeopardized by Logan's activities, and even suspect that his venture did in fact help to open the way for President Adams to nominate a new minister to negotiate with the French and to work out the Convention of 1800.¹²

B. *The Early History of the Act*

It was during the years of Jeffersonian Administration that the Logan Act revealed its potential as a principle of political behavior, as a debating weapon against the opposition and as a threat against those out of power. Although an attempt was made to repeal the Act while Dr. Logan was a Senator but during his temporary absence,¹³ the Logan Act survived the reaction against Federalist repression that ended the Alien and Sedition Acts. In 1803 a grand jury found the first and only indictment under the Logan Act.¹⁴ Francis Flourney, a Kentucky farmer, wrote an article in the *Frankfort Guardian of Freedom* under the *nom de plume* of "A Western American," in which he advocated a separate Western nation allied to France. Both parties attempted to make political capital out of this and other separatist manifestations. The United States Attorney for Kentucky, an Adams appointee and brother-in-law of Chief Justice Marshall, went so far as to procure the indictment of Flourney. No further proceedings were taken on this matter and the purchase of the Louisiana Territory later in the same year rendered the separatism issue obsolete.

Our relations with Spain furnished the basis for two Logan Act charges. In 1802 the Spanish Government was involved in negotiations with the United States over Spain's responsibility for the seizure and condemnation of vessels by the French in Spanish ports.¹⁵ Our Minister to Spain, Charles Pinckney, attempted to include a provision on this subject in the then proposed treaty between the United States and Spain. The Spanish Government procured from five eminent American lawyers an opinion on an abstract question of the law of nations which ran con-

¹⁰ The first specific but tangential reference to Dr. Logan seems to be that at p. 2643. It is plain, however, that he is the person referred to at p. 2503.

¹¹ Foster, *A Century of American Diplomacy* 226-228 (1900); 2 McMaster, *A History of the People of the United States* 415-416 (1885); 2 H. C. Lodge, *George Washington* 258 (1889); R. G. Adams, *History of the Foreign Policy of the United States* 108-109 (1924). Compare Bemis, *A Diplomatic History of the United States* 121-122 (4th ed., 1955).

¹² Tolles, *op. cit.* note 5 above, at 204.

¹³ 11 *Annals of Congress* 185-187 (1802); Tolles, *op. cit.* note 5 above, at 231. In 1810 Logan undertook a mission to London, which, but for the partial concurrence of President Madison, would presumably have violated "his" Act. *Ibid.* at 287.

¹⁴ For an account of this transaction, see Warren, *Odd Byways in American History* 168-175 (1942).

¹⁵ This episode is described in Tolles, *op. cit.* note 5 above, at 242-243.

trary to the contentions of the American Government. Of these attorneys, Jared Ingersoll, William Rawle, Joseph McKean and Peter DuPonceau came from the Philadelphia Bar and Edward Livingston from New York. The Administration was irritated at their interference. President Jefferson in a message of December 21, 1803, transmitted the correspondence to Congress.¹⁶ It was moved that the matter be referred to a committee, the contention being incidentally made that Rawle had drawn the Logan Act himself.¹⁷ A Senate committee shortly thereafter reported its finding that these five men had, while controversies with Spain were pending, corresponded with the Spanish Government with an intent to influence the measures of the Government of Spain and defeat the measures of the United States, all in violation of the Act of 1799.¹⁸ The committee suggested that the Attorney General be given the documents and that he be directed to have prosecutions begun, if he judged the evidence sufficient. This report was apparently the last step taken in the matter.

In 1805 the Jeffersonian Administration found a second occasion to invoke the Logan Act in connection with Spain.¹⁹ The Spanish Minister, the Marquis Yrujo, had annoyed the State Department in various ways and finally his recall was demanded. This gentleman, son-in-law of Governor McKean of Pennsylvania and friend of Dr. Logan, had become involved with a Philadelphia editor whom he was assertedly attempting to bribe to favor the Spanish cause. Although only the editor was an American citizen, Yrujo could perhaps have violated the then provision of the Act punishing even aliens who counseled, advised or assisted in forbidden communications. This violation was used as the stated reason for asking his withdrawal.

The final episode of the early period under the Logan Act was one in which one of its protagonists, Mr. Pickering, was accused of violating it. In 1808, now in opposition, he entered into correspondence with Mr. George Rose, a special British envoy, taking a New England Federalist's pro-British position on various issues then in controversy between the Administration and Great Britain.²⁰ The exchange continued until 1812. Although the facts seem to indicate a fairly clear-cut violation of the Act, the correspondence was apparently not then known and no steps were then taken to indict him.

C. *The Later Nineteenth Century*

During the Civil War there was, of course, a considerable quantity of correspondence between American citizens and foreign governments on

¹⁶ 1 Messages and Papers of the Presidents 354 (Richardson ed., 1897); Warren, *History* 12-13.

¹⁷ Plumer, *Memorandum of Proceedings in the United States Senate, 1803-1807*, at 94-95 (Brown ed., 1923).

¹⁸ Warren, *History* 13-14.

¹⁹ For a description of the Yrujo episode, see Foster, *A Century of American Diplomacy* 218-219 (1900).

²⁰ See *Documents Relating to New-England Federalism* 366-373, 387 (H. Adams ed., 1905), for copies of the correspondence. The tendencies of Pickering's thought were that "our own best citizens consider the interests of the United States to be interwoven with those of Great Britain." *Ibid.* at 367.

behalf of the Confederate States. Technically, those who served the South in a diplomatic capacity nearly all violated the Logan Act; however, they were also committing more serious offenses against the United States for which they could have been indicted after Appomattox but for the general amnesty policy. While the hostilities were in progress some threatening gestures were made in the direction of using the Logan Act. Mr. Bunch, the British Consul in Charleston, South Carolina, was given by his government the duty of inviting the Confederacy to declare its adherence to the Convention of Paris on naval warfare. Some of his dispatches, while being carried by an American citizen, were intercepted by the North and were interpreted as tending toward the recognition of the Confederacy.²¹ Secretary of State Seward asserted that Bunch's work contravened the subsection of the Logan Act on aiding and counseling correspondence by citizens, and ultimately procured his recall. At about the same time a Federal Judge in Boston, charging grand juries with respect to offenses against the United States, mentioned the Logan Act and drew the juries' attention to its possible application to Northern residents who had, according to newspaper accounts, written to London asking for its intercession and its recognition of the South.²² Apparently the juries found no suitable occasion to render an indictment on this score.

In 1888, the Logan Act was again resorted to, in an episode which seems, at this remove, to have been an "ignoble little electioneering trick."²³ In connection with the then pending presidential election, a man using the name of Murchison wrote to Lord Sackville, then British Minister in Washington, inquiring what position with respect to the election one well disposed toward Great Britain ought to take, in the light of the various issues at stake between the countries. Incautiously, Lord Sackville replied to the effect that the incumbent Democratic Administration was preferable. The publication of this advice, in a period when Great Britain enjoyed no extensive popularity in this country, threatened severe political damage to the party which it had been intended to favor. Even while calling for the replacement of Lord Sackville, the Administration pondered the possibility of applying the Logan Act to the American provocateur. The existence of the requisite intent either to influence the foreign policy of Great Britain or defeat any measures of the United States is questionable; such difficulties may have led to the decision not to proceed further with any prosecution. There is also reported²⁴ an obscure and not pre-

²¹ 5 Moore, *Digest of International Law* §700 (1906); Bernard, *Neutrality of Great Britain during the American Civil War* 185 (1870).

²² 30 Fed. Cas. (No. 18,274) 1042 (D. Mass., 1863); 30 Fed. Cas. (No. 18,277) 1049 (C.C.D. Mass., 1861). The latter charge describes the background as follows: "A few months since, a member of the British Parliament declared, in the most public manner, that he had received many letters from the Northern States of America, urging parliament to acknowledge the independence of the Southern Confederacy" (p. 1051). It has not been possible to track down who that person was or what he said.

²³ [1888] 2 U. S. Foreign Relations 1684 (1889), quoting from London Daily Telegraph, Oct. 29, 1888. For a thorough account of this incident, see Tansill, *The Foreign Policy of Thomas F. Bayard, 1885-1897*, at Ch. 11 (1940).

²⁴ Foster, *op. cit.* note 11 above, at 230-231.

cisely dated event involving a controversy between the United States and Mexico over the extraterritorial application of Mexico's criminal legislation—quite possibly the Cutting affair of 1886.²⁵ A Congressman who took issue with the State Department's position was advised by the newspapers that he was violating the Logan Act. Even an authority so generally favorable to the Act as Foster's *A Century of American Diplomacy* found those accusations were "carrying the law beyond its proper limits."²⁶

D. World War I and After

The years 1914 to 1917 presented an international scene somewhat similar to that in which the Logan Act arose, with America attempting to maintain its neutrality from a struggle for European hegemony. Not surprisingly, American citizens became involved in ways more or less reminiscent of Dr. Logan's. In 1915 Henry Ford took his famous "Peace Ship" across the Atlantic in order to urge the warring nations to settle their disputes; inevitably, a lawyer pointed to the law of 1799 and argued that, since President Wilson had offered the Government's services as a mediator, Ford's trip would interfere with measures of the United States.²⁷ In the same year an American journalist named Archibald was arrested by the British and found to be carrying dispatches from Dumba, the Austrian Ambassador in Washington, to Vienna. The Department of Justice considered the advisability of prosecuting him under the Logan Act.²⁸ Shortly after our entry into the war, the Government invoked the Logan Act to bar American attendance at the Stockholm Peace Conference called by the Socialist Parties of various countries. Secretary Lansing denied passports to the intended American delegates and warned of criminal liability, noting the possible attendance of quasi-official personages from other lands.²⁹

Congressional concern about private meddling in foreign affairs grew. Senator Brandegee's interest reached the point of causing Charles Warren to write a history of the Logan Act and related statutes which he laid before Congress in 1917.³⁰ At that time Congress was considering strengthening our criminal legislation on foreign affairs; one result is a section of the criminal code rather closely related to the Logan Act which forbids the making of false oaths with an intent to influence the United States in its relations with foreign Powers, or foreign nations with respect to the United States.³¹ The particular stimulus for this appears to have been

²⁵ 2 Moore, *Digest of International Law* 228-242 (1906). Cutting was a Texan who fell afoul of Mexican justice by defaming a prominent Mexican in an American newspaper.

²⁶ Foster, *op. cit.* note 11 above, at 231.

²⁷ N. Y. Times, Nov. 27, 1915, p. 2, col. 5. Corwin, *The President: Office and Powers* 469 (3rd ed., 1948), comments that at that point in history United States involvement had hardly reached the point where the Act could be violated.

²⁸ See Warren, *Odd Byways in American History* 175 (1942); the documents are collected in [1915] U. S. Foreign Relations, Supp. 932-947 (1928).

²⁹ N. Y. Times, May 24, 1917, p. 1, col. 6; *ibid.*, May 25, 1917, p. 9, col. 4.

³⁰ 54 Cong. Rec. 2301 (1917). As further, private, evidence of contemporary interest in the Logan Act, see Scott, "Private Peace Parleys," 12 A.J.I.L. 593 (1918).

³¹ 18 U.S.C. §954 (1964).

an accusation that pro-Germans were falsely stating that the *Lusitania* had been carrying arms when it fell victim to a U-boat's torpedo.³² This statute appears to have been no more actively resorted to than the Logan Act.

The coming of quiet to the battlefields had no parallel on the political front, and 1920 proved a record year for Logan Act episodes. In October Senator Warren G. Harding, in the midst of his presidential campaign, gave out the impression that he had been in touch with emissaries of France, who hoped that he would "lead the way to a world fraternity" in substitution for the League we had rejected. President Wilson reacted by sending a sharply worded letter of inquiry to Harding. General denials followed; there was the usual speculation in the *New York Times* about the Logan Act's applicability, in this case centering on the questions whether Harding's membership on the Senate Foreign Relations Committee entitled him to an exemption and whether the Senate rejection of the League Covenant made it no longer a matter of controversy.³³ There is some suggestion that the root of the whole quarrel was a visit paid to Harding by a French pornographic novelist named Maurice DeKobra.³⁴ In the same month an attack was made on ex-President Taft as a violator of the Act. He and other leaders of the League to Enforce Peace had, according to counsel for a Senate committee investigating campaign expenditures, been communicating with Lloyd George, the German Chancellor, and other foreign figures about the prospects of getting both the United States and Germany into the League of Nations.³⁵ In 1922 the Vice President of the Woman Patriot Publishing Company filed a complaint with the Department of Justice against Senator Joseph France, asserting that he had been in touch with "foreign Governments, including German Socialists and Russian Bolsheviki, in direct defiance of the measures of the Government. . . ." The "measures" turned out to be the non-participation of the United States in the International Economic Conference at Genoa. Attorney General Daugherty, then still keeper of the national legal conscience, took the position that the Department of Justice acted in such cases only at the instance of the State Department.³⁶ In 1927 Senator Borah became involved in Logan Act controversy because, as Chairman of the Committee on Foreign Relations, he sent a telegram to President Calles of Mexico asking for some statistics bearing on the Mexican land nationalizations which were then in progress and had formed the basis of strenuous State Department protests.³⁷ Political antagonists accused him of violating the Act, despite his official position and despite the fact that he had done no more than ask a question. For some reason the 1930's, fraught though they were with foreign difficulties, apparently produced only one Logan Act incident. In 1933 Senator Joseph Robinson

³² 54 Cong. Rec. 3483 (1917).

³³ N. Y. Times, Oct. 19, 1920, p. 1, col. 8; p. 2, col. 1.

³⁴ *Ibid.*, Oct. 19, 1920, p. 1, col. 6 (comment of Governor Cox, Democratic candidate for President).

³⁵ *Ibid.*, p. 3, col. 4.

³⁶ *Ibid.*, April 15, 1922, p. 1, col. 7; the remarks of the Attorney General are found in *ibid.*, April 16, 1922, p. 2, col. 7.

³⁷ *Ibid.*, Feb. 28, 1927, p. 1, col. 3.

asked who one William C. Bullitt was and why he was "flitting around Europe" discussing war debts. The Senator thought that if he were unofficially there, he clearly violated the Act. His puzzlement did not subside when, after various Government denials of Bullitt's official status, he turned up on the American Delegation to the Economic Conference in London.³⁸

E. Since World War II

After World War II, the Logan Act reached a new peak of activity as a basis for accusations and threats. In the days of the preparations for the European policies later known as the Truman Doctrine and the Marshall Plan, Henry A. Wallace found himself out of sympathy with the Administration. In April, 1947, he traveled to Europe, interviewed government officials and made speeches, all with a tendency contrary to that of official policy.³⁹ His enemies in Congress immediately resorted to the Logan Act. Representative J. Parnell Thomas found that the Act "covers Wallace like a cloak."⁴⁰ The Justice Department and the White House took no interest in indicting Mr. Wallace for various reasons, of which the technical difficulty of showing that any of the tendencies of the Administration had ripened into a "measure" or that Mr. Wallace had intended to "defeat" them may have been one of the least important.⁴¹

In October, 1947, the scientist Leo Szilard submitted to the Department of Justice a letter he wanted to send directly to Stalin. He did not receive permission and instead published it in the *Bulletin of the Atomic Scientists*. In it he, on behalf of a "vast body of men and women in the United States," urged Stalin to initiate steps to avert atomic warfare.⁴²

In 1949 a private party, Colonial Airlines, used the Logan Act as a reason for not participating in hearings before the Canadian Air Transport Board to defend its right to a Montreal-New York route license against the threat of suspension. It took the position that concurrent diplomatic negotiations between the United States and Canada about the international air route agreement constituted a controversy and that it could not even cross-examine witnesses without falling afoul of the Act.⁴³

³⁸ 76 Cong. Rec. 3146-3147; 77 *ibid.* 4748 (1933).

³⁹ N. Y. Times, April 15, 1947, p. 1, col. 2; *ibid.*, April 20, 1947, §IV, p. 2, cols. 1, 3, 5, 7.

⁴⁰ *Ibid.*, April 15, 1947, p. 1, col. 2; see also 93 Cong. Rec. 3351 (1947) (remarks of Rep. Rankin).

⁴¹ N. Y. Times, April 15, 1947, p. 24, col. 5.

⁴² Letter to Stalin, 3 *Bulletin Atomic Scientists* 347 (1947). By the courtesy of Wayne Barnett, Esq., I have been furnished copies of the letters written to Dr. Szilard. That from the Department of Justice stated: "under the established policy of the Department of Justice the Attorney General does not advise private individuals as to the consequences of their acts under the criminal statutes." That from the Department of State acknowledged "the right of every citizen to give public expression of his personal views" but concluded that "the granting of permission or authority . . . would be construed as an approval of the views expressed in the letter." Neither squarely takes a position as to the legality of the Szilard letter.

⁴³ N. Y. Times, Dec. 13, 1949, p. 63, col. 5; *ibid.*, Dec. 14, 1949, p. 63, col. 1.

Secretary of State Acheson chided Colonial for taking this position. He asserted the Department would have given them permission to defend themselves had Colonial's attorneys asked for it, which they could easily have done, since they had been conferring constantly with the State Department.⁴⁴ The matter was ultimately resolved by a new international agreement which gave a parallel route to Trans-Canada Airlines.⁴⁵

On October 5, 1950, the *New York Times* published a letter⁴⁶ addressed by Harold Stassen, then President of the University of Pennsylvania, to Joseph V. Stalin, which showed its awareness of the Act by noting:

I write to you now, as I spoke then [at a meeting in 1947], in the interest of world peace and freedom . . . and not to influence your Government in relation to any disputes or controversies with the United States, which are entirely in the hands of our officials.

He somewhat spoilt the effect of this by saying later in almost precisely statutory terms:

I therefore write to you to urge that you change the policy of the Soviet Union. . . .

Confronted with this missive, Secretary of State Dean Acheson noted that "the question of the Logan Act was one that obviously came to mind" but added that it was "theoretical."⁴⁷ He further asserted that it was a matter for the Justice Department and not his own Department to consider.

Armed with this knowledge of the Logan Act, Harold Stassen in 1953 denounced Senator Joseph McCarthy for negotiating, without Administration approval, an agreement with certain Greek shipowners whereby they pledged that they would not permit their ships to become involved with Red China.⁴⁸ The defense of this procedure was put in rather vague terms of the transaction being a "private one."⁴⁹ To state it more precisely, it seems that the correspondence was not with a foreign government but merely with foreign citizens and thus fell outside the scope of the Act.

As the Korean War was coming to an end in 1953, Representative O'Konski of Wisconsin sat down and wrote a letter to President Syngman Rhee of South Korea which congratulated him on the release of 27,000 Communist prisoners being held subject to the efforts of the Communists to persuade them to return, and which expressed the prayer that "God grant you the courage and vision to liberate those remaining [23,000] helpless patriots as you did the others."⁵⁰ Although this was an outcome

⁴⁴ *Ibid.*, Dec. 15, 1949, p. 71, col. 1.

⁴⁵ 1 H. C. Deb. (Can.) 427 (1950). It has been pointed out that, aside from the Logan Act, our Government has sought to keep control over international negotiations on air rights to the exclusion of the carrier concerned. Calkins, "The Role of the Civil Aeronautics Board in the Grant of Operating Rights in Foreign Air Carriage," 22 *Journal of Air Law and Commerce* 253, 264 (1955).

⁴⁶ *N. Y. Times*, Oct. 5, 1950, p. 18, col. 4.

⁴⁷ *Ibid.*, Oct. 12, 1950, p. 38, col. 1.

⁴⁸ *Ibid.*, March 31, 1953, p. 1, col. 4.

⁴⁹ *Ibid.*, March 30, 1953, p. 14, col. 1 (remarks of Sen. Mundt); *ibid.*, April 3, 1953, p. 13, col. 5 (remarks of Pres. Eisenhower).

⁵⁰ *Ibid.*, Oct. 20, 1953, p. 4, col. 3.

devoutly feared by President Eisenhower and Secretary Dulles in their endeavors to sustain a rather shaky truce, they chose to ignore the missive.⁵¹

During the 1950's American individuals began to attempt to circumvent the official iron curtain by establishing relationships with persons in the Soviet Union. A conspicuous rôle in this process was played by the financier Cyrus Eaton, who came to enjoy a relatively close relationship with Nikita Khrushchev and was the host at several "Pugwash" conferences at which important figures from the scientific and academic world met with their counterparts from the Soviet side, their counterparts tending to be employees of some branch of the Soviet Government.⁵² There were at times murmurings about the applicability of the Logan Act to this series of meetings. These reached a peak of stridency when, at the time of the U-2 episode, Senator Thomas Dodd demanded that the Attorney General "keep a special eye on" Mr. Eaton, "a materialistic, meddlesome, evil old man."⁵³ He invited the Government's attention not only to Eaton's meetings with Khrushchev but to his appeals to the Canadian Government to dissociate itself from America's position. Similarly, there were questions in 1961 about the activities of the Free Katanga Committee which advocated the cause of Tshombe against the Central Government of the Congo and which communicated with various of the United Nations on his behalf.⁵⁴

The applicability of the Logan Act came sharply into question in connection with the so-called Tractors for Freedom Committee. After the disastrous Cuban exile expedition to the Bay of Pigs, it was naturally an objective of our Government to minimize the hardships being suffered by those who had involved themselves in the enterprise in reliance upon our support. For manifest reasons, it was not seemly for the Government to take overt charge of these negotiations which were conducted by one or more American individuals acting as a private committee.⁵⁵ As these negotiations progressed, opposition grew heated. In Congress, several Senators drew attention to the Logan Act. Senator Dirksen foreshortened history somewhat when he stated it "gets its name from the late distinguished Senator Logan from Kentucky, whom it was my pleasure to know quite well."⁵⁶ Senator Capehart asked: "[c]an there be any question in the mind of anyone that this is a dispute between Castro and

⁵¹ *Ibid.*, Oct. 22, 1953, p. 3, col. 4.

⁵² See, e.g., *ibid.*, May 20, 1960, p. 1, col. 8. Mr. Eaton has not been deterred from conferring with Communist officials. *Ibid.*, May 25, 1965, p. 3, col. 1.

⁵³ 106 Cong. Rec. 10661 (1960). For a defense of Eaton's activities see a letter to the Times from Leonard Boudin, Esq., N. Y. Times, May 28, 1960, p. 20, col. 8.

⁵⁴ *Ibid.*, Dec. 15, 1961, p. 1, col. 8.

⁵⁵ For a journalistic account of these negotiations from the original Castro tractor-for-prisoner proposal to the final medicine deal, see Haynes Johnson, *The Bay of Pigs* 229-341 (1964). Somewhat similar negotiations on behalf of U. S. fliers held prisoner by Red China were conducted by Rep. Adam Clayton Powell at the Bandung Conference. N. Y. Times, April 29, 1955, p. 5, col. 1. Plischke, *Conduct of American Diplomacy* 102 (2d ed., 1961), sees a Logan Act problem here, though I find no contemporary mention of it.

⁵⁶ 107 Cong. Rec. 9722 (1961).

the U. S. Government?"⁵⁷ He quoted a speech by Senator Fulbright in 1960, discussing the application of the Act to the picketing by an American union of the Egyptian vessel *Cleopatra*, in protest of that country's policies of blacklisting American ships which had entered Israeli ports.⁵⁸ He then asked that Senator Fulbright as Chairman of the Foreign Relations Committee investigate the Cuban situation. Enough support was raised to send resolutions to the effect that the Logan Act was violated to committees of the Senate and the House, where they quietly perished.⁵⁹ Outside Congress, a group of citizens sought in the Court of Appeals for the Seventh Circuit to mandamus the Attorney General to prosecute the Committee.⁶⁰ A man in Florida attempted to make a citizen's arrest of the Committee as they passed through Miami, and followed this up with a lawsuit in the Federal court there.⁶¹ Neither of these made any significant progress.

The Administration's responses to these attacks varied significantly in emphasis. To queries about the status of these parties under the Act, President Kennedy replied:

I am advised that the Logan Act is not involved, inasmuch as it covers only negotiations "in relation to any disputes or controversies with the United States, or defeat the measures of the Government of the United States."⁶²

In response to a letter from Representative Robert Michel, Attorney General Kennedy forwarded a copy of his brother's statement and added, backed by various citations from the *Annals of Congress*, that the "underlying intent of the legislation . . . was to prohibit 'an interference of individual citizens in the negotiations of our Executive with foreign governments.'"⁶³ He found that the Committee was not interfering with governmental negotiations. He also attempted to negate any intent to influence the measures or conduct of the Cuban Government in relation to any disputes or controversies with the United States, or to "defeat the measures of the United States." He thus apparently reiterated the "no-dispute-or-controversy" position taken by the President. In Florida, some months later, representatives of the Department of Justice took a rather different tack.⁶⁴ Here they emphasized the proposition that the transactions took place with the knowledge and the tacit assent of the

⁵⁷ *Ibid.*, at 8538-8539.

⁵⁸ *Ibid.* at 8643. The situation in question was the subject of litigation not involving the Logan Act. *Khedivial Line, S.A.E. v. Seafarers' International Union*, 278 F.2d 49 (2d Cir., 1960).

⁵⁹ See 107 Cong. Rec. 9073, 9641 (1961).

⁶⁰ The writer is advised by the Clerk of that court that a petition for mandamus, filed as No. 13391, was denied on June 23, 1961, and that no briefs were filed. See *N. Y. Times*, June 18, 1961, p. 7, col. 7.

⁶¹ See *ibid.*, June 16, 1961, p. 4, col. 4. The resulting action, *Voorhees v. Morrison*, No. 63-20-Civ.-EC in the Miami Division, Southern District of Florida, was dismissed by an order dated March 4, 1963.

⁶² 44 Dept. of State Bulletin 934 (1961). ⁶³ 107 Cong. Rec. 11220 (1961).

⁶⁴ Memorandum in Support of Motion to Dismiss, *Voorhees v. Morrison*, No. 63-20-Civ.-EC, S.D. Fla., pp. 7-12.

Government. They had, incidentally, to make it clear that the Government's involvement was not too affirmative lest they seem to be conceding that, as plaintiff charged, the Committee's actions were violating statutory provisions⁶⁵ against governmental aid being furnished to Castro. Secondly, the brief noted that there had been no governmental negotiations with Cuba and advised the court that the State Department authorized them to say that in its opinion "there was no 'dispute or controversy', as those terms are customarily understood in diplomatic parlance, between the United States and the Cuban governments,"⁶⁶ and that no acts done by American citizens tended to defeat or obstruct any measures of the United States.

In the last few years, the Act has been mentioned in several connections, including various communications seeking accommodations with North Viet-Nam.⁶⁷ More significantly for lawyers, the Act was judicially construed for the first time, though in civil rather than criminal litigation. The opinion,⁶⁸ by Judge Herlands of the United States District Court for the Southern District of New York, is upon a motion to dismiss an anti-trust action and for summary judgment. As relevant to the Logan Act, the complex facts involved can be reduced to the following. Plaintiff Waldron thought he saw in the nationalization of the oil industry in Iran and in the disappearance of the normal market for that oil, an opportunity for profit. He procured a contract with the National Iranian Oil Company on May 25, 1952. The contract, or option, expired on June 30, 1953, without Waldron having been able to find a purchaser for any of the oil. The State Department, after suggesting that "non-official entities should refrain from getting involved in the dispute," had declared that any decision as to purchasing oil from Iran "must be left to such individuals or firms as may be considering them," although it undoubtedly took a negative view of the regime of Mr. Mossadeq, which had instigated the nationalization, and did nothing to prevent its downfall. Waldron alleged that defendant oil companies had by conspiratorial means prevented any prospective purchasers from taking the Iranian oil. The oil companies replied that he had no legitimate business to be destroyed since his project was in violation, *inter alia*, of the Logan Act. The court, moved by doubts about the constitutionality of the Logan Act, construed it as not applicable to the above facts, since it was not certain that there were any "measures of the United States" involved which Waldron might have intended to "defeat." Apparently no discussion was directed to the conceivable alternative theory that Waldron had sought to influence the Iranian Government in its relationships with the United States.

⁶⁵ 75 Stat. 444 (1961), as amended, 22 U.S.C. §2370 (1964). Most, but not all, of the subsections of that section forbid only assistance under "this chapter" but some are general in terms and probably apply to Cuba.

⁶⁶ Memorandum, note 64 above, at 12.

⁶⁷ N. Y. Times, Aug. 13, 1965, p. 1, col. 7 (communication by Rev. Martin Luther King to North Viet-Nam); *ibid.*, Dec. 29, 1965, p. 3, col. 2; Jan. 9, 1966, p. 1, col. 2 (visit of Messrs. Aptheker, Hayden and Lynd to Hanoi).

⁶⁸ *Waldron v. British Petroleum Co.*, 231 F. Supp. 72 (S.D.N.Y., 1964).

II. INTERPRETATION OF THE ACT

In the absence of authoritative construction of the Logan Act, the history above recited at least furnishes us with a series of non-hypothetical exercises in its application. From these one can identify the more probable types of interpretive problems likely to arise under the statute and concentrate one's efforts upon them. Up to a point it is possible, in traditional criminal law style, to divide the statute into "elements." In particular one can distinguish an element of a communication—an American corresponding with a foreign government—and two alternative elements of intention—either to influence the foreign government with respect to a dispute or controversy with the United States or to defeat the measures of the United States. However, the typical Logan Act problem has an exasperating way of raising considerations under more than one element.

A. *The Communication Element*

1. *American Citizens*

The first set of construction problems can be grouped around the requirement that an American citizen communicate to a foreign government. The American citizen aspect has caused no particular problem; our nationality legislation generally provides fairly clear rules distinguishing citizens from aliens. Corporate citizenship (and corporate criminality) had not in 1799 developed to the point where the draftsmen needed to pay heed to it. There are now quite a few precedents on what kinds of corporations are to be assimilated to American citizens for various purposes.⁶⁹ Considering the antiquity of the Act and its vagueness in other respects, one is inclined to guess that a court would hew to the older (and less elastic) method of determining the question on the basis of the place of incorporation. Non-citizens were covered by a portion of the original Act which penalized them if they counseled, aided, advised or assisted in a citizen's violation.⁷⁰ This clause was, for example, used to rationalize the requests for the withdrawal of the Marquis Yrujo and Mr. Bunch from the United States.⁷¹ The 1948 codification, deleting this clause, remitted the matter to the general definition of "principals" in Section 2.⁷² From the comments one infers that aliens can still, in certain circumstances, be guilty of violating the Act, even though not coming within the terms of Section 953.

2. *Foreign Governments*

Defining the foreign governments that can be the addressees of communications presents, theoretically, quite a number of constructional

⁶⁹ Vagts, "The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise," 74 *Harvard Law Rev.* 1489 (1961); *Restatement of Foreign Relations Law of the United States* §27 (Proposed Official Draft, 1962).

⁷⁰ See note 1 above.

⁷¹ See pp. 272 and 273 above.

⁷² 18 U.S.C. §2 (1964); see H.R. Rep. No. 304, 80th Cong., 1st Sess., A76 (1947).

problems. As a practical matter, nearly all of the cases in which the Logan Act has been called into question have involved transactions with what one might call the "core" of a government, that is, its formal political leaders—premiers, members of parliament, foreign ministers, and the like. If an American has an intent, forbidden by the Logan Act, it is to those persons that he is most apt to resort. Yet, if one lets one's imagination play a bit with the possibilities, fueled by examples selected from the somewhat parallel problems developed by the law of immunities of foreign sovereignties, one can generate a wide variety of troubling hypothetical problems. The possibilities are multiplied by the increasing scope of the tasks which governments are undertaking and the increasing variety of structures through which they do so. For example, suppose that an American citizen engaged in the air transport business communicates with the foreign entity which operates airlines in that country and proposes to undertake new operations which will increase air competition to the loss of that American. Is that agency part of the government? Should it depend on such institutional factors as whether the agency is incorporated within that country's Department of Transport, or is set up as a separate "authority" or is in the form of an entity organized under that country's commercial code but 100% owned by the state? What if it is a quasi-judicial agency like our own Civil Aeronautics Board or the Canadian Air Transport Board? Or should distinctions be made on the basis of function, attempting to distinguish, as do some sovereign immunity cases, between traditional governmental functions, on the one hand, and commercial (or other) functions, on the other?⁷³ The experience in the area of sovereign immunity indicates that the latter type of distinction is exceedingly hard to make because of the variations in practice between the states involved. Like problems can arise in communications to churches in nations where no First Amendment wall has been built between church and state and to universities and scientific foundations in nations where the state has more extensively assumed those functions. Political parties in some states raise quite similar questions, as they did at the time of the Stockholm Convention of Socialists in 1917.

In resolving these problems it can be argued that the Logan Act would adequately serve its purposes if it were restricted to communications with the traditional political and diplomatic agencies which were already known in 1799 and which are apt to be in the forefront of any controversy with the United States. On the other hand, increasingly international controversies can arise on the economic or scientific fronts and it seems arbitrary not to include national agencies concerned with them. Any gain in clarity and modesty of coverage which may be achieved by restricting the Act's definition of government to orthodox political agencies may, in any event, be lost by operation of the fact that "indirect" communications are covered by the Act, and wherever there is a controversy with any foreign agency it can be expected to pass on the data it receives to its political

⁷³ See, *e.g.*, *Victory Transport Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir., 1964), 59 A.J.I.L. 388; cert. denied, 381 U. S. 934 (1965).

confrères. Thus one is left with a feeling that it is not useful to restrict the scope of the Logan Act by a narrow reading, based on functional distinctions, of what constitutes a part of the "government," but that it will be necessary to analyze the governmental quality of the agency in question in the more formal terms of its own legal framework.

Certain types of governments pose special problems. Consider the unrecognized regime, for example. To some extent we regard such a unit as one "of whose existence we know nothing."⁷⁴ Some portions of the Criminal Code, particularly those dealing with espionage, cover the point explicitly; however, Section 11 of the Code states that "foreign government" is to be understood throughout the code without reference to American recognition. Even though this section was enacted with other crimes in mind, it would seem applicable to the Logan Act and to bar any argument one might otherwise make that private initiative should be permissible where no inter-governmental relations exist to be interfered with.⁷⁵

What of the United Nations and other international organizations? In cases involving sovereign immunity and other issues, courts have found that the United Nations, though possessing legal personality, is not a state.⁷⁶ To adhere to such a reading would, additionally, preserve a channel of access for Americans to more or less impartial and supra-national bodies and might promote the growth of the agency in question, even though it might conceivably disadvantage the United States in a controversy with that organization. Again, there might be cases in which such a communication might be held to be an indirect communication with one or more of the foreign nations which are members of the organization.

The Act goes on to include communications with officers or agents of the foreign government; indeed all but quite formal written communications would be addressed to some person. The problems here often run parallel to those of ascertaining whether an authority or corporation is part of the government. A special problem is whether a person who is, for some purposes, a government agent can also have a private capacity. Is a Russian bureaucrat who doffs his official uniform to attend a Pugwash conference, saying that he is there in his private capacity, still a government agent or can he be said to be, however ponderously, on a "frolic of his own"? The question interrelates with that of the American's intention to influence the bureaucrat's government's conduct, another element of the offense. If the American has such an intent, then he is treating the Russian listener as an agent of the government. Or, the American may be communicating indirectly with other officers and agents who will receive a report from the conferee.

⁷⁴ *United States v. Klinton*, 18 U. S. (5 Wheat.) 144, 149 (1820).

⁷⁵ H.R. Rep. No. 304, 80th Cong., 1st Sess., A7-A8 (1947), indicates that the provision was taken over from the Espionage Act of 1917 (see, *e.g.*, 18 U.S.C. §794 (a) (1964)). The Logan Act is not one of the sections which the comment lists as being affected.

⁷⁶ *United States v. Melekh*, 190 F. Supp. 67, 81 (S.D.N.Y., 1960), 55 A.J.I.L. 734 (1961); *Reparations for Injuries Suffered in the Service of the United Nations*, [1949] I.C.J. Rep. 174, 179, 43 A.J.I.L. 589 (1949).

3. *Correspondence or Intercourse*

Between the American and the foreign government there must exist a link of "verbal or written correspondence or intercourse." The phrase seems to have a wide sweep. Surely the draftsmen meant to cover communications by whatever sort of device; that they could not foresee all the means enumerated by the draftsmen of later statutes on unlawful communications should not limit the construction in that regard.⁷⁷ Nor does it seem desirable to read into the phrase limitations that would exclude communications in the form of a question or a mere statement of fact. It has been in effect suggested⁷⁸ that "negotiation" be substituted for "correspondence or intercourse"; while such a restrictive reading might be desirable, there is little warrant for it in the legislative history and little to guide a court in giving content to such a term. To the extent that the Act reflects such an idea, it does so in the clauses defining intent. While both "correspondence" and "intercourse" suggest repeated and reciprocal relationships, the use of the term "commences" indicates that a single communication from an American is enough and indeed such a missive could well accomplish the effect the Act seeks to prevent. The Act does seem to contemplate that the American take an active rôle in formulating the communication; merely carrying a message from an alien to a foreign government should not create liability.

The real difficulties as to "correspondence or intercourse" arise when one adds the accompanying "directly or indirectly." Does this mean that expressions aimed primarily for domestic consumption are covered? Albert Gallatin, in the debates of 1799, asked whether writing a book on foreign affairs would be a crime.⁷⁹ Indeed, in the only indictment handed down under the Act, the crime—if such there was—was committed by publishing a letter in a journal on the frontier in 1803 at a time when the likelihood of its being read by the foreign Power involved was minimal.⁸⁰ Now that voracious foreign intelligence sources pick up vast quantities of American literature, the likelihood of publications intended by the writer for domestic consumption reaching foreign governments is enhanced and in such cases an indirect communication may well take place.

A statute covering such indirect communications would court grave dangers of unconstitutionality. In construing the provisions of the act regulating attempts by lobbyists to influence our own Congress, the Supreme Court read the words "or indirectly" out of the law in order to preserve its constitutionality.⁸¹ A court might do the same thing with the Logan Act, but the contexts are different. It is hard to avoid the effect of the anti-lobbying legislation by appealing to Congress via

⁷⁷ Compare §3 of the Trading with the Enemy Act, 40 Stat. 412 (1917), 50 U.S.C. App. §3(e) (1958); 12 A.J.I.L. Supp. 27 (1918), 36 *ibid.* 56 (1942).

⁷⁸ See, e.g., N. Y. Times, Aug. 18, 1965, p. 1, col. 7 (statement of Rev. Martin Luther King). Robert G. Harper pointed out that the Act did not use the term "negotiate" and implied that Gallatin had tried to smuggle the idea into the debates. 9 Annals of Congress 2531 (1798).

⁷⁹ *Ibid.* 2596 (1799).

⁸⁰ P. 271 above.

⁸¹ *United States v. Harriss*, 347 U. S. 612 (1954).

the public press, for the very purpose of that legislation is to avoid *secret* pressures and influences. Thus that legislation was not crippled by the rewriting. The Logan Act, however, aims at preventing the proscribed influences altogether, and undoubtedly some communications via such a publication as the *New York Times* or (as in Szilard's case) the *Bulletin of the Atomic Scientists* would not only reach the foreign ministry involved, but would influence it as much as, or more than, if the same material were sent in a sealed envelope. Perhaps one should draw the line at communications which had a *bona fide* domestic purpose, so as to make unlawful publications in the United States which were merely subterfuges for communications abroad. Where the intermediary is the press in the foreign country concerned, there is perhaps somewhat less need from the point of view of either policy or the Constitution to protect that sort of communication. Correspondence through non-public media, such as messengers or even via the governments of third countries, seems to fall within the scope of the Act. Even today, face-to-face confrontations seem to create the greatest dangers of influences the Act is designed to combat, particularly when the impact of the defendant's presence is not counterbalanced by that of official representatives.

B. *The Intentional Elements*

In order to violate the Logan Act, the communication by defendant must accompany one of two intents: (a) to influence conduct of the foreign government in relation to some dispute or controversy with the United States or (b) to defeat the measures of the United States. Each of these involves different factors, though the two clauses will overlap in some cases. Each of them, though stated in terms of subjective intent, involves judgments as to the legal characterization to be given to some group of facts, particularly disputes and measures.

1. *Influencing in Disputes or Controversies*

Under this heading there must first of all be found a "dispute or controversy" between the United States and the foreign government. In searching for elucidation, one first reaction is to recall that but ten years earlier, the draftsmen of Article III of the Constitution had spoken of "cases" and "controversies." However, "controversy," the term common to both texts, has, if anything, a narrower meaning than "cases," and cases are, in the constitutional context, limited to a very specific type of justiciable clash of interests.⁸² This narrowness would clearly draw too confined a circle around the Logan Act phrase. The Government's memorandum in the Florida case involving negotiations with Castro suggests that we look at the meaning of the words in their accepted international sense.⁸³ In 1799 the law of nations scarcely knew any of the

⁸² Wright, *Federal Courts* §12 (1953).

⁸³ Memorandum in Support of Motion to Dismiss, *Voorhees v. Morrison*, No. 63-20-Civ.-EC, S.D. Fla., 1963, p. 12 ("as those terms are customarily understood in diplomatic parlance").

modern devices for settling "disputes" and thus had little occasion to concentrate on defining what a dispute was; the term was not, however, unknown then, since Vattel dedicated a chapter of his treatise to the topic.⁸⁴ Nowadays discussions of disputes arise in connection with grants of jurisdiction to international tribunals or to the Security Council. The opinions of the Permanent Court of International Justice and the International Court of Justice generally define a dispute in terms of the existence of a well-developed set of conflicting views. In the *Mavrommatis Palestine Concessions* case, the Court said:

A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.⁸⁵

While this definition suggests that a clash of interests not expressed by the parties suffices, that suggestion was rejected by American dissent. The American Judge, John Bassett Moore, drew a narrower line:

There must be a pre-existent difference, certainly in the sense and to the extent that the government which professes to have been aggrieved should have stated its claims and the grounds on which they rest, and that the other government should have had an opportunity to reply, and if it rejects the demands, to give its reasons for so doing.⁸⁶

The language of other cases, for example, that of the *South West Africa Cases*, follows Judge Moore:

Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other.⁸⁷

Article 34 of the United Nations Charter grants to the Security Council jurisdiction over "any dispute, or any situation which might . . . give rise to a dispute." It thus, like the jurisprudence of the Court, stresses the difference between a conflict of interests (a situation) and the taking of positions thereon (a dispute). Unlike Article 36 of the Statute of the International Court of Justice, it does not speak of a *legal* dispute. The Security Council usage, as connoting the taking of conflicting positions, whether legalistic or not, seems the most useful guide to interpreting the Logan Act. One can say this even though it may not give the Act all the scope its framers intended, even though its use is rather anachronistic, and even though it does not solve all specific questions.⁸⁸

⁸⁴ Vattel, *Law of Nations*, Ch. XVIII (1793 ed., transl.).

⁸⁵ P.C.I.J., Series A, No. 2, p. 11 (1924).

⁸⁶ *Ibid.* at p. 61. See also *Asylum Case*, [1950] I.C.J. Rep. 395, 403, 45 A.J.I.L. 179 (1951); *Interpretation of Peace Treaties with Bulgaria, Hungary and Roumania*, [1950] I.C.J. Rep. 65, 74, 44 A.J.I.L. 742 (1950).

⁸⁷ [1962] I.C.J. Rep. 319, 328; 57 A.J.I.L. 640 (1963).

⁸⁸ See, for example, the conflict of views as to *when* the "dispute" between the nations arose for purposes of the reservation *ratione temporis* in the *Interhandel Case* (Switzerland v. United States), [1959] I.C.J. Rep. 6, 20-22, 59-62 (Sir Percy Spender), 33-40 (Judge Hackworth); 53 A.J.I.L. 671 (1959). For discussion of "dispute" in Art. 34, see, for example, the interchange between the Soviet and French Security Council delegates on the Syrian-Lebanese Controversy, Report of the

Consider some of the recurrent Logan Act situations under this standard. A dispute most clearly exists when two countries are arguing about a past injury, for example, in the 1803 episode between the United States and Spain which gave rise to the suggestion that American lawyers be prosecuted for giving an opinion as to the law of the matter. A dispute internationally can certainly be more far-ranging; thus the *South West Africa Cases* covered a large number of interrelated issues and policies. If the United States is negotiating a treaty with the foreign government and negotiations encounter difficulties, one supposes that no controversy has arisen at least so long as each party recognizes that the other is acting properly when it refuses to make the concession which it requests. The same would even be true of a requested re-negotiation of an existing treaty. Bargaining and disputing are separate notions even though, particularly with regard to treaties settling past grievances, they may overlap. A very difficult question may arise when the two governments have broken off official relations. Presumably this does not mean that they are then in a state of controversy about everything. However, their failure to send each other notes about some matter may not mean that they are not in disagreement about it. Achilles sulking in his tent was clearly engaged in a dispute or controversy. The question is how broad is the territory of dispute forbidden to private Americans. The case of the Cuban prisoners and Logan's own case illustrate the problem. Evidently the members of Congress in 1799 thought that there existed a state of controversy about the ships and prisoners seized by the French and that it continued despite diplomatic silence. The Cuban prisoners situation was stated by the American Government not to involve a controversy. That statement may well of itself be conclusive on an American court, though not on an international tribunal.⁸⁹ Absent such a determination, the proposition is debatable. It was clearly our Executive's wish that the

Security Council to the General Assembly, Oct. 3, 1946, U.N. Doc. A/93 at p. 69, reprinted in Sohn, *Cases on World Law* 737 (1950). Problems also arise in determining who is a party to a dispute who shall abstain from voting in the Council under Art. 27.

One of the questions international practice does not answer is whether one violates the Act by *creating* a dispute between the United States and a foreign government. It would seem that such conduct would be at least as harmful as intervening in a pre-existing one, and that the text of the Act does not require that the dispute antedate the correspondence.

⁸⁹ On the conclusiveness of State Department certifications, see *International Products Corp. v. Koons*, 325 F.2d 403 (2d Cir., 1963). One may, however, be doubtful as to the effectiveness of a government certification to *extend* the scope of a "dispute," particularly in a criminal case. International tribunals are not so bound, see *South West Africa Cases*, [1962] I.C.J. Rep. 319, 328: "it is not sufficient for one party . . . to assert that a dispute exists with the other party." On the specific point that absence of negotiations means absence of controversy, compare the memorandum cited in note 83 above with the opinion of Sir Percy Spender in the *Interhandel* case, note 88 above, at 60:

"A dispute may arise long before it crystallizes into its component parts or reveals all its different facets. No special formality is necessary. It need not arise in the course of diplomatic negotiations. It may do so independently thereof and may precede negotiations."

prisoners be released and Castro's that they not be, at least until his price was met. While the case differs from Dr. Logan's in that we were not claiming a legal right to have the prisoners released, I doubt that such a distinction is crucial.

Third-country situations pose special problems, illustrated by the Anglo-Iranian dispute involved in the *Waldron*⁹⁰ case. There was quite clearly a dispute between Great Britain and Iran as evidenced by their litigation before the International Court of Justice.⁹¹ Was there a dispute between our Government and Iran? We were unhappy about the fact that Mossadeq had nationalized the oil properties: we may even have taken steps via the Central Intelligence Agency to dispose of him.⁹² In the sense here attributed to the Logan Act I would suppose that there was then no dispute or controversy.

Once a dispute or controversy is found, I read the statute as not requiring that the American's intention be adverse to those of the United States' official representatives or that it be shown to be one to interfere with their actions.⁹³ The Logan Act's proponents saw the gist of the evil in the "usurpation of executive authority" involved in communicating with the foreign Power on the taboo topic.⁹⁴ Logan himself had been seeking the same objectives as the unsuccessful American emissaries; much of the purpose of the Act was to prevent foreign Powers from playing American party politics by granting to one faction what they would not give to another. Attempts to introduce language requiring that the actions of the defendant be adverse to the United States were defeated.⁹⁵ Thus in such a situation as the Cuban prisoners question, the fact that the efforts of the private committee were in harmony with the views of the Administration would not be a defense. This reading of the "disputes or controversies" clause gives it a meaning quite independent from the "defeat the measures" clause.

The Logan Act stresses intent. Thus it is not necessary that the foreign state's conduct in fact be influenced, a factor that would introduce insurmountable problems of proof. This intentional requirement, on the other hand, immunizes some kinds of communications which in fact might have some influence on a foreign regime. If the speaker at an American rally or writer to the American newspaper inadvertently influences a foreign government, he has clearly not violated the Act. The interpretation above suggested would also free him if he had a genuine intention of influencing Americans, even if he also contemplated influencing a foreign government in the process.

⁹⁰ See note 68 above.

⁹¹ Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), [1952] I.C.J. Rep. 93; 46 A.J.I.L. 737 (1952).

⁹² If one believes Tully, CIA: The Inside Story 88-89 (1962).

⁹³ But see statement of Attorney General Kennedy, 107 Cong. Rec. 11220 (1961) citing the Annals' use of the term "interference."

⁹⁴ E.g., 9 Annals of Congress 2677 (1799) (Isaac Parker).

⁹⁵ *Ibid.* 2679-2682 (1799).

2. *Defeating Measures*

The alternative branch of the Logan Act clearly involves a collision between private intention and official policy. In general "defeating" seems to involve roughly the same idea as "influencing the policy of the foreign government unfavorably" and is thus narrower than that intent discussed in the prior section. It is broader, however, in that it need not involve any crystallized dispute or controversy between the governments. It does, however, require a measure by the United States and this introduces problems of construction. As to this I have found no body of law so helpful as the international law relating to disputes. It is true that the United Nations Charter refers to "measures" which the Security Council has the power to take, but the context makes the term reasonably clear and limited.⁹⁶

In the Logan Act context, measures clearly include statutes, treaties, executive orders and other specific manifestations of national power. Thus, urging a foreign government to defeat our foreign assistance program as embodied in the statutes, or our regulations and laws limiting trade with various Communist countries, would clearly be illegal. Actions directed by the Government, such as the landing of Marines, seem also to be measures, even if the directives never appear in the statutes, the *Federal Register* or the *Treaty Series*. When American action is less concrete, the question is doubtful. At the time in 1947 when Wallace was accused of violating the statute, it is not at all clear whether the developing program of the United States to assist Western Europe had reached the point of being embodied in "measures." At the time of the Anglo-Iranian oil controversy our State Department position had been so weakly stated that it never approached the point of involving measures.⁹⁷ A borderline case would be that of an announced policy not yet implemented by legislation or treaty. Does one who induces a European country to violate the Monroe Doctrine defeat a measure? Would an American's negotiating with a foreign government to suggest a joint venture in violation of the program of "voluntary" restraints on investment abroad involve a measure? Perhaps the most extreme extension of the concept has been in the claim that the refusal of the United States to attend a conference constituted a measure.⁹⁸ Actually, refraining from action may, in international relations and international law, have significant consequences. Presumably a statute, to remain constitutional, would have to be read as referring only to steps that are public and concrete in nature, though any attempt to enumerate them might omit some significant item.

⁹⁶ Arts. 39, 41, 42. The term "measure" appears in a context rather similar to the Logan Act's in §1 of the Sedition Act of 1798, 1 Stat. 596. Note also that the term appears in the Logan Act's clause forbidding influencing the "measures or conduct" of a foreign government. It is hard to see how "measures" are to be differentiated from "conduct."

⁹⁷ *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 88 (S.D.N.Y., 1964).

⁹⁸ See p. 275 above.

Again, the intentional element limits the scope of the Act's application, since the accused must have known about the measure in order to have an intent to defeat it. One should also read the statute as requiring an intent to defeat our measures by means of the foreign communication so that an intent to defeat our measures by argumentation aimed at a domestic audience should not render a person liable if such argument also incidentally reaches a foreign sovereign.

C. *Exemptions*

The Logan Act provides two exemptions for actions otherwise within its scope. The first of these applies when the correspondent has the "authority of the United States." This is the one area where a post-1799 change may have made a significant difference; the 1948 codification eliminated the words "permission" before that clause, thus seeming to narrow it, although the legislative history reveals no intent to change the meaning.⁹⁹ The authority of the United States seems clearly to protect ambassadors, ministers and consuls appointed with the advice and consent of the Senate. Despite contemporaneous doubts, it must now be taken to cover other persons properly appointed by the Executive when acting within their instructions.¹⁰⁰ A difficult problem is presented by Congressmen with foreign relations responsibilities. Such a case was that of Senator Borah in 1927. Since he seemed to be asking only a *bona fide* question, he may well not have had an intent proscribed by the Act. It would seem that since Congress has no power to influence the policies of a foreign country, though it needs to inform itself about foreign relations, no Congressman has authority to communicate in a way otherwise forbidden.¹⁰¹ Clearly State representatives have no license to deal with foreign regimes.¹⁰²

Where the activities involved are not carried out on behalf of the Government, though they are not disapproved, the distinction between "permission" and "authority," if intended, could be crucial. Thus in the Cuban prisoners situation the Government argued that no change was intended and that the Committee had the tacit assent of the Administration.¹⁰³ Dean Acheson had in 1949 told Colonial Airlines that it could get a clearance from him to communicate with the Canadian Air Trans-

⁹⁹ See note 72 above.

¹⁰⁰ 9 Annals of Congress 2584-2586 (1799); see, generally, Waters, *The Ad Hoc Diplomat: A Study in Municipal and International Law* (1963).

¹⁰¹ See notes 33-37 above. As to limits on Congressional activity in the foreign relations area, see Corwin, *The President: Office and Powers* 216-235 (3d ed., 1948).

¹⁰² *Pennsylvania v. Nelson*, 350 U. S. 497, 516 (1956). In *Holmes v. Jennison*, 39 U. S. (14 Pet.) 540, 575-576 (1840), Chief Justice Taney, without referring to the Logan Act, found that the Constitution itself "cut off all communications between foreign governments, and the several state authorities." See, generally, Corwin, *op. cit.* above, at 210-212, on the exclusion of the States from foreign affairs. As Taney noted, negotiations between States and foreign governments could be used to further divisions and factionalism. Thus, a violation of the Logan Act by, say, a State Governor could be particularly dangerous.

¹⁰³ See p. 279 above.

port Board.¹⁰⁴ There existed until 1960 a regulation of the State Department by means of which Americans who proposed to advise foreign governments with respect to disputes with the United States could obtain clearance.¹⁰⁵ At present, however, there is no regular procedure whereby any party can obtain approval of his proposed activities. This lack of administrative construction plus the ambiguous change in the statute produces a situation that is unfortunately obscure from the point of view of the private party. It also tends to constrict the Government's range of possibilities in the area of unofficial diplomacy. To the extent that the "authority of the United States" clause is taken in its narrower interpretation, it means that any communication from an American citizen during a controversy should be taken by the foreign government either as an official gesture or as an illegal action. Of course many a foreign ministry will not take the Logan Act so seriously as to believe in the dilemma and disregard the possibility that this is a private step as to which the State Department has not taken any fixed position. However, to the extent that the Logan Act in its present form appears to restrict the Government's flexibility in benefiting from individuals' efforts, it seems worthy of amendment.

The second escape clause is the one which permits private parties to pursue redress of their grievances from the foreign state. This has existed from 1799 and clearly covers aggrieved parties and their attorneys and agents, including such modern variants as the Council of Foreign Bondholders that represents many such parties. It does not, however, protect those who, like George Logan himself, benevolently intermeddle in the woes of others. In one respect the Act may be narrower than the need. The redress clause tends to suggest that it applies only to relief from past legal wrong by the foreign government, *i.e.*, the typical case of an international claim. Harrison Gray Otis at the time of the original debates asserted that such activity was protected by the law of nations and could not be forbidden by domestic legislation (a view of the relationship of national and international law not followed by later decisions).¹⁰⁶ Nowadays, there may also be a need, particularly in commercial matters, for an American to negotiate with a foreign government to forestall action by that regime—for example the proposed revocation of an air carrier permit in the Colonial Airlines case—or to deal with it concerning a past or impending harm by the government which may not involve

¹⁰⁴ See p. 277 above.

¹⁰⁵ These regulations were revoked by 25 Fed. Reg. 13138 (1960). The former regulations can be found as part 3 of the 1958 edition of 22 C.F.R. See the discussion of them in 4 Hackworth, Digest of International Law 610-611 (1942). There is also reported a response to an inquiry by Eldon R. James, an American lawyer, as to his status if he became a Minister of Siam. The State Department advised him that any requests for permission to act for Siam in a controversy with the United States should be addressed to the Secretary.

¹⁰⁶ 9 Annals of Congress 2587 (1799): "Every owner or commander of a vessel is authorized by the law of nations to make application for the release of his own property. . . . This is a right which the Government of the United States could not deprive them of. . . ."

a violation of either municipal or international law—for example, the introduction of a new competitive air carrier service by the regime. One might wish the Act were clearer in these regards.

III. CONSTITUTIONAL OBJECTIONS

The Constitutional objections which have been raised against the Logan Act can be divided into three categories: extraterritoriality, infringement upon freedom of speech, and unconstitutional vagueness. The latter two seem to have considerable force.

A. *Extraterritoriality*

The Logan Act provides the first, and one of the plainest, examples of legislation expressly covering the activities of citizens outside the country. This feature was asserted by the leader of the original opposition in Congress, Albert Gallatin, as a ground for believing the Act violated the law of nations.¹⁰⁷ Later, as explicitly or implicitly extraterritorial legislation became more common, the Logan Act was referred to as a clear instance of Congressional intent. Mr. Justice Holmes in *American Banana Co. v. United Fruit Co.*¹⁰⁸ mentioned the Logan Act as showing that when Congress intended its legislation to operate abroad it knew how to express that intent (and that the Sherman Act by contrast showed no such purpose). On the other hand, *Blackmer v. United States*¹⁰⁹ and *Skiriotes v. Florida*¹¹⁰ cited the Act in support of their findings that the enactment of rules governing citizens' conduct abroad by the Federal or a State Government was not unconstitutional. Since the courts have consistently refused to find other statutes beyond the powers of Congress because of their sweep abroad and since legal opinion has tended to follow those cases,¹¹¹ it is exceedingly unlikely that the Logan Act would fall victim to this attack.

In the 1948 revision of the Act an extraterritoriality problem was by inadvertence introduced with respect to non-Americans involved in illegal correspondence. Before that time non-citizens were subject to a special clause penalizing them if they counseled, aided, advised or assisted in a citizen's violation while they themselves were resident within the United States. The codification deleted this clause, relying on the general definition of "principals" in Section 2, which has no territorial limitation. It is established law that one who is personally disqualified from committing a particular crime directly may be liable under such a section.¹¹²

¹⁰⁷ *Ibid.* at 2645.

¹⁰⁸ 213 U. S. 347, 356; 3 A.J.I.L. 1306 (1909).

¹⁰⁹ 284 U. S. 421, 437, note 3; 26 A.J.I.L. 611 (1932); see also *United States v. Craig*, 28 Fed. 795, 801 (C.C.E.D. Mich., 1886).

¹¹⁰ 313 U. S. 69, 74; 35 A.J.I.L. 569 (1941).

¹¹¹ Restatement of Foreign Relations Law of the United States §80 (Proposed Official Draft, 1962).

¹¹² *E.g.*, *Haggerty v. United States*, 5 F.2d 224 (7th Cir., 1925), construing a predecessor of 18 U.S.C. §2 (1964).

Where nationality is involved there must be some limits to this idea; clearly Goebbels was not guilty of treason for aiding Mrs. Gillars and other Americans to broadcast to the United States. However, the legislative history of the Logan Act change indicates that some foreigners should still be subject to it. Does this mean that a foreigner acting abroad to encourage illegal correspondence could, if found here, be tried for violating the Act? This would, by our established notions of criminal jurisdiction, be stretching our reach to an extreme, since it would involve covering a non-citizen not acting in this country and producing an impact on the United States only very indirectly, that is, via the effect of the correspondence on the foreign government involved.¹¹³

One may well be skeptical of the assertion that the Logan Act is, as Wharton said,¹¹⁴ proof against extraterritoriality objections because it is an exercise of Congress' power to define crimes against the law of nations. Nonetheless, there are ample sources of authority in the Constitution, particularly in the foreign affairs power, to provide a firm foundation for the law; and they justify a certain measure of extraterritorial effect. The true objections to the Act are to be found in its capacity to deprive individuals of their Constitutionally guaranteed rights rather than in any absence of Congressional power.

B. Violation of the First Amendment

Since the time the Logan Act became law, the interpretation of the First Amendment has been in a state of increasingly rapid change. More and more cases have dealt with the relation between Federal and State legislation and the guarantee of free speech without bringing more clarity and consistency to the area. To attempt to reconcile them all and to estimate their impact on the status of the Logan Act would overtax the space of this article and the capacities of this writer. Thus this section will be limited essentially, first, to a review of the major cases in the area of international relations and the personal freedoms; and, second, to a presentation and evaluation of the defense that could be made of the Act.

¹¹³ Such jurisdiction would have to be defended on the basis of the so-called "protective principle." The formulation in §33 of the Restatement of the Foreign Relations Law of the United States (Proposed Official Draft, 1962), makes this depend on the fact that such "conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems." As to such recognition, see the remarks of Lord Campbell on the law of England, note 114 below, and Art. 80 (2) of the French Penal Code, which penalizes dealings with foreign agents that harm France's diplomatic position. Gallatin argued that the lack of foreign counterparts at that time indicated the Act's un wisdom. 9 Annals of Congress 2597 (1799).

¹¹⁴ 1 Wharton, Criminal Law §274 (9th ed., 1885). This view has the support of Lord Campbell who, in discussing in the House of Lords an incident involving a private deputation to Napoleon III, said: "he apprehended they had been guilty of an offence, perhaps against the law of the land, and, at all events, against the law of nations. . . ." 125 Parl. Deb. (3d Ser.) 506-507 (1853). See Wheaton, Elements of International Law 373, note 115 (2d ed. Lawrence, 1863).

The conflict between the protection of these rights and the reservation to the United States of adequate power to deal with foreign problems has given rise to a series of important cases since World War II. These may be thought of as establishing a separate area of Constitutional law possessing a logic and structure of its own. One might start with two sets of cases only rather distantly related to the Logan Act problem, each involving special Constitutional provisions. They are includible only as showing that the court does not hesitate, where personal liberties are involved, to invade even areas where the legislation is said to be based on urgent foreign policy needs. I refer to the cases severely restricting the power of Congress to extend court-martial jurisdiction overseas to persons not actually in the land or naval forces¹¹⁵ and to those cases which cut down most of our denaturalization legislation.¹¹⁶

In another group of cases, more closely analogous, the courts have confronted administrative regulations and Congressional enactments restricting the right of American citizens to travel abroad. In *Kent v. Dulles*¹¹⁷ the Court narrowly construed our passport legislation so as to avoid Constitutional doubts. While it emphasized the right to movement as a liberty in itself, it quoted extensively and approvingly from the late Professor Chafee's essay¹¹⁸ stressing the impact of controls on movement upon freedom to acquire and transmit ideas. In the recent *Aptheker*¹¹⁹ decision invalidating portions of the Internal Security Act that restricted the foreign travel of Communist Party members, the Supreme Court gave priority to freedom of movement and indirectly to First Amendment freedoms, even in the face of Congressional concern about Communist activity that seemed to be the product of extensive investigation and findings. It found freedom of travel to be "a constitutional liberty closely related to rights of free speech and association" and thus entitled to the benefits of the doctrine originating with *Thornhill*¹²⁰ that a statute infringing on speech be judged on its face.

On the other hand, in *Zemel v. Rusk*¹²¹ the Court sustained the right of the authorities to restrict travel to Cuba. Confronted with the argument that this practice "renders less than wholly free the flow of information concerning that country," the majority concluded that:

¹¹⁵ *E.g.*, *Reid v. Covert*, 354 U. S. 1, 51 A.J.I.L. 783 (1957); see, generally, Girard, "The Constitution and Court Martial of Civilians Accompanying the Armed Forces," 13 *Stanford Law Rev.* 461 (1961).

¹¹⁶ *Schneider v. Rusk*, 377 U. S. 133, 58 A.J.I.L. 1014 (1964); *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 57 A.J.I.L. 666 (1963); *Trop v. Dulles*, 356 U. S. 86, 52 A.J.I.L. 777 (1958); but see *Marks v. Esperdy*, 377 U. S. 214 (1964); *Perez v. Brownell*, 356 U. S. 44, 52 A.J.I.L. 767 (1958).

¹¹⁷ 357 U. S. 116 (1958); 53 A.J.I.L. 171 (1959).

¹¹⁸ 357 U. S. at 126-127, citing Chafee, *Three Human Rights in the Constitution of 1787*, at 195-196 (1956).

¹¹⁹ *Aptheker v. Secretary of State*, 378 U. S. 500; 58 A.J.I.L. 1014 (1964).

¹²⁰ *Thornhill v. Alabama*, 310 U. S. 88, 97-98 (1940).

¹²¹ 381 U. S. 1; 59 A.J.I.L. 935 (1965).

... we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.¹²²

Thus this sequence of passport cases leaves us with a sense that the majority of the Court will tolerate some restraints on travel, provided that a strong showing of governmental need is made. As one judge has noted, in one sense the Logan Act is a narrower restraint on speech, since it only forbids the mischievous practices therein described, whereas passport restrictions impose a more general "blackout" on reporting.¹²³ In other respects, it is a broader restraint, covering even persons in the United States and specifically punishing communication.

The closest Supreme Court analogy probably is to be found in *Lamont v. Postmaster General*,¹²⁴ invalidating a statute preventing Americans from receiving "Communist propaganda" via the mails unless they specifically requested it. Can one simply say that, if this relatively mild restraint on a foreign government's communications with Americans is unconstitutional, the converse must also be true, and Americans cannot be restrained from communicating with a foreign government? Certainly it does not help the Act to say that it is only the sender's freedom that is impaired by it, since we have consistently stressed freedom to speak at least as much as freedom to hear.¹²⁵

A district court decision back in 1951,¹²⁶ sustaining the validity of the Foreign Agents Registration Act, affords an even closer parallel. As the court noted, that statute is in a sense the converse of the Logan Act. It deals with foreign agents who act in the United States, typically in endeavors to influence some branch of the Government, whereas the Logan Act bars Americans from conducting similar activities abroad. When one compares the two statutes, however, one sees at least one significant difference between the two. Judge Holtzoff could say of the Foreign Agents Registration Act:

¹²² 381 U. S. at 16-17.

¹²³ *Briehl v. Dulles*, 248 F.2d 561, 587 (D.C. Cir., 1957) (Bazelon, J., dissenting), rev'd, 357 U. S. 116 (1958), 53 A.J.I.L. 171 (1959); but see *Copeland v. Secretary of State*, 226 F. Supp. 20, 38-40 (S.D.N.Y.), vacated, 378 U. S. 588 (1964) (doubting Logan Act and other criminal laws to be more effective or "broader" than passport rules).

¹²⁴ 381 U. S. 301 (1965).

¹²⁵ Note, "Government Exclusion of Foreign Political Propaganda," 68 *Harvard Law Rev.* 1393, 1406 (1955); dictum in *Griswold v. Connecticut*, 381 U. S. 479, 482 (1965), equates the two rights.

¹²⁶ *United States v. Peace Information Center*, 97 F. Supp. 255 (D.D.C., 1951),

The statute under consideration neither limits nor interferes with freedom of speech. It does not regulate expression of ideas. Nor does it preclude the making of any utterances. It merely requires persons carrying on certain activities to identify themselves by filing a registration statement. . . .¹²⁷

The Logan Act does, however, preclude the making of certain utterances upon pain of criminal penalties, and does not merely require that persons communicating with foreign governments identify themselves.

Faced with such a line of cases, the defenders of the Logan Act would have a difficult but perhaps not impossible task. They would start with establishing the proposition that freedom of speech cases have recognized that there are very different types of governmental and private group decision-making processes and that each of them has received and deserves a different type of protection against pressures, each involving at least some element of speech, which would weaken or distort that process. Three illustrations from domestic areas should suffice to establish the general point. On the Congressional front, the courts are hesitant to allow restraints on communication to legislatures, being sensitive to the need for free access and to the specific First Amendment guarantee of the right to petition for redress.¹²⁸ They assume that legislators can and must function under great political pressure. Yet even here the disclosure provisions of the lobbying legislation and its special international counterpart, the Foreign Agents Registration Act, have been sustained.¹²⁹ Judges and juries need a quieter atmosphere in which to work and freedom from communications that would cause them to pay heed to factors excluded by the law they are sworn to enforce. Here the courts have tried to draw a line between communications broadcast to a general public which may affect judges or jurors¹³⁰ and specific influences exerted by demonstrating near the courthouse or communicating to jurors already empaneled.¹³¹ In the labor relations area we find the courts and Congress in various situations trying to preserve the processes of decision-making by employees and their unions and by other private parties, while still allowing the greatest possible scope to freedom of speech. Let me take one situation, that of an employer dealing with his employees after a union has become their exclusive bargaining agent. To negotiate with them, as by requiring their approval of the agreement, is an unfair

¹²⁷ *Ibid.* at 262.

¹²⁸ See *Eastern RR. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127, 137-138 (1961) (doubting Constitutionality of applying Sherman Act to lobbying).

¹²⁹ *United States v. Harriss*, 347 U. S. 612 (1954); *cf. United States v. Rumeley*, 345 U. S. 41 (1953); *United States v. Peace Information Center*, 97 F. Supp. 255 (D.D.C., 1951).

¹³⁰ *E.g., Pennekamp v. Florida*, 328 U. S. 331 (1946) (contempt conviction for publication of criticisms of pending cases reversed).

¹³¹ *Cox v. Louisiana*, 379 U. S. 559 (1965) (narrowly drawn statute protecting courthouse found Constitutional).

labor practice.¹³² To inform them of the course of developments is not, and may be protected by the First Amendment.¹³³

With this background, the key question for the Logan Act becomes the degree to which the President and his foreign affairs aides need protection in the area which the Act covers. Certain peculiarities of international processes must be borne in mind. Here our Government appears primarily as a negotiating and bargaining agency rather than as the ultimate decision-maker. Its counterparts may be quite evenly matched in strength with us and may be free of domestic divisions. Others may be sensitive about points we regard as trivial, a sensitivity enhanced by their domestic factionalism. The idea that our foreign affairs agencies deserve protection from interference has become crystallized in the concept of "embarrassment." This term, perhaps misleadingly personal in the image it conveys, has been developed in a number of areas, including that of freedom from standards of delegation prevailing as to domestic problems.¹³⁴

In the area of sovereign immunity, the State Department has been accorded by the courts a very wide range of discretion in deciding whether or not a suit against a foreign entity should be allowed to continue. The courts have respected such determinations even where the positions taken by the Executive seem to be inconsistent with each other, and where the net effect may be to impose considerable financial hardship on the disappointed American plaintiff.¹³⁵ Where, however, preferred freedoms are at stake the courts have been more firm in upholding the rights of private parties. For example, in *International Products Corp. v. Koons*,¹³⁶ the court, per Judge Friendly, refused to approve an order that would have forbidden defendants in a civil action from publicizing any data, whether or not procured by judicial process, which concerned payments to officials of a South American government. He concluded:

The conduct of our country's international relations might indeed be somewhat easier if citizens could be prevented from publicly reflecting on officials of foreign governments even when their information had been privately obtained. But the price of any such facilitation is higher than we have chosen to pay; we rely instead on the responsibility of the press and on the ability of the foreign service to explain to other governments that our Constitution does not permit such suppression of private thought.¹³⁷

¹³² *May Dep't. Stores Co. v. NLRB*, 326 U. S. 376, 383-386 (1945); *Medo Photo Supply Corp. v. NLRB*, 321 U. S. 678, 683-684 (1944). In a proviso somewhat similar to that of the Logan Act, Sec. 9(a) of the National Labor Relations Act, after stating that the selected representative shall be exclusive, allows the direct presentation of individual grievances to the employer. 49 Stat. 453 (1935), as amended, 29 U.S.C. §159(a) (1964).

¹³³ *Cf. Swarco, Inc. v. NLRB*, 303 F. 2d 668, 672-673 (6th Cir., 1962); cert. denied, 373 U. S. 931 (1963).

¹³⁴ *E.g., United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936); 31 A.J.I.L. 334 (1937).

¹³⁵ *E.g., Rich v. Naviera Vacuba S.A.*, 197 F. Supp. 710 (E.D. Va.), aff'd, 295 F. 2d 24 (4th Cir., 1961); 56 A.J.I.L. 550 (1962).

¹³⁶ 325 F. 2d 403 (2d Cir., 1963).

¹³⁷ *Ibid.* at 409.

Similarly, the Supreme Court has paid little or no heed to arguments about inconvenience or embarrassment in its more recent cases such as *Schneider v. Rusk*¹³⁸ and *Aptheker v. Secretary of State*.¹³⁹ This stands in sharp contrast with the attitude of the opinion earlier written for the Court by Mr. Justice Frankfurter in *Perez v. Brownell*, where he found that voting in a foreign election by an American citizen was "potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations."¹⁴⁰

In conclusion, one sees that embarrassment is a very general concept which cannot by-pass weighing the particular harm done by communications with the severity of the restraint involved. Clearly, communications involving United States military secrets or in wartime even broadcasting enemy appeals to the American public may be restrained.¹⁴¹ At their

¹³⁸ 377 U. S. 163, 167-168; 53 A.J.I.L. 1014 (1964).

¹³⁹ 378 U. S. 500, 512-514; 58 A.J.I.L. 1014 (1964).

¹⁴⁰ 356 U. S. 44, 60; 52 A.J.I.L. 767 (1958). For a forceful statement of the claims of free speech to primacy in that situation, see the dissent of Mr. Justice Douglas, especially the following:

"Some of the most heated political discussions in our history have concerned foreign policy. I had always assumed that the First Amendment, written in terms absolute, protected those utterances, no matter how extreme, no matter how unpopular they might be. Yet if the power to regulate foreign affairs can be used to deprive a person of his citizenship because he voted abroad, why may not it be used to deprive him of his citizenship because his views on foreign policy are unorthodox or because he disputed the position of the Secretary of State or denounced a Resolution of the Congress or the action of the Chief Executive in the field of foreign affairs? It should be remembered that many of our most heated controversies involved assertion of First Amendment rights respecting foreign policy. The hated Alien and Sedition Laws grew out of that field." 356 U. S. at 81.

¹⁴¹ *Gorin v. United States*, 312 U. S. 19 (1941); *Chandler v. United States*, 171 F. 2d 921, 938-939 (1st Cir., 1948), 43 A.J.I.L. 804 (1949), cert. denied, 336 U. S. 918 (1949); *Gillars v. United States*, 182 F. 2d 962 (D. C. Cir., 1950), 45 A.J.I.L. 372 (1951). The Federalist supporters of the Logan Act regarded the actions proscribed by it as virtually treason. *E.g.*, 9 Annals of Congress 2587-2590 (1799); but *cf.* remarks of Livingston, *ibid.* at 2682. In this they had the almost contemporaneous support of Burke, who, in his Letter to the Duke of Portland and Lord Fitzwilliam, published in 1793, wrote of a private mission to the Empress Catherine of Russia:

"This proceeding of Mr. Fox does not, as I conceive, amount to absolute high treason—Russia, though on bad terms, not having been then declaredly at war with this kingdom. But such a proceeding is, in law, not very remote from that offence, and is undoubtedly a most unconstitutional act, and a high treasonable misdemeanor. The legitimate and sure mode of communication between this nation and foreign Powers is rendered uncertain, precarious, and treacherous by being divided into two channels, by which means the foreign Powers can never be assured of the real authority or validity of any public transaction. This proceeding has given a strong countenance and an encouraging example to the doctrines and practices of the Revolution and Constitutional Societies, and of other mischievous societies of that description, who, without any legal authority, are in the habit of proposing, and to the best of their power of forming, leagues and alliances with France." (As quoted by Lord Campbell, 125 Parl. Deb. (3d ser.) 508 (1853)).

I am indebted to Prof. Clive Parry for pointing out to me, via Prof. Richard Baxter, that the impeachment of Thomas, Earl of Danby, in 1678, included a charge that he had "traitorously encroached to himself Regal Power by treating in matters

most critical, Logan Act situations involve almost as much danger to the national interest. They become acute when the relations between our country and the foreign government have reached a high pitch of tension. The problem is exacerbated when the communication in question involves more than speech, in particular an element of representing a group larger than the speaker alone. In such cases (of which Dr. Logan's would be one, if the Federalist view of it were correct, and Pickering's would be another, if the hypothetical Republican view of it were correct) the official representatives of the United States would find their task of defending our national interests severely impeded. Combining the element of tension with that of faction, one might imagine a group of a thousand Americans cabling their support of Khrushchev to the Kremlin during the Cuban missile crisis. It seems unlikely that a statute penalizing such action would be unconstitutional. However, the Logan Act covers a great deal more than this and therein lie many problems.

C. *Breadth and Vagueness*

Since the point was first raised by the opposition in the debates on Mr. Griswold's bill,¹⁴² there has been an awareness that much of the Logan Act's phraseology lacks clarity and specificity. Indeed, a district court has queried whether the Act might not be unconstitutional on these very grounds.¹⁴³ A preceding section has attempted to explore some of the rough edges that can be found in the Act. In a situation such as that of the Logan Act where First Amendment freedoms are involved, the courts are apt to resort to a combination of interrelated concepts: void for vagueness, excessive breadth, and voidness on its face.¹⁴⁴ The net effect of these ideas is that a statute is apt to be held unconstitutional either if it unduly impinges on freedom of speech or if it is either unclear in the simpler sense of not conveying a clear warning to those whose conduct is to be regulated, or in the more complex sense of being so broad that the warning, while intelligible, includes areas which may not be trespassed upon by legislation. In the case of the preferred freedoms a statute may be successfully challenged even by persons whose conduct puts them in the heart of the prohibited zone, where any reasonable person would see that the statute applied, and where there would be no Constitutional barrier to its application. The courts are thus specially solicitous of these types of activity, being concerned that overly broad or vague

of peace and war with foreign ministers and ambassadors. . . ." 11 How. St. Tr. 600, 621-622. The annotations indicate that the charge of "accroaching" of royal power was regarded even then as a dangerous and vague extension of the concept of treason.

¹⁴² 9 Annals of Congress 2595, 2637 (1799) (Albert Gallatin); *ibid.* at 2678 (Isaac Parker), 2690 (Livingston).

¹⁴³ *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 89 (S.D.N.Y., 1964).

¹⁴⁴ Note, "The Void-for-Vagueness Doctrine in the Supreme Court," 109 U. Pa. Law Rev. 67, 76 (1960).

statutes will coerce people to "steer far wider of the unlawful zone."¹⁴⁵ No simple formula can be developed for ascertaining when a statute is overly vague, and no restatement of the concept is apt to be very helpful in deciding a specific case. One can only hazard an estimate on the basis of not too closely analogous decisions; the writer's instinct is to say that the combination of Constitutional problems which the Logan Act presents is probably enough to bring it down. The statute does seem to be both broader than necessary to confront the evils aimed at and woolly in its language. The technique of saving legislation by reliance on a requirement of an unlawful intent would not seem applicable where so much of the constructional difficulty with the law is precisely in the area of defining what sort of intent is called for.¹⁴⁶ Particularly when, as here, the conduct prohibited is apt not to be based on selfish personal motivations or destructive impulses, but rather on idealistic—if occasionally misguided or overbearing—intentions,¹⁴⁷ the standard of clarity demanded of a statute is apt to be a more exacting one than the Logan Act in its present form could meet.

IV. CONCLUSION

At this time when our international affairs occupy so much more of our attention, and when the network of public and private relationships with foreign Powers is so much more complex than in 1799, the Logan Act should be given careful legislative scrutiny. Such re-examination has already been accorded to the far more modern Foreign Agents Registration Act.¹⁴⁸ A political determination should be arrived at as to what restraints are actually necessary.

The directions which should be explored include the following: First, one might convert the Act into a registration statute along the lines of the Foreign Agents Registration Act. This would improve the chances of its being held Constitutional. However, it would render it useless against those who were determined to engage in such conduct and might seem to confer approval upon conduct so revealed. Second, one might give the Executive power to issue regulations forbidding intercourse with specific countries on specific sensitive topics during particularly delicate times. If properly circumscribed, such an act would presumably pass the tests of unconstitutional delegation which have been relatively lightly applied in the international field.¹⁴⁹ It would roughly parallel the powers the President has to license communications with the enemy in wartime,¹⁵⁰

¹⁴⁵ *Speiser v. Randall*, 357 U. S. 513, 526 (1958); see also *Smith v. California*, 361 U. S. 147, 150-151 (1959).

¹⁴⁶ *Loc. cit.* note 144 above, at 87, note 98. Cf. *Screws v. United States*, 325 U. S. 91 (1945).

¹⁴⁷ *Loc. cit.* note 144 above, at 86-87.

¹⁴⁸ See Foreign Agents Registration Act Amendments, Hearings before the Senate Foreign Relations Committee, 83rd Cong., 1st Sess. (1963); Note, 73 *Harvard Law Rev.* 619 (1964).

¹⁴⁹ *E.g.*, *United States v. Curtiss Wright Export Co.*, note 134 above; but see *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 495 (1962) (concurring opinion of Brennan, J., stressing procedural aspects of Post Office obscenity curb).

¹⁵⁰ 40 Stat. 412 (1917), 50 U.S.C. App. §3(c) (1958).

to control commercial transactions with foreigners during emergency periods,¹⁵¹ and to restrict travel to sensitive areas.¹⁵² The authorities might, however, shrink from putting themselves in a position where they would have to incur the onus of declaring an emergency, thereby perhaps intensifying the crisis. It might also seem dangerously like a censorship arrangement, viewed as a restraint on speech.

Third, one could leave the statute in its present basic form as a criminal prohibitory law, but attempt to clarify and restrict it. Such a revision at least should remove the coverage of indirect communications via the American public. As Judge Herlands suggested, it might attempt to make more specific the terms "defeat" and "measures,"¹⁵³ though alternatives do not come easily. More drastically, it might reduce the scope of the statute simply to the "defeating the measures" side, reversing the 1799 decision to make the ban one on all interference, whether meant to be helpful or noxious. This would, however, not give weight to two major Logan Act ideas—that a foreign sovereign should not be able to play on American factions by giving the "outs" what it will not give the "ins," and that, while some private action may give desirable flexibility to foreign relations, too much would produce chaos.¹⁵⁴ One might attempt the difficult task of limiting the statute to cases where the defendant expressly or impliedly speaks not for himself alone but for some faction or party. Much may be said for some exemption for lawyers. They are very clearly covered when acting for a foreign government against this country as in the Spanish controversy of 1802; they may also come within the Act if they represent a foreign private client and if they or the client seek the aid of his home country in settling a dispute with the United States. There seems little reason to bar lawyers in such matters, particularly since they are governed by the Foreign Agents Registration Act.¹⁵⁵ The present indefinite status of the Government's power to give leave for communications needs to be clarified.

Finally, one could eliminate the criminal penalties from the Logan Act and leave it as a mere declaration of principle. This step, while somewhat out of our ordinary pattern, would have the advantage of eliminating the use of the Act as a threat and leave it as a general standard that would guide the conduct of well-intentioned Americans (who after all constitute the great majority of those who become involved with the Logan Act) and serve as a reference point to guide debates. Considering the

¹⁵¹ 40 Stat. 415 (1917), as amended, 50 U.S.C. App. §5(b) (1958).

¹⁵² *Zemel v. Rusk*, note 121 above.

¹⁵³ *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 89 (S.D.N.Y., 1964).

¹⁵⁴ See remarks of Sen. Fulbright, 106 Cong. Rec. 8526 (1960). Out of a desire to avoid such chaos, many countries have sought to channel even their governmental agencies' contacts with foreign countries through their foreign ministry. See Blix, *The Rights of Diplomatic Missions and Consulates to Communicate with Authorities of the Host Country* (1964).

¹⁵⁵ *Rabinowitz v. Kennedy*, 376 U. S. 605, 58 A.J.I.L. 814 (1964); *Foreign Agents Registration Act Amendments*, Hearings before the Senate Foreign Relations Committee, 88th Cong., 1st Sess. 108-109 (1963) (remarks of Prof. Fisher on Logan Act's applicability to counsel). See p. 291 above.

history of the Act, it would not in fact substantially lessen its real utility. Meanwhile, flagrant and fairly frequent unpunished violations of the law, at a minimum, do not increase public respect for it or for criminal law generally.¹⁵⁶

There are strong reasons for cutting down the statute to the lowest level in scope and intensity that will satisfy identifiable governmental needs for freedom from interference. The statute, whether or not Constitutional, cuts into areas of political rights to which we have traditionally given high priority. Although the presence of the 1799 Act in its desuetudinous condition will not deter the bold world reformer, its shadows may warn off the more timorous. Its original opponents noted that it was peculiarly susceptible of arbitrary application by the party in power, both by virtue of the absence of any standards as to when permission is to be granted or withheld, and by the inherent discretion of the Department of Justice as to when to initiate prosecutions.¹⁵⁷ If a revised and restricted statute were produced as a result of new deliberations, it might have a better chance of surviving Constitutional challenge than does the present version.

¹⁵⁶ The literature analyzing police and prosecutorial discretion in the ordinary, inconspicuous crime cases is extensive. See, *e.g.*, Goldstein, "Police Discretion not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice," 69 Yale Law J. 543 (1960). In terms of visibility, most Logan Act cases (except Pickering's correspondence with Rose) seem to lie at the opposite end of the spectrum from *Griswold v. Connecticut*, 381 U. S. 479 (1965).

¹⁵⁷ *E.g.*, 9 Annals of Congress 2639, 2691-2692 (1799).

LEGAL ASPECTS OF PIRATE BROADCASTING

A DUTCH APPROACH

BY H. F. VAN PANHUYSEN

Professor of International Law at the University of Leyden

AND

MENNO J. VAN EMDE BOAS

Lecturer in International Law at the University of Leyden

I. INTRODUCTION *

Modern science and technology have produced and will continue to produce new phenomena calling for new rules of law. Among these phenomena are the so-called "pirate" broadcasting stations, moored or installed outside territorial waters so as to escape the control of states. This new phenomenon has made its appearance in particular in Northwest Europe. It is natural, then, that states whose interests are actually or potentially adversely affected by such stations should contemplate what measures of protection are possible in fact and permissible in law.

The Netherlands Government had to deal with specific problems. First, it was confronted with the *Veronica*, a ship of unknown registry, anchored off Scheveningen, just outside Dutch territorial waters. It has broadcast to Holland on 192 m. since 1959. It is operated by a Dutch company, which as far as can be ascertained, is run mainly by people of Dutch nationality. Pending the negotiation, under the auspices of the Council of Europe, of the Convention on Pirate Broadcasting, which was eventually concluded on January 20, 1965, the Dutch Government has so far refrained from taking any unilateral measures against this station.¹

Secondly, The Netherlands enjoyed the dubious privilege of being the first country to have off its coast a radio *and* television broadcasting station. This station, called Radio and TV *Noordzee*, was being operated from an artificial structure erected on the seabed off Noordwijk, just beyond the three-mile limit of Dutch territorial waters. The installation was built by a Dutch private company, the *Reclame Exploitatie Maatschappij* (R.E.M.), which also operated the broadcasting. It was publicly stated by the

* *Abbreviations:* Bijl., *Bijlagen* (Annexes to the *Handelingen*); Handelingen I or II, Proceedings of the States-General, First or Second Chamber; I.T.C., International Telecommunication Convention; M.v.A., *Memorie van Antwoord* (Memorandum of Reply); M.v.T., *Memorie van Toelichting* (Explanatory Memorandum); R.R., Radio Regulations; V.V., *Voorlopig Verslag* (Provisional Report).

¹ See p. 326 below; cf. statements by the Netherlands Government, Handelingen II, 1963-64, p. 62; M.v.A., Handelingen II, Bijl., 1963-64, 7643, No. 7, at 15 (second column); Handelingen II, 1964-65, p. 82 (second column). The Government hesitated for some time before signing the convention, even after it had been agreed upon, Handelingen I, 1964-65, p. 163.

R.E.M. that the ownership of the "island" was in foreign hands.² The names and nationality of the owners have not been disclosed. The station started its transmissions on July 29, 1964 (radio), and August 15, 1964 (television), and ceased on December 17, 1964, as a result of police action taken under the North Sea Installations Act, which had been specifically enacted for this purpose.³ The reasons for setting up broadcasting stations on the high seas will be dealt with in Section 2 below.

Even to the extent to which measures against such broadcasting stations are taken exclusively under the municipal law of the state whose interests are alleged to be jeopardized, the question has of course an international aspect. In this respect there seems to be a parallel between this kind of measure and unilateral acts delimiting sea areas. The fact that acts of the latter kind cannot be dependent merely upon the will of the coastal state as expressed in its municipal law, but always have an international aspect, was emphasized by the International Court of Justice in its judgment in the *Anglo-Norwegian Fisheries* case.⁴ While not seeking to draw a parallel between the two cases in other respects, the same can be said of measures taken with regard to the offshore broadcasting stations.

The crucial question, as far as international law is concerned, is the extent to which a coastal state can exercise regulatory control over activities on ships and installations of the type described above. Another question concerns the legality of the practices concerned, in particular the establishment of the station and its operation. In this connection a distinction must be drawn between the possible illegality of the practices and authority under international law to take action. Consequently, governments contemplating measures against such stations will have to be sure that they will be able to justify their action from the point of view of international law. If they cannot base the action on general treaties, they must fall back on the rules or principles of general international law. Having regard to the newness of the phenomenon, such justification cannot be provided by merely referring to textbooks or judicial decisions. The careful thinking out and propounding of a new legal theory seems unescapable. It is therefore of interest to analyze the views put forward by governments and to examine how, in so doing, they wittingly or unwittingly have contributed to the development of international law.

In the present paper an attempt will be made to analyze, from this point of view, the attitude adopted by the Netherlands Government towards offshore broadcasting stations. Such a case study is the more called for, since international law, especially the rules relating to the freedom of the seas, looms large in the traditions of the Dutch.

2. REGULATION OF RADIO AND T.V. BROADCASTING

The very nature of radio and television broadcasting requires its regulation by governmental authority. Unlike press and film, the use of which

² See the undated letter addressed to the States-General in early June, 1964, mimeographed text, p. 11.

³ See March Hunnings, 15 Int. and Comp. Law Q. 411 (1964).

⁴ [1951] I.C.J. Rep. 116, 132; 46 A.J.I.L. 348 (1952).

is—in principle—available to everyone,⁵ the limited number of broadcasting frequencies available makes it impossible to establish an unlimited number of broadcasting stations.⁶ Hence the need for “traffic control.” Without such control, the indiscriminate use of the available wave-lengths, disregarding the legitimate interests of existing broadcasting stations and the needs of sea and air wireless communication and of radio navigation, would lead to chaos in the ether and harmful interferences with other radio stations,⁷ and might even endanger human life.⁸

a. *International Regulation*

At quite an early date states recognized the need to lay down domestic regulations to ensure order in the ether. National legislative measures are, however, insufficient of themselves, as radio waves do not stop at frontiers. International regulation is therefore necessary. Unfortunately, conflicting national interests have prevented the creation of an international machinery with competence to enforce such regulation. The several international conventions in the field of telecommunications concluded since 1906, aiming at the prohibition of harmful interference by the radio stations of one state with the radio services or communications of another state, leave it to each sovereign state to decide the measures to be taken to conform to this international obligation. The purpose of these conventions, however, has been merely to facilitate a proper functioning of international telecommunications.

The International Telecommunication Union (I.T.U.) has thus not been vested with any “supranational” powers.⁹ The system, envisaged to “facilitate relations and cooperation between peoples by means of efficient telecommunication services,”¹⁰ consists mainly in the international co-ordination and promotion of a number of technical and administrative remedies¹¹ against harmful interference.¹² The technical remedies aim at research for new frequencies and wider use of existing ones. The administrative remedies consist of the establishment by the I.T.U. of a de-

⁵ Note, however, the limitations resulting today from economic causes, which have led to many mergers. See M. L. Ernst, *The First Freedom* (New York, 1946).

⁶ See U.N. Doc. E/Conf. 6/30, pp. 3-4.

⁷ In Art. 1, Sec. III, Rule 93, R.R. Geneva, 1959, T.I.A.S., No. 4893, *harmful interference* has been defined as: any emission, radiation or induction which endangers the functioning of a radio navigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radio communication service operating in accordance with these Regulations. See also Annex 3, I.T.C., Geneva, 1959, T.I.A.S., No. 4892, Rule 313.

⁸ The sinking of the *S.S. Titanic* is a case in point. The Radiotelegraphic Conference held in London in 1912 thereupon decided to lay down binding rules for radio-communication equipment on board ships and assigned certain wave-lengths solely to ships and coastal stations, long-distance radio telegrams and to radio buoys. Cf. Goy, 5 *Annuaire Français de Droit International* 569, at 572 (1959).

⁹ See, lately, I.T.C., Geneva, 1959, T.I.A.S., No. 4892. For reference on the earlier conventions, see 1 Oppenheim-Lauterpacht, *International Law* 1024 (8th ed.). Cf. also Sørensen, “‘Pirate Broadcasting’ from the High Seas,” *Legal Essays* (Festschrift Castberg) 319, at 320 (Oslo, 1963). ¹⁰ Quoted from the Geneva I.T.C., 1959.

¹¹ On these remedies, see the interesting article by Goy, mentioned in note 8 above.

¹² See Art. 4, I.T.C., Geneva, 1959.

tailed and delicately balanced system of international planning for the *allocation* of wave-lengths to different services, and the recognition and registration of frequencies *assigned* to particular stations. Important results have been obtained in the allocation of wave-lengths.¹³ The principle of state sovereignty has, however, prevented the realization of effective international control over the assignment of frequencies.¹⁴ States parties to the I.T.C. *may* notify the International Frequency Registration Board of the I.T.U. of frequencies assigned to broadcasting stations and other services, if they wish to obtain international recognition of their use of a particular frequency.¹⁵ The task of the Board is, however, essentially an administrative one,¹⁶ as it lacks the power to enforce international recognition, while the non-recognition of frequency assignments by the Board is devoid of an effective sanction. A great number of assignments thus escape the control of this international body.

The effectiveness of the system created by the I.T.U. is furthermore reduced in three ways. In the first place, not all states have ratified the various international telecommunication conventions or acceded to the four Administrative Regulations completing the provisions thereof.¹⁷ Secondly, the enforcement of the international regulations in the field of telecommunications is left to individual states and no sanctions are provided if a state does not fulfill its obligations. Finally, no means have been provided in the conventions for enforcing the international regulations against stations which do not come within the jurisdiction of a member state.¹⁸

¹³ See R.R., Geneva, 1959, Art. 5, Sec. IV, Rules 156-412.

¹⁴ Assignment of frequencies to transmitting stations may take place either unilaterally or by means of an international agreement. At the European Broadcasting Conferences of Copenhagen (1948) and Stockholm (1952) the frequencies available for sound and television broadcasting in the so-called "European Broadcasting Area" were distributed among the states situated in that area. A number of the interested states did not participate in these conferences and refused to sign or ratify the agreements obtained. The distribution of frequencies among stations of the different states in the European Broadcasting Area is therefore not completely regulated. Cf. Goy, *loc. cit.* 590-591, and March Hunnings, *loc. cit.* 415.

¹⁵ See Art. 9, Sec. I, R.R., Geneva, 1959, §1(1), Rule 436. See also Art. 10, Nos. 640-658.

¹⁶ On the action of the International Frequency Registration Board, see Goy, *loc. cit.* 583-590.

¹⁷ The question may be raised as to what extent the international telecommunication conventions and annexed radio regulations affect states which are not parties to them. Apart from the possible contention that these instruments contain provisions which are declaratory of existing international law, a full analysis should also take into account the possibility that some provisions may be regarded as evidence of the practice of states as an element of customary international law. In this connection see also note 20 below. In addition, it should be considered whether the said instruments are in the nature of "semi-legislative treaties." Cf. McNair, *The Law of Treaties* 259 (Oxford, 1961). Various factors, *e.g.*, the fact that the assignment of frequencies falls to a great extent outside the effective control of the I.T.U. (see below), make it doubtful that on this particular point they can be said to be of such a semi-legislative character. A thorough discussion of this question would carry us too far afield, particularly since it cannot be answered in the abstract.

¹⁸ According to Spørensen, *loc. cit.* 320, the very existence of such stations amounts to an actual or potential threat to the perfection and completeness of the system established within the framework of I.T.U.

The Radio Regulations adopted at Geneva on December 21, 1959, by the Administrative Radio Conference, an organ of the I.T.U., contain some provisions of importance to our problem, *viz.*, those prohibiting unauthorized broadcasting from outside territorial waters. Article 28, §6 (Rule 962) reads: "The operation of a broadcasting service by mobile stations at sea and over the sea is prohibited." This provision, which dates back to the 1938 Cairo Conference, is most probably intended to protect essential radio emissions at sea.¹⁹ In 1959 another article 7, §1 (Rule 422) was added, which was directed against the appearance of radio broadcasting vessels on the high seas. It reads:

The establishment and use of broadcasting stations (sound broadcasting and television broadcasting stations) on board ships, aircraft or any other floating or airborne objects outside national territories is prohibited.

In accordance with the usual pattern of the international telecommunication conventions, the enforcement of these provisions was left in the individual states and no international sanction was provided, although the Administrative Radio Conference adopted a Recommendation urging states to study possible means to prevent or suspend the operation of broadcasting stations outside national territories.²⁰

b. National Regulation

It appears from the foregoing that the international system created in the field of telecommunications leaves each state the power to promulgate and enforce regulations with regard to radio communications and broadcasting within its own jurisdiction. This is natural, since, in the absence of a rule to the contrary, a sovereign state is, under international law, exclusively empowered to exercise jurisdiction within its own territory. So far as radio communication by ships and aircraft is concerned, here, too, it is, in principle, the flag state or state of registration which is exclusively competent to lay down and enforce the necessary rules.²¹

States have often used their regulatory power for a triple purpose: first, to maintain order in the ether by securing that the different telecommunication services under their jurisdiction conform to the necessities of international traffic and the international obligations imposed upon them; secondly, to assign the limited number of frequencies available for broadcasting to a limited number of broadcasting stations; and, finally, to take such measures

¹⁹ Cf. Sørensen, *loc. cit.* 320, and Kraemer, 10 *Jahrbuch für Internationales Recht* 206, at 214 (1962).

²⁰ Administrative Radio Conference, Geneva, 1959, Recommendation No. 15. The François Commission noted that the prohibition in multilateral treaties of broadcasting on the high seas may indicate that the operation of broadcasting services must not be considered one of the freedoms of the seas, even in relation to states which are not parties to the said instruments. See the Report of the Commission, M.v.A., *Handelingen II*, Bijl., 1963-64, 7643, No. 8, at p. 22. Compare also Sørensen, *loc. cit.* 327.

²¹ On the exclusive jurisdiction of the flag state, see also Art. 6, Convention on the High Seas, Geneva, 1958; Art. 30, Convention on International Civil Aviation, Chicago, 1944, T.I.A.S., No. 1591. See, however, p. 320 below.

as they deem necessary for upholding law, morals and public order in radio and T.V. broadcasts. It has usually been provided by law that radio waves may not be transmitted without the authorization of the administrative authorities. The terms and conditions under which such authorization is granted, together with the provisions of the law, determine the rights and obligations of licensees. With regard to broadcasting, most European states have used this power to establish a monopoly of broadcasting in favor of the state, acting through an independent government agency, a public corporation or any similar public or semi-public institution.²² Many European states do not allow commercial companies to exploit broadcasting.

The right of states to require the licensing of radio and television broadcasting is internationally recognized.²³ This prerogative of course may not be used to suppress freedom of expression and the freedom to receive and impart information, which is guaranteed, *inter alia*, by the European Convention of Human Rights and recognized in any country which observes the rule of law. It is a controversial question, however, how this principle should be applied in practice.²⁴

The situation in The Netherlands with regard to broadcasting is rather complicated, owing to a special situation that has developed there over the years. Five broadcasting associations are licensed to broadcast radio and television, each of which represents an important religious or political faction of the population.²⁵ These associations usually maintain close relations with like-minded groups in Parliament, and thus were able to obtain a monopoly of broadcasting. They are, however, obliged under their government charter to co-operate in a joint organization for the co-ordination of programs, the installation and operation of studios, staff policy and international representation. The Government is also represented on this controlling body. The five broadcasting associations obtain air time according to the number of members they have,²⁶ a certain number of hours being reserved for joint programs. Both the controlling body and the associations receive financial support from the Government, which comes from receipts for listening and viewing licenses (*luister- en kijkgelden*). Until a few years ago, it was the policy of the Government not to allow advertising on the air. Commercial exploitation of radio or television has also been rejected by the Government and by Parliament.

²² Sørensen, *loc. cit.* at 319-320. For a detailed survey see March Hunnings, *loc. cit.* 415-416.

²³ *Cf.* Art. 10, European Convention of Human Rights, 213 U.N. Treaty Series 221; Art. 1, Draft Covenant on Freedom of Information, U.N. Doc. A/4341.

²⁴ *Cf.* van Panhuys, *Het Verdrag van Rome, de Reclame en de Commerciële Televisie* (1962); Sørensen, *loc. cit.* 321, and the sources there mentioned.

²⁵ K.R.O. (Roman Catholic), allied with the Roman Catholic Party; V.A.R.A. (Socialist), allied with the Labor Party; N.C.R.V. (Dutch Reformed), which supports the main Dutch Reformed political parties; A.V.R.O. (politically non-committed); V.P.R.O. (liberal Protestant).

²⁶ Membership is coupled with a subscription to advance weekly sound and T.V. broadcasting programs surveys, copyright of which belongs to the broadcasting associations. It is therefore extremely difficult to say whether members actually favor the principles of the associations or merely wish to subscribe to the programs.

Endeavors to break the monopoly of these political and religious associations by creating an independent broadcasting corporation, the expenses of which were to be paid from the proceeds of advertising, failed, owing to strong pressure in parliamentary circles from the political groups affiliated with the several broadcasting associations. Recently this question even led to the fall of the Government. New proposals now before Parliament are aimed at the introduction of advertising on all radio and T.V. stations but do not provide for an independent broadcasting corporation in addition to the well-established broadcasting associations.²⁷

3. THE APPEARANCE OF "PIRATE" BROADCASTING STATIONS ON THE HIGH SEAS

As most European countries do not allow commercial exploitation of broadcasting and a great number do not—or at least did not until recently—permit advertising, it is natural that enterprising people should attempt the commercial exploitation of radio and television broadcasting elsewhere. They might consider doing so in three ways: The first way is by buying air time for advertising from commercial stations lawfully operating in nearby states. These stations transmit advertisements in programs beamed at certain foreign countries. Such, for example, is the case with *Radio Luxemburg*, *Radio Andorra*, and *Radio-T.V. Monte Carlo*. It would seem that the states in question are thus *not* acting contrary to international law. Every sovereign state is free to regulate broadcasting in its own territory within the limits set by general and conventional international law.²⁸ Although it is uncertain whether international law contains a corresponding obligation to permit the reception of transmissions of other states, the very nature of radio waves makes it impossible to prevent such reception except by jamming. The latter is, however, not allowed in time of peace, since it would constitute harmful interference with the legitimate services of other states.²⁹ The second possibility of evading the local provisions with regard to broadcasting would be to set up within the territory of another state a commercial radio and/or T.V. station specializing in transmissions to the state whose radio and T.V. legislation it is sought to evade. An example of this is the French-owned commercial station *Radio-Europe I*, which operates from German soil on frequencies assigned to the Saarland both under domestic and international law. In view of the limited number of frequencies, these possibilities are limited.³⁰ The third possibility is to

²⁷ See, too, in this connection: "Nota betreffende het omroepbestel" (Governmental Memorandum on its broadcasting policy), *Handelingen II*, *Bijlagen*, 1964-65, 8099, No. 2.

²⁸ See p. 307 above.

²⁹ The French Government in fact in May, 1948, ordered the systematic jamming of *Radio Andorra*. After an action was successfully brought before the Tribunal Civil de la Seine for an injunction against the jamming, the Tribunal de Conflits of Paris held that this was an act of a governmental nature and thus escaped jurisdictional control, 56 *Revue du Droit Public* 423, at 432 (1950); *Juris-classeur Périodique* 1950, II, 5542; cf. Rousseau's Opinion for the R.E.M. (see note 75) and March Hunnings, *loc. cit.* at 417.

³⁰ For measures to that effect taken by the French Government, see March Hunnings, *loc. cit.* 416-417.

go to sea, either by broadcasting from a ship or by erecting or using for that purpose an artificial structure built upon the continental shelf outside territorial waters.³¹ As technology stands today, the transmission of television requires the use of high masts, which cannot (as yet?) be erected on ships.

As a matter of fact a number of such "extraterritorial" radio stations, together with one television station, appeared along the coast of Western and Northern Europe, transmitting programs of light music and entertainment interspersed with commercial advertising.³² *Radio Mercur* on board the M.V. *Lucky Star*, moored in the Öresund outside Danish territorial waters, beamed its programs at Denmark until the Danish Government took police action against the ship in August, 1962. *Radio "Syd"* in the Öresund and *Radio "Nord"* in the Baltic are still transmitting to Sweden, notwithstanding penal action taken within Sweden against the owners of the vessels.³³ *Radio "Caroline,"* *Radio "Atlanta"* and *Radio "London,"* off the English coast, claim to have more than eight million listeners. The British Government has manifested the same cautious attitude with regard to action against these ships as The Netherlands.³⁴ In the Thames Estuary some broadcasting stations were established on derelict War Department forts (Martello Towers) outside British territorial waters. The British Government has announced its intention of adopting bay-closing lines under the Geneva Convention on the Territorial Sea, thus bringing the forts within British territorial waters.³⁵

The appearance of these so-called "pirate" stations raises several important problems of domestic and international law. Their transmissions take place on frequencies which may have been recognized as being assigned to other stations which are under the jurisdiction of states; they are thus liable to cause harmful interferences or, at least, to impair the

³¹ Broadcasting from a vessel moored, or an installation situated, in the territorial sea would be of no avail, since, apart from some obligations mainly deriving from the duty to respect the right of innocent passage, the sovereignty of the coastal state extends to those waters. Cf. Art. 1, Convention on the Territorial Sea and the Contiguous Zone, Geneva, 1958. See, too, M. van Goethem, *Het Statuut van de Territoriale Zee*, 1962, pp. 95-97 (Bruges, 1963); Kraemer, *loc. cit.* 210. Anchoring a ship for the purpose of broadcasting cannot be said to be innocent passage; see Art. 15, pars. 3 and 4 of the Convention cited.

³² For a more detailed survey, see March Hunnings, *loc. cit.* at 410-412.

³³ *Ibid.* at 410, note 2.

³⁴ Rousseau, 68 Rev. Gén. de Droit Int. Public 952-956 (1964); March Hunnings, *loc. cit.* 422.

³⁵ March Hunnings, *loc. cit.* 423. Meanwhile the Territorial Waters Order in Council, 1964, was issued. See Developments in the Law of the Sea, 1958-1964, published by the British Institute of International and Comparative Law, Special Publication No. 6 (1965), p. 85. According to information received from the General Post Office through the kind intermediary of Mr. N. March Hunnings, there are three radio stations now operating from fixed structures within U. K. territorial waters, namely, *Radio City* (formerly *Radio "Sutch"*), *Radio 390* (the successor to *Radio Invieta*) and *Radio Essex*. These are all continuing to transmit unauthorized broadcasts. The Postmaster General made a statement in the House of Commons on Dec. 8, 1965 (722 Parl. Deb. (H.C.) col. 425) admitting that the transmissions were being made from points within U. K. jurisdiction and warning that, if these did not cease, "prosecutions might follow."

interests of states to which the illegally occupied frequencies have been assigned.³⁶ Moreover, their transmissions may adversely affect sea and air navigation by causing serious interferences in radio communications. For that reason the operation of broadcasting services from mobile stations at sea and over the sea has been prohibited under international treaties since 1938.³⁷ "Pirate" stations are therefore threatening to undermine the whole delicate system established by the successive international telecommunication conventions. Finally, the transmissions are intended to be heard and produce an effect within the territory of the coastal states without being subject to the control of any state. Their contents might endanger the security, the public order, the mental health or the good morals of the coastal states.³⁸

4. THE USES OF THE HIGH SEAS

As stated above, the prohibition of the erection or use of broadcasting stations at sea under the Radio Regulations does not extend to fixed installations.³⁹ Nevertheless, the *rationale* of that prohibition, *viz.*, the safeguarding of the interests of other maritime telecommunication services and the prevention of infringements of the system of frequency assignment, would seem to apply, *mutatis mutandis*, to fixed installations.⁴⁰ Although, essentially, common international interests are at stake here, the Netherlands Government cannot be said to have based its action against the R.E.M. structure primarily on the protection of those interests as such. Throughout it has laid great stress on the protection of its own interests, even though justifying this protection in reliance on international arrangements.⁴¹ The prudent attitude of the Netherlands Government with regard to limitations on the free use of the sea is, moreover, illustrated by the statement of the Secretary of State for the Navy that the construction of the R.E.M. structure did not in itself constitute a violation of the international law of the sea. Since the installation did not constitute an obstacle to navigation, there was no unreasonable interference with the traditional uses of the high seas.⁴² Professor Samkalden questioned this refined distinction between the establishment and the use of the installation, particularly in view of the fact that the owners of the installation had made no secret about their aim: the transmission of radio and T.V. broadcasts

³⁶ *E.g.*, Belgium complained that *Radio Caroline* interfered with the broadcasts from *Radio Brussels* on the wave-length of 198 meters, Rousseau, *loc. cit.* 954. With respect to interferences by *Radio Andorra*, see March Hunnings, *loc. cit.* 417.

³⁷ See R.R., Geneva, 1959, Art. 28, §6, Rule 962. See also p. 307 above.

³⁸ March Hunnings, *loc. cit.* 413, adds that "pirate" broadcasting stations may escape the copyright and performing rights laws and avoid paying income and other taxes. It should be noted that the owners of *Radio Veronica* and the Radio and T.V. Station *Noordzee* have deliberately complied with all obligations incumbent on Netherlands inland corporations in this respect.

³⁹ The same is true of the European Convention; see Sec. 8 below.

⁴⁰ *Cf.* Adm. Radio Conference 1959, Recommendation No. 16, and Council of Europe, Consultative Assembly Res. No. 422 (text in 14 Int. and Comp. Law Q. 436 (1965)).

⁴¹ See Handelingen II, p. 83, but *cf.* statement referred to in note 142.

⁴² Handelingen II, 1963-64, Appendix 330; M.v.A., Second Chamber, at 7.

beamed at The Netherlands.⁴³ According to him, one cannot separate means and purposes to this extent. Having regard to the fact that, from a technical point of view, the broadcasting equipment on the R.E.M. structure and the structure itself are not easily severable, some support for Professor Samkalden's view might be found in the phrasing of Article 7 (Rule 422) of the Radio Regulations, which not only prohibits the use but also the establishment of broadcasting stations on the high seas.

It is generally recognized that the uses covered by the notion of "the freedom of the high seas" cannot be exhaustively enumerated. The four categories specifically listed in Article 2 of the Geneva Convention on the High Seas are: freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, and freedom to fly over the high seas. These are the more important uses, but do not exclude others, such as scientific research, exploration and exploitation of the subsoil, and uses for military purposes.⁴⁴ The exercise of these freedoms is, however, subject to various limitations. In the first place, Article 2 makes their exercise subject to the conditions laid down in the convention and *to the other rules of international law*. Though the convention does not indicate what other rules are meant, it appears from the history of this provision that the addition was mainly intended to indicate that the rules contained in the other Geneva Conventions, which were said by the International Law Commission to be designed not to limit or restrict the freedom of the high seas but to safeguard its exercise in the interest of the entire international community, are also applicable to the regime of the high seas.⁴⁵ Such rules are furthermore to be found in other conventional law besides the Geneva Conventions; *e.g.*, the Brussels Conventions on Immunity of State-Owned Ships (1926) and Relating to the Arrest of Seagoing Ships (1952) and the Conventions of London on the Safety of Life at Sea (1914 and 1948, amended in 1960) and the Constitution of the International Maritime Consultative Organization.⁴⁶ Since the prohibitions contained in the Radio Regulations *inter alia* serve to safeguard telecommunications at sea, it is only logical to include them within this kind of provision. Even if the rules laid down by these provisions are not of general application, the obligations they contain do limit the exercise of the freedom of the high

⁴³ Handelingen I, 1964-65, p. 158. In the same sense the Advisory Report of the François Commission (see note 53 below), reproduced in Handelingen II, Bijl. 1963-64, 7643, No. 8, at 24. Professor Samkalden, who at that time was a member of the First Chamber and professor of the law of international organizations in the University of Leyden, is now Minister of Justice of The Netherlands. At the time that the report of the François Commission was drawn up, he was also a member of that Commission.

⁴⁴ 1955 I.L.C. Yearbook (II) 21-22; 1956 I.L.C. Yearbook (II) 278, par. 2. *Cf.* McDougal and Burke, *The Public Order of the Oceans* 757-759. Freedom of exploration and exploitation is recognized in Arts. 1-5 of the Convention on the Continental Shelf, subject to the exclusive sovereign rights of the coastal state; freedom of scientific research is expressly laid down in Art. 5, par. 1, of that convention. The recognition that the high seas are open to use for military purposes in general seems to be implied in the failure of the Geneva Conference to adopt any prohibition of certain specified military uses. See 2 Official Records 22-24, 6 *ibid.* 137-141, 4 *ibid.* 43-48.

⁴⁵ 1955 I.L.C. Yearbook (II) 22; 1956 I.L.C. Yearbook (II) 278, par. 5.

⁴⁶ *Cf.* Suy, *Volkenrechtelijke Aspecten van de R.E.M. Affaire* 29 (Louvain, 1965).

seas with respect to participating states, which constitute the great majority of states in the world. The four Scandinavian countries considered the operation of "private" broadcasting stations on objects floating on the sea or in the air an activity in violation of general international law and contrary to the vital interests of the Scandinavian states as signatories of the I.T.C. and its Radio Regulations.⁴⁷

Another restriction to which the exercise of the freedom of the seas is commonly considered to be subject is the so-called principle of reasonableness.⁴⁸ It implies that the high seas may not be utilized in a manner which unreasonably prevents other states from enjoying the freedom of the seas.⁴⁹ The content of this principle, if it is to be used as a standard of conduct, seems to be rather vague. It belongs to the category of those subjectively defined legal standards which have little chance of becoming objective except in the hands of an impartial judicial body. Also, the question may be raised, as it was in fact raised at the Geneva Conference, whether certain activities, such as nuclear weapon-testing, must be regarded *per se* as unreasonably interfering with the exercise of the freedom of the high seas by other states.⁵⁰

It should be noted that Article 2 of the Geneva Convention on the High Seas, defining the notion of the freedom of the seas, extends not only to the four "classic" freedoms but also to others "which are recognized by the general principles of international law." There are two divergent views of what this implies. According to one view, every user of the high seas is permissible unless it would run counter to a general principle of international law, such as the principle of sovereign equality. This view seems to imply that access to the oceans is permissible for any peaceful use.⁵¹ According to the other view, only such other users are permissible as have found some express recognition in international law.

The point of view assumed by the Netherlands Government on this issue may be summarized as follows: To start with, a distinction is drawn

⁴⁷ See the Explanatory Memoranda to the Scandinavian Acts discussed in Sec. 7 below. See also the data given by March Hunnings, *loc. cit.* 418.

⁴⁸ On this principle and its discussion in the International Law Commission and at the Geneva Conference, see McDougal and Burke, *The Public Order of the Oceans* 758-763 (1962).

⁴⁹ Cf. 1956 I.L.C. Yearbook (II) 10, par. 52.

⁵⁰ See the proceedings in the International Law Commission and at the Geneva Conference. In the Commission no express pronouncement on the freedom to undertake nuclear tests was made, the Commission stating in its report the general principle that "States are bound to refrain from any act which might adversely affect the use of the high seas by nationals of other States," 1956 I.L.C. Yearbook (II) 278. For the discussion of this principle see *ibid.* 10 and 11, and 1956 I.L.C. Yearbook (I) 32-35. Soviet-sponsored amendments to include in the convention an interdiction of nuclear tests on the high seas failed. See 4 Official Records 43-49, 2 *ibid.* 22-24. A Polish proposal to include in Art. 2 of the Convention on the High Seas the above pronouncement of the I.L.C. was also rejected, as it was considered to be aimed exclusively at the prohibition of nuclear tests on the high seas. 4 *ibid.* 56. Finally, a more generally phrased British amendment was adopted, which, according to its drafters, embodied the test of reasonableness. *Ibid.* 41. Cf. McDougal and Burke, *op. cit.* 759-760, 762.

⁵¹ McDougal and Burke take the same view. See *op. cit.* 763.

between the use of the high seas that is protected by international law and such use as is not.⁵² It assumes that international law primarily protects the four classic freedoms and, in addition, such other freedoms as are referred to in the Geneva Conventions. The Governmental Advisory Commission on Problems of International Law, under the chairmanship of Professor François, the so-called François Commission, mentioned in this respect, apart from the exploration and exploitation of the subsoil, fundamental oceanographic and other scientific research, which is referred to in the Convention on the Continental Shelf (Articles 4-5).⁵³ Limitations on the exercise of the four classic freedoms are not easily to be presumed but may result from specific provisions contained in the Geneva and similar conventions. The views of the Government seem to imply that the exercise of the "other" recognized freedoms is subordinate to the classic freedoms, as may be seen from Articles 4 and 5 (par. 1) of the Convention on the Continental Shelf.⁵⁴ As far as still other uses of the high seas are concerned, their permissibility under international law should be judged by their utility for, or interference with, the traditional uses of the high seas and by the test of reasonableness.⁵⁵ This criterion led the Government to distinguish between uses that are protected, those that are forbidden and those left unregulated by international law.⁵⁶ Although the Government refused to take a position with regard to the controversial question whether the erection of an installation for any arbitrary purpose could be considered in principle as an internationally protected, forbidden, or (as yet) unregulated use of the high seas,⁵⁷ it did not wish to charac-

⁵² M.v.A., Second Chamber, pp. 8-9.

⁵³ The François Commission was set up by the Minister for Foreign Affairs on Dec. 30, 1953. Its task is to advise the Government on questions of international law, particularly on drafts prepared by the International Law Commission and submitted to the governments of Members of the U.N. for comment. The present members of the Commission, which includes members of Parliament, professors of public international law, legal advisers of the government and other experts, are: Prof. J. P. A. François (Chairman), Prof. F. M. van Asbeck, Dr. N. S. Blom, Prof. M. Bos, Judge L. Erades, Dr. H. Fortuin, Jonkheer M. van der Goes van Naters, M. P., Prof. P. J. G. Kapteyn, Prof. Gezina H. J. van der Molen, Rear Admiral M. W. Mouton, Prof. H. F. van Panhuys, Prof. C. L. Patijn, Prof. W. Riphagen, Prof. B. V. A. Röling, Prof. P. Sanders, Dr. C. W. van Santen, Mr. H. E. Scheffer, General J. D. Schepers, Prof. H. G. Schermers, Prof. G. J. Scholten, Prof. A. M. Stuyt, Prof. A. J. P. Tammes, Mr. D. J. Veegens, Miss J. C. H. H. de Vink, M. P. See also note 43 above. The issues discussed in this article were submitted to the Commission by the Government for its advice after severe criticism had been leveled at the North Sea Installations Bill as initially drafted. The Commission's Report was annexed to the M.v.A., *Handelingen II*, Bijl., 1963-64, 7643, No. 8. In the text reference is made to pp. 8-9 thereof. For a French translation of the Report, see 12 *Netherlands International Law Review* 202 (1965).

⁵⁴ Cf. M.v.T., *Handelingen II*, Bijl., 7643, No. 3, p. 3.

⁵⁵ Thus, according to the Netherlands Government, the erection of structures serving the interests of a recognized use of the high seas, such as buoys for sea and air navigation, installations for scientific research and fixed fishing-gear (Arts. 13 (1), Geneva Convention on Fishing), would be allowed by international law, so far as they do not unreasonably interfere with navigation and other protected activities on the high seas. M.v.A., cited in note 52, p. 9.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* at p. 1; see also M.v.T., p. 4.

terize the actual use of such an installation for an activity forbidden by international law as an internationally protected use of the high seas.⁵⁸

The Government was, however, disinclined to base its action on a pretendedly existing rule of international law prohibiting the establishment and use of broadcasting stations on the high seas. First, even if international law did prohibit television broadcasting from the high seas, such transmissions do not affect the interests of The Netherlands in the exercise of the freedom of the seas, but only the legal order prevailing within the territory of The Netherlands.⁵⁹ Moreover, according to the Government, the international provisions to this effect are applicable to the use of the ether rather than to that of the sea.⁶⁰ The fact that international law left the erection and use of installations on the high seas—other than those for the exploration and exploitation of the subsoil—unregulated and consequently unprotected, induced the Netherlands Government to fill the jurisdictional vacuum existing with regard to these structures by enforcing Netherlands law thereon.⁶¹ This view, which originally was suggested by Professor François,⁶² was endorsed by the Commission of which he was the chairman.⁶³

A stricter view with regard to the permissibility of new uses of the high seas was advanced by Professor Tammes.⁶⁴ He considered that any new activity on the high seas which does not belong to the freedoms recognized by the general principles of international law, such as installations facilitating the use of the sea, or intended for scientific research or use as fisheries equipment (Article 13, Convention on Fishing, etc., Geneva, 1958), need not be respected by other users of the high seas. In this he agreed with Gidel, according to whom those who erect or use artificial structures that are not in the interests of air or sea navigation, and which are neither ships nor fishing equipment, cannot invoke the principle of the freedom of the seas in order to justify their use of the high seas.⁶⁵

5. LEGAL CONCEPTS EMPLOYED BY STATES IN JUSTIFYING THE PERFORMANCE OF ACTS OF AUTHORITY ON THE HIGH SEAS

In the parliamentary debate on the North Sea Installations Act,⁶⁶ various concepts naturally came up for discussion. Therefore, a preliminary examination of them seems to be called for. In the first place, the term "sovereignty" and the concept which it denotes must be defined. It is of importance to note that this concept, as a legal concept, implies a totality

⁵⁸ M.v.A., Second Chamber, p. 7.

⁵⁹ *Ibid.* at pp. 7 and 9. *Cf.* also Handelingen II, pp. 82–83.

⁶⁰ M.v.A., Second Chamber, p. 7.

⁶¹ *Ibid.*, p. 9.

⁶² François, 18 *Internationale Spectator* 120, at 121–122 (1964); see also below, p. 322 and pp. 332 *et seq.*

⁶³ Advisory Commission Report 22–23.

⁶⁴ *Nederlands Juristenblad* 672, at 673–674 (1964).

⁶⁵ 1 Gidel, *Le droit international public de la mer* 502–503 and 506 (1932). The Government did not agree with this view, although stating at the same time that it knew of no rule of international law that activities harmful to international or national interests should never be interfered with. M.v.T., p. 4. See also note 55 above.

⁶⁶ See Sec. 9 below.

of competences inuring to a state. These competences are not susceptible of exhaustive enumeration. Nor is it justifiable to identify or associate this notion with the concept of "territoriality." This plenitude of competences is confined, it is true, within limits laid down by international law, but at the same time it is one which cannot be exhaustively dissected into a definite number of component elements. Hence it is only possible to describe a few of its *aspects*. Three of such aspects should be mentioned here, as possibly relevant to the case under consideration:

- (a) The first aspect or element is a state's power to perform acts of authority over persons.
- (b) A second aspect is the state's power of disposal over its own territory, either legally, *e.g.*, by abandoning its territory or transferring it to another state, or factually, namely, by changing the condition of its territory, such as the reclaiming of bays or lakes or the digging of tunnels.
- (c) Thirdly, a state's right to defend or protect itself should be mentioned.

These three aspects are interrelated. A state which wants one of its territorial bays, such as the Zuyder Zee, to be reclaimed will probably also proceed to acts of authority in order to realize this aim. Furthermore, acts performed in the exercise of the right of self-protection or self-defense will often be clothed in or accompanied by acts of authority. This complexity may give rise to confusion, not least in terminology. The term "control," for instance, may be used for indicating almost any of the three aspects.

It will be clear that any limitation placed by international law on the sovereignty of states may affect any one or more of the three aspects mentioned above. Thus, there has been much discussion of the limits on a state's power to perform acts of authority. In the well-known case of the *S.S. Lotus*, the Permanent Court of International Justice drew a clear distinction between the actual exercise of jurisdiction outside a state's territory and the exercise of jurisdiction inside its borders but relevant to acts which have taken place abroad.⁶⁷ On the first issue, the Court held that a state cannot exercise jurisdiction outside its territory except by virtue of a permissive rule derived from international custom or from a convention. From an earlier sentence in the judgment it seems that the Court probably had in mind the exercise of power in a territory belonging to another state rather than in areas which are not subject to sovereignty, such as the high seas. As to the second issue mentioned above, the Court held that in this respect a wide measure of discretion is left to states, which is only limited in certain cases by prohibitive rules.

When a government is confronted with a new situation affecting its interests, so that it considers it to be its duty to take certain action, and

⁶⁷ The *S. S. Lotus* case, Judgment of Sept. 7, 1927, P.C.I.J., Series A, No. 10, particularly at p. 18 *et seq.* The distinction drawn by the Court might be compared to the distinction drawn by Bin Cheng between "jurisdiction" and "jurisdiction," see 12 *Current Legal Problems* 181-182 (1959).

the existing rules of international law give no clear answer to whether the action contemplated is permitted under international law, the government concerned, in order to justify its action, is forced to have recourse to one or more of the concepts listed above. It will most probably do so in a manner that accords as much as possible with principles underlying existing rules of international law, while at the same time avoiding (if possible) any adverse effects that might result for its own interests in other respects from the construction adopted. A good example of this phenomenon is to be found in the practice of states with regard to what was later to be called the "contiguous zone." Here a limited extension of jurisdiction, implying the power to perform acts of authority over foreign ships, was claimed by coastal states, in order to protect their interests in matters such as customs, immigration and sanitary regulations.⁶⁸

A similar choice among the arsenal of concepts had to be made by governments which, during and after the Second World War, wished to take measures to protect, usually by their appropriation, the natural resources of the soil and subsoil of the so-called continental shelf.⁶⁹ It should be recalled that the practice of states in this matter eventually led to the adoption of Article 2 of the Geneva Convention on the Continental Shelf, which stipulates that the coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. Two things are worth noting. First, a new term has been used: "sovereign rights." As appears from the records, the drafters thereby intended to discard any implication that the exercise of sovereignty over the continental shelf should be considered to extend to the superjacent waters and the airspace above those waters. (See also Article 3 of the convention.) Second, the sovereign rights are qualified by the words: "for the purpose of exploring it and exploiting its natural resources." In view of these two considerations it may be concluded that a new concept has been added to the arsenal at the disposal of states.

⁶⁸ This practice eventually led to a generally accepted rule of international law, now codified in Art. 24 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, 52 A.J.I.L. 834 at 840 (1958). Its first paragraph runs as follows:

"In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

- (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
- (b) Punish infringement of the above regulations committed within its territory or territorial sea."

On the relevance of the regime of the contiguous zone to the question in issue see also pp. 321-322, and 327 below.

⁶⁹ The first states to take any action in this respect, that is, the United Kingdom and Venezuela, claimed "sovereignty" over the submarine areas in question. President Truman, however, in his famous Proclamation of Sept. 28, 1945, preferred a different and, in fact, more cautious terminology, by referring to the subsoil and seabed on the continental shelf contiguous to the United States as "appertaining to the United States, subject to its jurisdiction and control." Moreover, in the Preamble, the principle of "self-protection" was invoked. Thus it appears that, though the term "sovereignty" is not used, all the three aspects of that notion, as listed above, are mentioned. On these examples see Mouton, 85 Hague Academy Recueil des Cours 368-369 (1954, I).

6. THE LEGAL STATUS OF "PIRATE" BROADCASTING STATIONS ON THE HIGH SEAS

Broadcasting stations on the high seas may be installed either on board ships or on "installations." These two contingencies will be examined *seriatim*.

a. *Broadcasting Stations on Board Ships*

It is generally held today that a ship cannot be considered a floating portion of the territory of the flag state, although the latter has exclusive jurisdiction over it, that is to say, as long as the ship is on the high seas (as distinct from foreign internal or territorial waters). To this general rule only a few exceptions are recognized.⁷⁰ The prerogatives of the flag state also entail duties for it.⁷¹ If a broadcasting station is operated on board a ship that has a different nationality from the state at whose territories the broadcast is directed, the question arises whether the territorial state may take effective action against the ship. As the case is not one of those envisaged in Article 22 of the Geneva Convention on the High Seas (see note 70 above), it might seem at first sight that this question must be answered in the negative. At the same time, however, a case could be made out for the view that a ship permanently moored offshore for the purpose of broadcasting loses its character of a "ship," since it can no longer be considered to be destined for navigation. Having regard to the fact that the Geneva Convention on the High Seas does not lay down a definition of a ship, this remains a moot question. If it were to be assumed that in this case the ship loses its character, the vessel must be equated with "installations." These would seem to be the only possible alternatives.

If, however, the status of "ship" is to be retained, there is no doubt that the flag state can be made liable by other states if it omits to take measures to ensure that the ship does not interfere with such interests of the latter states as are protected by international law. Apart from restrictions imposed by general international law, more specific obligations are conceivable, such as those laid down in the European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories, of January 20, 1965, in which the contracting parties undertook to make the establishment of any broadcasting stations on ships punishable.⁷² Should the flag state bluntly refuse to take the necessary measures and be unwilling to submit the matter to international adjudication, the coastal state might well take measures of self-help.

Situations may be conceived in which there is no "genuine link" between the ship and the flag state, as required by international law as codified in Article 5 of the Geneva Convention on the High Seas. Opinions differ about whether in such a case the coastal state is entitled to disregard

⁷⁰ See Art. 22 of the Geneva Convention on the High Seas, 52 A.J.I.L. 842 at 847 (1958).

⁷¹ See, for example, Arts. 5, 12 and 13 of the Geneva Convention on the High Seas, *ibid.* at 843, 845.

⁷² On this Agreement, see Sec. 8 below.

the nominal foreign flag and to treat the ship as if it had no nationality. Professor Verzijl, who presided over the Netherlands Delegation to the Geneva Conference, believes that, although Article 5, as it was finally phrased, was a *nudum praeceptum*, international tribunals, municipal legislators and municipal courts have been given a free hand to attach to the general requirement of a "genuine link" the legal consequences they deem fit and proper.⁷³ The case of the *Veronica* shows that this question is by no means a theoretical one. Although the Netherlands Government has not so far been able to determine the *Veronica's* nationality, it seems doubtful that there is any genuine link between the vessel and any country other than The Netherlands. During the Dutch parliamentary debate the view was expressed that, even though the absence of a genuine link might deprive the flag state of its right to diplomatic protection, this would not justify the conclusion that other states could do what they liked with regard to such a ship. The Government agreed that these two questions were to be distinguished.⁷⁴

If Professor Verzijl's proposition is the correct one—a point of view which appears to imply that one would be free to regard a ship which does not satisfy the requirement of a genuine link as a ship of no nationality—the question remains of what is the status of a "stateless" ship. In the case of *Naim Molvan v. Attorney-General for Palestine* the Privy Council held that no question of any breach of international law can arise if there is no state under whose flag the vessel sails.⁷⁵ It remains, however, very doubtful whether such a ship can be treated as a complete outlaw, especially as regards persons or objects having no tie with the state that envisages the measures. It would seem, however, that, under the conditions contemplated above, reasonable measures safeguarding the rights and interests of the coastal state can in any case be taken against a stateless ship anchored outside territorial waters for the purpose of broadcasting. As was noted above, the Danish Government has taken direct action against the *Lucky Star*—a ship of Guatemalan registry transmitting broadcasts into Danish territory—seizing it and obtaining a confiscation order in a Danish court. In justifying this action the Danish Government argued that the Guatemalan flag had been flown by the ship simply as a flag of convenience; no foreign government intervened to protect any non-Danish interests.⁷⁶

⁷³ 6 Netherlands International Law Review 118 (1959).

⁷⁴ V. V., *Handelingen II*, 7643, No. 5, p. 9 and M.v.A., p. 15.

⁷⁵ [1948] Appeal Cases 531; 15 Annual Digest and Reports of International Law Cases 115, No. 37 (1948); 42 A.J.I.L. 953 (1948). See also Waldock's Advisory Opinion, p. 35; this is one of the five Advisory Opinions that were given to the R.E.M. by various experts in international law: a joint Opinion by Professors Henri Rolin and Frans de Pauw (June 26, 1964) and separate Opinions by Dr. C. John Colombos (Oct. 14, 1964), Professor David H. N. Johnson (Oct., 1964), Professor Charles Rousseau (Nov. 1, 1964) and Sir Humphrey Waldock (Nov. 4, 1964). The text of the opinions was distributed by R.E.M. to those who they thought might be interested. In addition, the joint Opinion by Rolin and de Pauw was published in the *Nieuwe Rotterdamse Courant*, Aug. 1, 1964.

⁷⁶ On this case see Rousseau, 67 *Revue Générale de Droit International Public* 161-162 (1963); Waldock's Opinion, p. 34; and Sørensen, *loc. cit.* 330-331.

Finally, the question arises of the position where there is a genuine link between the flag state and the broadcasting ship. So far as *indirect* action is concerned, the reader should refer to Section 8 below, where this question will be considered in relation to the European Agreement mentioned earlier. So far as *direct* action or, as Cheng would call it, *jurisdiction*, is concerned, the issue would seem to be a delicate one. Let us assume that the flag state, after being summoned to do so, declines to take measures against the ship, which it ought to take under a rule of international law binding on both the flag state and the coastal state. Circumstances may well be imagined in which it would hardly be justifiable for the flag state to invoke Article 22 of the Geneva Convention on the High Seas as a legal shield against direct action by the coastal state. Since this contingency did not arise for The Netherlands, this question may be left open.

b. *Broadcasting Stations on Artificial Structures on the Seabed*

As far as can be ascertained, nobody has ever seriously contended—at least in connection with the R.E.M. affair—that structures artificially attached to the seabed by technical means are to be equated with islands in international law. That such a view—which would imply that sovereignty acquired over them (by occupation or otherwise) would extend to the subjacent waters and to the airspace above the “island” or to a maritime belt around it—does not find support in international law is borne out by Article 5 of the Geneva Convention on the Continental Shelf.⁷⁷ In addition, the acceptance of this view by other states—let alone whether it would be of any avail to the Dutch Government in the present case—is highly unlikely. Thus, the only question worth examining is what rights could be claimed and by whom they could be claimed.

In considering what action it could take against the R.E.M. station, the Dutch Government has declined from the outset to regard artificial structures erected on the seabed as being in the same legal position as ships and to apply the principle of nationality *per analogiam*.⁷⁸ Such analogous application would of course imply the necessity for states to lay down the conditions for the grant of their nationality to such structures. As appears from the parliamentary proceedings, the Dutch Government did not favor such a development. It stressed the factual difference between those installations and ships: Whereas the latter are movable, so that their nationality cannot be made dependent on their location, the former are fixed. Jurisdiction should therefore be determined by their situation.⁷⁹

⁷⁷ Art. 5 stipulates that the installations and devices referred to in the convention, though under the jurisdiction of the coastal state, do not possess the status of islands. This provision accords with generally held views; see Higgins and Colomkos, *The International Law of the Sea* 109 (4th ed.), and McDougal and Burke, *The Public Order of the Oceans* 397.

⁷⁸ M.v.A., Second Chamber, pp. 13 and 16; M.v.A., First Chamber (*Handelingen I, Bijl.*, 1964–65, No. 7643, 18*), p. 4.

⁷⁹ M.v.A., Second Chamber, p. 17 (left-hand col.).

Although it must be admitted that this factual difference prevents the transplantation of the flag concept and all that goes with it to installations, this difference is not a sufficient excuse for taking measures against the R.E.M. platform, while leaving the *Veronica* undisturbed.⁸⁰

A second alternative would seem to be to leave any rights over artificial structures to the state whose nationals have erected, own or use such installations. Apart from objecting to this solution on points of principle, the Government stated that this alternative offers certain disadvantages from a practical point of view. It would lead to uncertainties, not only because the various material factors might change continually or even not coincide, but moreover because it would create an inadmissible opportunity to escape from the domestic legislation of the coastal state by creating a company under the laws of a state chosen merely for reasons of convenience.⁸¹ As to "floating" installations, that is, installations not resting on the seabed, which do not fall under the scope of the North Sea Installations Act, the Government reserved its point of view.⁸²

For the rest, the Netherlands Government could justify direct action against the R.E.M. island from different points of view and modify such action accordingly. First, it might have applied by analogy the regime of oil installations as laid down in the Geneva Convention on the Continental Shelf. The extension of this rule by analogy would be a somewhat hazardous undertaking, if one takes into account that this recently negotiated convention is strictly limited to installations connected with the exploration of the continental shelf and with the exploitation of its natural resources. The history of the Conference shows, however, that the drafters of the convention did not entirely rule out a potential use of the continental shelf for other installations, such as those erected for meteorological purposes, although they were of the opinion that the Conference was not the proper place to examine that subject.⁸³ It is therefore difficult to draw any final conclusion therefrom. Moreover, this theory would have given the Netherlands Government more than it wanted. Its aim was not to acquire sovereign rights and the right inherent therein to forbid the erection of artificial structures other than those contemplated in Article 2 of the Continental Shelf Convention, but rather to possess a right to extend its laws to persons and objects on such structures.

Another legal device was suggested to the Government by Professor M. Bos, who stressed the fact that, for attaining its aims, the Netherlands Government had in any event to extend by analogy *some* existing rule of international law.⁸⁴ Although he did not condemn such extensions in

⁸⁰ See van Panhuys, 1964 *Nederlands Juristenblad* 565.

⁸¹ In this connection cf. also François Advisory Commission Report 23 (left-hand col.).

⁸² *Handelingen II*, 1964-65, p. 105; M.v.A., First Chamber, p. 8.

⁸³ See Summary Records, Committee IV, U.N. Conference on the Law of the Sea, Official Records (A/Conf. 13/42), Vol. VI, pp. 76, 86, 88-91.

⁸⁴ 1964 *Nederlands Juristenblad* 685. Prof. Bos is Professor of Public International Law in the University of Utrecht. He is also a member of the François Commission (see note 53 above).

principle, he believed that the latter were only justified if kept within strict confines. Therefore he preferred to extend the rules concerning the contiguous zone in two ways: first, by including among the regulations contemplated in Article 24 of the Geneva Convention on the Territorial Sea and the Contiguous Zone regulations concerning the transmission of broadcasts;⁸⁵ second, by extending the 12-mile limit laid down in that article to a width coinciding with the width of the continental shelf. In this manner the Government could enforce Dutch broadcasting legislation on ships and other objects of any kind or nationality without otherwise interfering with life on board. In his opinion the method advocated by the Government went much farther than was necessitated by the circumstances. For reasons which will be further explained in Section 9 below, the Government was not attracted by Professor Bos' suggestions. It should be added that this approach, granting the coastal state only a small amount of control over installations, did not meet the Government's needs.

A third approach, first advocated by Professor François, consequently had a better chance of appealing to the Government.⁸⁶ This approach is based upon the assumption that international law, and more particularly its rules concerning the freedom of the seas, may never be deemed to accord private persons or enterprises a right to create places not subject to the jurisdiction of any state. Such installations might otherwise quickly become breeding-grounds for criminal or other undesirable activities. Since, in the case of installations, there is no question of any flag state, other states, and particularly those whose interests are likely to be affected, have a right to extend their jurisdiction to such structures. If such a right were not to be recognized, a "legal vacuum" would arise. The only question that remains is which state is primarily called upon to fill this vacuum. In the opinion of Professor François this is the nearest coastal state. To determine the "nearest" coastal state the criteria employed for the delimitation of the continental shelf seemed to be most appropriate.

It should be emphasized that the legal vacuum doctrine, unlike the continental shelf doctrine, does not imply that the coastal state has any sovereign rights such as to require the licensing of those seeking to establish installations.⁸⁷ Here the difference between sovereignty (or sovereign rights) and the right to perform acts of authority, pointed out above, once again comes to the fore. In other words it might be said that the Government, though rejecting any extension of Article 2 of the Continental

⁸⁵ On Art. 24 see note 68 above.

⁸⁶ 18 *Internationale Spectator* 120 (1964); see also p. 315 above. Prof. François, formerly Professor of Public International Law at the Netherlands School of Economics at Rotterdam and former Legal Adviser to the Ministry for Foreign Affairs, is now Secretary General of the Permanent Court of Arbitration at The Hague. He is also Chairman of the Advisory Commission on Questions of International Law, referred to in note 53 above, which bears his name.

⁸⁷ Competence to license must, of course, be exercised in conformity with the law of the high seas. The licensing state must thus ensure that no obstacles are caused to navigation.

Shelf Convention, had no objections to applying, by analogy, the provision of Article 5, paragraph 4, stipulating that installations are under the *jurisdiction* of the coastal state.

7. LEGISLATIVE MEASURES TAKEN BY OTHER GOVERNMENTS

Legislation on pirate broadcasting in some other countries differs from that of The Netherlands. Some of these laws, such as the relevant statutes in Norway and Belgium, are explicitly confined to mobile stations such as ships or aircraft.⁸⁸ The laws enacted by Sweden, Denmark and Finland use broader language which does not in itself exclude stations on fixed installations, although it is uncertain whether their authors really intended this wider scope.⁸⁹

The five statutes under review, *i.e.*, those of Norway, Denmark, Sweden, Finland and Belgium, unlike the Dutch Act, do not contemplate direct action against offshore broadcasting stations but confine themselves to making punishable within the territory of the state concerned certain acts which, whether committed in that territory or abroad, amount to the establishment and use of such mobile stations and the operation of broadcasting services on them, as well as acts of assistance or complicity. This leading principle is made subject to certain conditions which vary from country to country. As a general rule, the Scandinavian statutes draw a distinction between acts committed within the territory of a Scandinavian state and those committed elsewhere. In the latter case the acts are only punishable if certain conditions are satisfied. Such conditions are that the transmissions are intended for reception or are liable to cause interference with broadcast reception in the territory of the enacting state, or that the persons concerned possess the citizenship of that state or have their residence within it. For the purpose of these laws the territories and citizenship of other Scandinavian countries are equated, in the law of each country, with the territory or citizenship of that country itself.

As is borne out by a statement made in the Explanatory Memorandum to the Norwegian Act, this system makes it possible for persons who render assistance in Norway in the operation of a station situated far away from Scandinavia, such as the *Veronica*, to be brought within the purview of the Act, irrespective of nationality. With regard to persons possessing one of the Scandinavian nationalities, acts of assistance in the operation of radio stations prohibited under Article 1 of the Act, no matter where they

⁸⁸ See Art. 1 of the Norwegian Act of June 22, 1962; Art. 2 (bis) of the Belgian Act of May 14, 1930, as amended on Dec. 18, 1962. A translation of these Acts, as well as of those mentioned in the next note, together with some of the Explanatory Memoranda, was provided by the Nederlandse Organisatie van Tijdschrift-Uitgevers, Amsterdam. See also March Hunnings, *loc. cit.* 419-421.

⁸⁹ See Art. 1 of the Swedish Act of July 27, 1962 (No. 400); Sec. 1, subsec. 3, of the Danish Telecommunications Act of April 12, 1949 (No. 188), as amended on June 22, 1962; Art. 1 of the Finnish Act promulgated on July 27, 1962. The laws enacted by the Scandinavian countries were the outcome of concerted action within the Nordic Council. They all came into force on Aug. 1, 1962. See March Hunnings, *loc. cit.* 419.

are committed, can also be made punishable by Royal Decree.⁹⁰ The Explanatory Memorandum states that, with regard to the condition of nationality, no objections can be made to this Act from the point of view of international law. If it were true that, under international law, acts committed abroad and constituting assistance in the installation or operation of an offshore broadcasting station transmitting broadcasts designed to be received in the enacting state may be prosecuted only if the condition of nationality has been fulfilled, the question arises why this condition should not also be required in the case of independent acts that have taken place abroad, such as the establishment and use of the stations themselves. The present authors doubt whether, in the case of such stations, the nationality of the perpetrators is really the only permissible connecting factor. This may, however, be the case, and even that would be a debatable point, in respect of broadcasting stations of a different nature, that is, those making transmissions which do not in any respect affect the interests of the state in question.

The scope of the Belgian Act is more restrictive in some respects. One of these is that foreigners may only be prosecuted if they have committed the act in question in Belgium or on board Belgian ships or aircraft, or if they have acted in concert with persons of Belgian nationality. In both cases a foreigner can only be prosecuted after being apprehended within Belgian territory.

It can be concluded from the foregoing that connecting factors such as the destination of the transmissions, the nationality or residence of the perpetrators, or the place where the acts are committed, or a combination of these factors, were considered by the various legislatures as providing a sufficient title for the exercise of criminal jurisdiction.

8. THE EUROPEAN CONVENTION ON "PIRATE" BROADCASTING

On January 20, 1965, the European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories was opened for signature by the Council of Europe.⁹¹ It was the preparation of this Agreement at which the Dutch Government hinted in justifying its refraining from taking measures against the *Veronica*.⁹² Under the Agreement the contracting states have undertaken to make punishable the establishment or operation of broadcasting stations on board ships, aircraft, or any other floating or airborne objects which, outside national territories, transmit broadcasts intended for reception or capable of being received within the territory of any contracting state, or which cause harmful interference to any radio communication service operating under the authority of a contracting party. This obligation also extends to certain acts of collaboration.

⁹⁰ This seems at least to be the meaning of the French translation of the English translation of the relevant Arts. 1, 3 and 4 of the Norwegian Act which has been used by the authors (see note 88).

⁹¹ See Doc. C.M. (64), p. 259; European Treaty Series, No. 53, reprinted in 59 A.J.I.L. 715; 14 Int. and Comp. Law Q. 434; and 4 Int. Legal Materials 115 (1965).

⁹² See p. 303 above.

The Agreement, which is conceived by its authors as an implementation of the Geneva Radio Regulations of 1959, does not provide for any direct action against the said stations. The duty of states parties to the Agreement is strictly confined to making punishable inside a state's territory certain acts committed both there and abroad. With regard to nationals this duty is more extensive than with regard to non-nationals. Whereas the Agreement applies to acts committed by the former within the territory of the state concerned, on its ships or aircraft, or outside national territories on *any* ships, aircraft or *any* other floating or airborne objects, acts performed by the latter come within the purview of the Agreement only when committed in the state's territory, on its ships or aircraft, or on board any floating or airborne object under its jurisdiction.⁹³ Thus it may be concluded that with respect to nationals the principle of personal jurisdiction, albeit in a limited sense, has been adopted, while with respect to non-nationals the action contemplated remains within the bounds drawn by the principle of territorial or quasi-territorial jurisdiction.

Although the obligation to punish does not extend to stations installed on objects affixed to or supported by the bed of the sea, it is stipulated in Article 4 that nothing in the Agreement shall be deemed to prevent a contracting Power from applying its provisions to such stations. This article, which leaves this question open, does not give any clue as to the conditions under which actions against this category of stations is allowed under general international law. It is worth noting that in a Resolution adopted on January 29, 1965, the Consultative Assembly of the Council of Europe recommended an examination of the possibility of extending the obligations contained in the Agreement to fixed installations.⁹⁴ Leaving this matter for examination by the Committee of Experts on Broadcasting and Television, the resolution does not reveal in what circumstances its drafters considered action permissible.

It was only on July 13, 1965, that the Agreement was signed by the Netherlands Government. So far, it has not been ratified by that government. The latter's initial hesitation probably stemmed from reluctance to accept so strict an obligation as that laid down in Article 3, which would have the effect not only of compelling the Dutch authorities to take action against foreign broadcasting stations which do not affect Dutch interests, but also against innocent Dutch ships broadcasting divine services. It should be borne in mind that reservations to the Agreement are not admitted.

The resolution referred to above further recommended supplementing the Agreement so as to make it clear that the Agreement was intended exclusively to cope with the limited availability of frequencies and not to safeguard the vested interests of any state or other monopolies in mass telecommunications. Such supplementary modification may become of prac-

⁹³ See Art. 3. In both its personal and territorial scope, this provision is more restricted than the Scandinavian Acts discussed earlier. For a critical note, see van Panhuys, 18 *Nieuw Europa* 41 (1965).

⁹⁴ Recommendation 422; see also 59 *A.J.I.L.* 719 (1965) and 14 *Int. and Comp. Law Q.* 436 (1965).

tical relevance to the present case, insofar as it could be argued that the Dutch legislation on telecommunications as actually applied amounts to a protection of the monopolies of the existing broadcasting associations.⁹⁵

Finally, it may be asked whether states which are not parties and do not want to become parties to the Agreement would be justified in criticizing its lawfulness under international law. Having regard to the broad powers left to states by general international law in extending their laws to acts committed abroad, the question must probably be answered in the negative. In justifying their actions, the signatory states can usually rely both on the so-called "universality theory" and on the "principle of protection," while in certain other cases the "principle of personality" (nationality), as well as the territorial principle and the "objective territorial principle" (as applied by the Permanent Court of International Justice in the *Lotus* case) might furnish some support.⁹⁶

9. THE NORTH SEA INSTALLATIONS ACT

a. Background

When at the beginning of 1964 the *Reclame Exploitatie Maatschappij N.V.* (R.E.M.), a limited liability company formed under Dutch law, informed the Government of its intention of erecting an artificial "island" outside Dutch territorial waters, for the purpose of transmitting radio and T.V. broadcasts,⁹⁷ the Government, although prepared to take counteraction, was faced with a dilemma. The R.E.M. was creating a base from which to broadcast commercial programs to The Netherlands unhampered by Netherlands legislation. This would, moreover, undermine the monopoly of the well-established Dutch broadcasting associations. A fair proportion of public opinion in The Netherlands being opposed to this monopoly, the R.E.M. hoped to gain wide popular support, which in fact it did. In this respect it was favored by the same feeling of dissatisfaction with the prevailing broadcasting situation in The Netherlands as was the ship-based *Radio Veronica*, a feeling that was to find full expression in the parliamentary debates. The originators of the R.E.M. project were undoubtedly enticed by the success of *Radio Veronica* and the lenient attitude of the Netherlands Government towards the vessel and its transmissions.

Once the Government had declined to take prompt unilateral action against the *Veronica* broadcasts, it was precluded from taking action against the R.E.M. on grounds which would also apply to the *Veronica*. Otherwise, under the principle that identical situations should receive the same treatment,⁹⁸ the Government would be forced to change its attitude

⁹⁵ For the history of the resolution on this issue, see Documents of the Consultative Assembly of the Council of Europe, No. 1887 (Jan. 27, 1965), No. AS (16) CR 23, point 9, AS (16) CR 24, point 8.

⁹⁶ On the *Lotus* case, see P.C.I.J. Publications, Series A, No. 8, p. 23. On the whole problem, see also Sørensen (*loc. cit.* 327 *et seq.*), who doubts, however, whether the principle of universality is applicable here.

⁹⁷ M.v.T., *Handelingen II*, Eijl., 1963-64, 7643, No. 3, p. 4 (right-hand col.).

⁹⁸ *Handelingen II*, 1964-65, p. 81 (right-hand col.).

towards the *Veronica*. In view of the shipping interests involved, the Government was not willing to make such a change.⁹⁹ Legislation along the lines of the Scandinavian and Belgian precedents was inappropriate, since such legislation is aimed in particular at the prohibition and punishment of the establishment and operation of broadcasting stations on board ships. The Government also had certain criticisms of this legislation.¹⁰⁰ First, the Scandinavian and Belgian laws do not provide for *direct* action against stations on the high seas, which the Government considered it necessary to provide with regard to fixed installations. Moreover, the *indirect* action authorized by that legislation only purports to prevent one specified undesirable activity, namely, broadcasting, although other undesirable activities are imaginable on fixed installations.¹⁰¹

It is clear that the theory advanced by Professor Bos, referred to above on p. 321, would also have meant striking at both the R.E.M. platform and the *Veronica*. For that reason alone, the theory, from the point of view of governmental policy, would have been unacceptable. Moreover, both the Government and the great majority of the François Commission seriously opposed the modification of certain recently codified rules of international law which are specifically directed at shipping and which do not contain any provision whatever in respect of any extension of the powers laid down in them. Moreover, they are expressly limited to the twelve-mile limit.¹⁰²

b. *Contents of the North Sea Installations Act*¹⁰³

The North Sea Installations Act consequently deals exclusively with the phenomenon of fixed installations. Furthermore, it is not primarily concerned with measures against pirate broadcasting, but has a broader purpose, *viz.*, to provide a legal order for fixed installations placed on the soil of the continental shelf off the Dutch coast.

The Act has consequently been drafted as a *loi-cadre* to extend the validity *ratione loci* of the legal order of The Netherlands. At the instigation of the François Commission, some changes were made in the original bill at an early stage to prevent any misunderstanding as to the Government's intentions. Thus, the original title of the bill, "*Continental Shelf Installations Act*," was amended to "*North Sea Installations Act*" in order to underline the fact that it was not based on the Continental Shelf Convention. For the same reason a new text was substituted for the Preamble and for Section 1 of the Draft.¹⁰⁴ The Preamble, as it is worded today,

⁹⁹ M.v.A., Handelingen II, Bijl., 1963-64, 7643, No. 7, p. 15 (left-hand col.). See the statement by the then Minister of Justice, Mr. Scholten, Handelingen II, 1964-65, p. 83 (left-hand col.).

¹⁰⁰ Mr. Scholten, Handelingen II, 1964-65, p. 82 (left-hand col.). Cf. M.v.A., Second Chamber, p. 2 (right-hand col.).

¹⁰¹ *Ibid.*

¹⁰² See, for instance, the Advisory Commission Report, Handelingen II, Bijl., 1963-64, 7643, No. 8, p. 23 (right-hand col.), and the Statement by Mr. Scholten, Handelingen I, 1964-65, p. 165 (left-hand col.).

¹⁰³ The translation of the text of the North Sea Installations Act is printed as an Appendix to this article. For a French translation, see 12 Netherlands International Law Review 209 (1965); a summary in French of the Memorandum of Reply is to be found *ibid.* 211.

¹⁰⁴ See below under c.

proclaims the purpose of the Act as follows:

Whereas We have deemed it desirable to make provision for the protection of legal interests in respect of installations on the bed of that part of the North Sea the boundaries of which correspond with those of that portion of the continental shelf which appertains to the Netherlands, until such time as the matter is regulated by international agreement.

The application *ratione loci* of the Act is defined in Section 1:

In this act the term "sea installation" shall mean an installation erected outside territorial waters on the bed of that part of the North Sea the boundaries of which correspond with that portion of the continental shelf which appertains to the Netherlands.

From the parliamentary debates it appears that the Act will apply to every installation erected on the Dutch continental shelf, used for whatever purpose and erected by private persons as well as by states.¹⁰⁵ At the suggestion of the François Commission the Government declared in particular that the Act will also apply to installations used for the exploration and exploitation of the natural resources of the continental shelf. In its original draft the Continental Shelf Mining Act, which was recently enacted, provided for a special regime applicable to drilling platforms, etc. The François Commission was of opinion that, if the jurisdiction of the coastal state over drilling platforms were to fall outside the scope of the North Sea Installations Act, the latter would acquire an entirely different character. For in that case it would, under the present circumstances, be exclusively related to an installation used for television and radio broadcasts.¹⁰⁶

Section 2 of the North Sea Installations Act now provides that the penal law of The Netherlands shall apply to all such persons as commit any offense on a sea installation. This provision has been taken from the Continental Shelf Mining Bill and will apply to all installations, including drilling platforms and the like. The notion of penal law used in this article has a broad meaning, referring not only to the criminal code but also to other penal provisions contained in Dutch legislation. It was realized, however, that not every penal provision is susceptible of being applied to acts committed outside Dutch territory. In particular, criminal provisions relating to acts that are expressly stated to be punishable only if committed within Dutch territory cannot, by such a simple and general provision, be made applicable to acts perpetrated elsewhere. In addition, the wording and tenor of other penal provisions, including those relating to broadcasting, make it uncertain whether such provisions were intended to have extraterritorial application.¹⁰⁷

¹⁰⁵ See, for instance, M.v.A., Second Chamber, pp. 9-10.

¹⁰⁶ Advisory Commission Report 24 (left-hand col.); for reference on the Dutch Continental Shelf Mining Bill, see 59 A.J.I.L. 515 (1965); it was enacted on Sept. 23, 1965, Staatsblad No. 428. As appears from a statement referred to below at p. 329, not all provisions of the North Sea Installations Act were intended to be applied to drilling platforms.

¹⁰⁷ Mr. Scholten, *Handelingen II*, 1964-65, p. 79.

Section 2 must be read with Section 3, which provides that:

Provision may be made by Order in Council that any provisions of the statutory law of the Netherlands shall apply on and with respect to sea installations.

The exact tenor of this section is somewhat dubious. It was said to serve a dual purpose: First, it enabled the Government to make special provision to extend the territorial scope of those penal provisions the extraterritorial application of which does not automatically or incontestably result from Section 2. Secondly, the provision covers non-penal legislation, *e.g.*, concerning the exercise of administrative powers.¹⁰⁸ It must, however, be said that the explanations given by the Government with regard to the first-mentioned purpose do not appear to be entirely consistent.¹⁰⁹ Finally, it should be observed that the Government indicated its intention not to apply Section 3 of the North Sea Installations Act to drilling platforms and similar installations.^{109a}

Objections in Parliament against the far-reaching delegation of legislative power provided for in Section 3 and certain other sections were met by a provision to the effect that all Orders in Council promulgated under the North Sea Installations Act should be submitted for ratification by Act of Parliament within three months after their entry into force (Section 6). Moreover, the Act contemplates a possible waiver of jurisdiction over certain categories of installations. Article 5 leaves this to the discretion of the Government, subject to the ultimate control of Parliament. It is clear from the parliamentary proceedings that what the drafters had in view was the contingency of a foreign state's erecting an installation on the Dutch continental shelf with the permission of the Netherlands Government. Such hypothetical installations as they had in mind would be used for the public services of the foreign state and manned by its nationals. In such circumstances, the coastal state might wish to waive its right to jurisdiction in favor of the other interested state.¹¹⁰

Furthermore, in conformity with the view that the nearest coastal state must accept responsibility for the protection of international legal interests within an area delimited by applying the equidistance principle,¹¹¹ the Act provides for the promulgation by Order in Council of regulations applying to installations erected or to be erected on the Netherlands part of the continental shelf, and intended to prevent unreasonable interference with navigation, fisheries, the conservation of the living resources of the seas, scientific research, the laying and maintenance of submarine pipelines and cables, the prevention of the pollution of the seas and for the protection of other interests recognized by international law (Section 7). The

¹⁰⁸ *Ibid.* 79-80; *idem*, *Handelingen I*, 1964-65, p. 162 (right-hand col.).

¹⁰⁹ The reader should compare the explanations referred to in the preceding notes with the statements in *M.v.A.*, First Chamber, pp. 9-10.

^{109a} But see, to a slightly different effect, a statement made by the Minister of Economic Affairs in the course of the debate on the Continental Shelf Mining Bill, *M.v.A.*, Second Chamber, *Bijl.*, 1963-64, 7670, No. 6, p. 14.

¹¹⁰ *M.v.A.*, Second Chamber, pp. 9-10.

¹¹¹ *Mr. Scholten*, *Handelingen II*, 1964-65, p. 77 (left-hand col.).

Government stated that this provision is based on the premise that international law contains no absolute prohibition of the erection of fixed installations on the bottom of the sea.¹¹² The other provisions of the Act are mainly procedural in character and relate to the exercise of governmental authority after the enactment of the law.

c. Basic Principles

Though the Government readily acknowledged that its legislative action was prompted by the appearance of the R.E.M. installation—the bill presented to Parliament being commonly known as the “*anti-R.E.M. Act*”—it went out of its way to argue that the purpose was not primarily the prohibition of radio and television broadcasts in contravention of national and international regulations.

The Government sought to make its proposed regulation the embodiment of a wider concept by creating a general regime applicable to future developments in the establishment and use of fixed installations on the high seas, including those *not* used for the exploration and exploitation of the natural resources of the sea-bottom.¹¹³ In doing so the Government proceeded on the assumption, referred to above, that the establishment and use of such installations are neither prohibited nor regulated by international law.¹¹⁴ As an international settlement of these unregulated activities might take a rather long time to develop, the Netherlands Government was determined to take unilateral steps to extend Netherlands jurisdiction over fixed installations built on the Dutch continental shelf until such time as the necessary international regulations were made.¹¹⁵ These international regulations were not those envisaged by the Convention of Strasbourg, the latter's sphere of validity *ratione materiae* being the protection of international telecommunications while not covering the new phenomenon of fixed installations.¹¹⁶ The Government underlined that it was thus acting not as *negotiorum gestor* of the international community in anticipation of an international regulation but on the basis of rights of jurisdiction already appertaining to the coastal state under positive international law.¹¹⁷ Here lies the core of many a misunderstanding about the intentions of the drafters, which was moreover enhanced by certain statements by the Government¹¹⁸ and the very title and text of the first draft of the Bill.¹¹⁹ For the Preamble, as originally phrased:

¹¹² *Ibid.* 76 (left-hand col.).

¹¹³ *Ibid.* 73; Handelingen I, 1964–65, p. 160 (right-hand col.).

¹¹⁴ Above, p. 315.

¹¹⁵ Mr. Scholten, Handelingen II, 1964–65, p. 74.

¹¹⁶ *Ibid.*

¹¹⁷ M.v.A., First Chamber, p. 5 (right-hand col.).

¹¹⁸ Cf. the statement by Mr. Scholten, Handelingen I, 1963–64, p. 421: “At this moment there lies before the Cabinet a Draft Bill according to which installations erected on that part of the continental shelf over which The Netherlands exercises *sovereignty* [italics added] may be considered as Netherlands territory for the purposes of the application of certain legislation.”

¹¹⁹ Bill of May 9, 1964, Handelingen II, Bijl., 1963–64, 7643, No. 2.

it being desirable to enact provisions with regard to installations on the continental shelf under the North Sea, to which the Kingdom has sovereign rights,

if read in conjunction with the original text of Section 1:

In this Act the term "continental shelf" shall mean: the sea-bed of the North Sea to which the Kingdom has sovereign rights in virtue of the Convention of Geneva on the Continental Shelf of April 29, 1958,

created the impression that the Government was claiming jurisdiction on the strength of the Geneva Convention on the Continental Shelf. This would mean an unwarranted extension of the continental shelf doctrine underlying the Geneva Convention, since the sovereign rights of the coastal state are therein recognized exclusively for the purpose of exploring the continental shelf and exploiting its natural resources.

For that reason the bill, as originally drafted, came under some criticism from the R.E.M.¹²⁰ and from others,¹²¹ these arguments also being voiced in Parliament itself.¹²² The Government, in justifying its point of view, emphasized that it was not claiming any sovereign rights in terms of the Continental Shelf Convention. It was only claiming certain rights of jurisdiction over fixed installations.¹²³ Thus, the reference in Section 1 of the Bill to the definition of the continental shelf as laid down in that Convention was merely intended as a useful delimitation of the sphere of validity *ratione loci* of the bill. For it cannot be denied that the part of the continental shelf thus described is identical with that part of the seabed which is nearer to the territory of The Netherlands than to that of any other state.¹²⁴ The principle of *equidistance* that is implied in this method of delimitation was said by the Government not to be confined to the Continental Shelf Convention, but to be quite a common device in dividing marine areas between states.¹²⁵ On closer analysis, and especially after the Government had complied with the suggestion of the François Commission that the paragraphs that were confusing in this respect should be redrafted, even the opponents of the "anti-R.E.M. Act" conceded that the claim of a right to legislate was not based on the continental shelf doctrine.¹²⁶ In essence, the claim to jurisdiction was based on three dis-

¹²⁰ See its letter referred to in note 2 above.

¹²¹ Mr. K. Jansma, *Nieuwe Rotterdamse Courant*, May 14, 1964, p. 3; Prof. M. Bos, 1964 *Nederlands Juristenblad* 685 at 688-689.

¹²² V.V., *Handelingen II, Bijl.*, 1963-64, 7643, §3.

¹²³ M.v.T., Second Chamber, *passim*.

¹²⁴ *Ibid.*, 5.

¹²⁵ Cf. Arts. 12 and 24(3) of the Convention on the Territorial Sea and the Contiguous Zone, Geneva, 1958, *loc. cit.*, and Art. 7 (5) of the Convention on Fishing and the Conservation of the Living Resources of the Seas, Geneva, 1958, 52 A.J.I.L. 851 at 854 (1958).

¹²⁶ See Professors Rolin and de Pauw's Legal Opinion. See also Prof. Johnson's Opinion, p. 8, par. 14, and Sir Humphrey Waldock's Opinion, pp. 25-26, par. 13. (On these Opinions, see note 75.) March Hunnings, *loc. cit.* 429-430, still seems to hold that the Netherlands Government unallowably based its action on the continental shelf doctrine.

tinct considerations: (1) *the legal vacuum theory*; (2) *the protection of legal interests*; and (3) *the notion of contiguity*.

(1) *The Legal Vacuum Theory*

This theory, which was first publicly advanced by Professor François,¹²⁷ would seem to link up with the view that one of the fundamental functions of international law is the delimitation of the spheres of validity of national legal orders. Such a view implies that international law does not purport to remove parts of the surface of the earth from the jurisdiction of states. International law therefore contains rules whereby all human acts and omissions may be brought under the jurisdiction of states, so that wrongdoing does not go unpunished. One of the most important *prohibitive* rules of international law is that no state may enforce its law within the territory of another state in the absence of a permissive rule to the contrary. A second important *prohibitive* rule forbids the subjection of parts of the high seas to national sovereignty. Nevertheless, certain acts of jurisdiction are permitted on the high seas. The absence of territorial sovereignty over the high seas has never meant, nor does it mean, that international law should tolerate a vacuum of legal authority or law. Many rules of international law can be examined against this background. With regard to sea-going vessels a long-standing practice has evolved subjecting them to the authority of the state of the flag they are flying. That state exercises jurisdiction over all persons and things on board the vessel. When technical developments led to other objects appearing on the high seas, such as installations for the exploration and exploitation of the riches of the continental shelf, provision was made to prevent such vacua of law and authority by subjecting them to the jurisdiction of the nearest coastal state.¹²⁸ Once private persons had constructed fixed installations for other purposes, it was natural that all acts and omissions taking place on such installations should also be brought under the jurisdiction of some state, so as to prevent a vacuum of law and to prevent the legal interests of others from being harmed by unfettered acts to which a complete absence of authority would inevitably lead.¹²⁹

The *legal vacuum theory* was heavily attacked by the legal advisers of the R.E.M., their main argument being that there was no vacuum of law and authority at all, since, in the absence of any "territorial" jurisdiction, the title to jurisdiction of the state of nationality of the persons erecting or making use of the installation prevails. That state could therefore fill the legal vacuum alleged by the Netherlands Government to exist.¹³⁰ According to the Government, however, this view overlooks the fact that the *personal* jurisdiction of a state, in contradistinction to its *territorial* jurisdiction, is not *exclusive*. The Government did not deny that conflicts of

¹²⁷ See p. 315 above.

¹²⁸ François Advisory Commission Report 22 (right-hand col.).

¹²⁹ *Ibid.*

¹³⁰ See in particular Waldo, *loc. cit.* 30, par. 26; 36, par. 42 (see, however, also pars. 43 and 44).

jurisdiction might arise between the coastal state claiming jurisdiction and the state whose nationals were involved in the erection and use of a fixed installation, but it argued that such a conflict was not unusual in international law,¹³¹ nor did it necessarily imply that the claim to jurisdiction of the coastal state had to give way to that of the national state. The Government stated that the absence of territorial jurisdiction over the high seas did not, in positive international law, give a state a title to jurisdiction over its subjects that was necessarily equivalent to territorial jurisdiction. In this connection the Government pointed to the recognized right of jurisdiction of a state over all persons and things on board ships flying its flag or on installations used for the exploration and exploitation of the continental shelf.¹³² Moreover the recognition of an exclusive title of jurisdiction appertaining to the *national* state of an installation would not be enough to prevent a legal vacuum occurring thereon, it being uncertain that the "national" state would be willing to step in and take the necessary measures to maintain law and order and prevent the legal interests of others from being harmed, particularly if that state were situated far away and the "national" interest in the structure was consequently an artificial one.

(2) *The Protection of Legal Interests*

The second contention of the Netherlands Government was that under international law a state might validly exercise jurisdiction on the high seas in order to protect certain legal interests. These legal interests might be those of itself, of its subjects or of the international community. The protection of the legal order prevailing on its territory against encroachments taking place from somewhere outside territorial waters solely in order to escape the effects of that legal order is an interest worthy of legal protection. In the widest sense, according to the Government, every domestic legal provision is meant to regulate legal interests.¹³³ The North Sea Installations Act is intended to create a framework within which such provisions, including the Dutch broadcasting laws, may be applied to fixed installations erected in a part of the high seas which is nearer to The Netherlands than to any other state.¹³⁴ The Government stressed the distinction between the protection of legal interests, such as those protected by the broadcasting laws, and that of vital interests, such as the right of self-defense.¹³⁵ The protection of vital interests may take place anywhere in the world, albeit within the confines set by international law.¹³⁶ Far from vindicating this wide competence in the present case, the Dutch legislature was deliberately restricting itself to statutory action with respect to those parts of the sea where activities on fixed installations might

¹³¹ See the François Advisory Commission Report 23 (left-hand col.).

¹³² Mr. Scholten, *Handelingen I*, 1964-65, pp. 165-167.

¹³³ Mr. Scholten, *Handelingen II*, 1964-65, p. 75 (right-hand col.).

¹³⁴ *M.v.T.*, Second Chamber, p. 3 (left-hand col.).

¹³⁵ It would seem that Professor Rousseau, in his Opinion (mentioned in note 75) at p. 20, considers the claim to protection of legal interests identical to that of vital interests.

¹³⁶ *Cf. M.v.A.*, Second Chamber, pp. 3 (right-hand col.) and 7 (right-hand col.).

entail harmful effects on (non-vital) legal interests protected by the Dutch legal order.¹³⁷

Admittedly, the legal interests which the coastal state seeks to protect might collide with the interests of other states. One might think of the interest asserted by other states in the freedom to impart information or in the production of wealth through free enterprise. With regard to broadcasting, the question seems to be academic, provided of course that international law contains a prohibition on the operation of broadcasting services at sea which applies to both the flag state and the coastal state, and provided also that the protective measures contemplated by the latter are in line with that prohibition. In other cases it might be difficult to see how such conflict can be solved otherwise than through reliance upon the notion of contiguity, which will be considered in the following subsection.

(3) *The Notion of Contiguity*

The notion of contiguity is partly of a subsidiary character. It comes into play once it is established that under international law a state may validly exercise jurisdiction to fill the legal vacuum existing on artificial structures erected on the bed of the high seas and to protect legal interests threatened by them and the activities thereon. It then becomes necessary to find out which state has the best title to do so. Three solutions are possible. The first solution consists of applying *per analogiam* the principle of the nationality of ships and in granting jurisdiction over fixed installations to the state of registration, provided such registration could be effected. A second solution would be to recognize the jurisdiction of the state whose subjects have erected, own or use the installation. The Dutch Government did not favor either of these two solutions.¹³⁸ A third solution was therefore adopted, *viz.*, that the nearest coastal state should have jurisdiction. In this respect the recent development of international law was followed which recognizes the authority of that state over certain acts taking place in the contiguous zone, on the continental shelf and on the high seas off the national coast with regard to fishing.¹³⁹

As was pointed out at the beginning of this section, the title to jurisdiction of the coastal state does not rest primarily on its geographical position. According to the François Commission, the legal authority of the coastal state over installations constructed by *private* persons in the sea area off its coast should, however, in principle be accepted over that of any other Power, and particularly so if any foreign interest has been artificially acquired.¹⁴⁰

The Government went further than this view of the Commission. It argued that, as long as no international arrangement had been arrived at regarding jurisdiction over all fixed installations on the high seas, the nearest coastal state, which already possessed certain restricted but recog-

¹³⁷ François Advisory Commission Report 23 (right-hand col.).

¹³⁸ See p. 320 above.

¹³⁹ The system of delimiting marine areas followed in these cases was applied here. See note 125 above.

¹⁴⁰ François Advisory Commission Report 23 (left-hand col.).

nized rights with regard to the continental shelf, was also competent to extend the exercise of its jurisdiction to any installations on its continental shelf in order to prevent the continued existence of a legal vacuum thereon. According to the Government, this title to jurisdiction is in no way subsidiary in the sense that it will only come into play if, and insofar as, no other state claims to exercise jurisdiction or actually does so. Even the fact that another state might be the owner of an installation could, it was emphatically stated, create no title to jurisdiction under international law for that state. A title to jurisdiction based on ownership alone was said to be a feudal conception not germane to modern international law. *A fortiori* this reasoning applies when a foreign national owns such an installation.¹⁴¹ At the same time, however, the nearest coastal state assumes with the exercise of its jurisdiction a certain responsibility in respect of fixed installations on its continental shelf. It ought therefore to provide by legislation for the protection of those international interests that are, under international law, entitled to protection, including those covered by the international telecommunication treaties.¹⁴²

The notion of contiguity was attacked by the R.E.M. advisers on the ground that, according to the arbitral award in the *Island of Palmas* case, "the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law."¹⁴³ The Government, however, did not claim territorial sovereignty over the fixed installations but only the right to take certain unilateral measures which seemed necessary for the protection of the legal order of The Netherlands as the nearest coastal state. It was further contended by one of the R.E.M. advisers that the notion of contiguity was of no avail in the present case, technical devices which could undermine the Dutch Radio Associations' broadcasting monopoly being conceivable at a considerable distance from the coastal state.¹⁴⁴ But the notion of contiguity advanced by the Netherlands Government was not relied upon primarily for the maintenance of the Dutch broadcasting system. The Government's purpose was of a more general character and concerned the maintenance of law and order on artificial structures on the sea in the vicinity of the Dutch coasts and the protection of the national legal order as a whole.

d. Implementation

It was generally accepted by those taking part in discussions on this subject that, from the point of view of international law, no national legislation was necessary for any action to be taken by the Government in the exercise of authority over fixed installations.¹⁴⁵ It had been sug-

¹⁴¹ M.v.A., Second Chamber, p. 9 (right-hand col.).

¹⁴² M.v.T., p. 4 (right-hand col.).

¹⁴³ Judge Huber in the *Island of Palmas* case (U.S.A. v. Netherlands), 22 A.J.I.L. 867 at 910 (1928), cited by Dr. Colombos in his Opinion delivered to the R.E.M. Co., p. 2.

¹⁴⁴ Johnson, *loc. cit.* 8, par. 14.

¹⁴⁵ François, *loc. cit.*; van Emde Boas, 7 *Liberaal Réveil* 131 (1963-64); *idem*, *Haagsche Courant*, June 23, 1964; *Bouchez*, *Algemeen Handelsblad*, May 21, 1964; François Advisory Commission Report 24 (right-hand col.).

gested that the Government should have acted immediately and not first awaited the enactment of rather complicated national legislation.¹⁴⁶ The Government contended, however, that such legislation was needed to ensure the legality *under domestic law* of any action taken with respect to fixed installations of the R.E.M. type.¹⁴⁷ The François Commission was of the opinion that, as a general rule, insofar as government actions would affect the interests of private persons, a foundation in national law was also desirable on constitutional grounds.¹⁴⁸ The Government emphasized that the bill, which was based on a certain conception of what international law allows states to do, in no way claimed to change the rules of international law. The international content of the freedom of the seas would remain the same before and after the enactment of the bill. The fact, however, that these freedoms did not include protection for private activities on artificial structures having no connection with the use of the sea and intended to produce an effect within the territory of the coastal state did not automatically mean that under Dutch law such activities ought to be regarded as illegal so that governmental action against them would be permissible. Legislation was therefore needed to remove any obstacles in Netherlands law to such action.¹⁴⁹

Immediately after the bill was passed, the Netherlands broadcasting legislation and certain criminal procedural provisions relating to the competence of prosecuting officers were made applicable to the R.E.M. structure by Order in Council.¹⁵⁰ Ten days later, the police landed on the broadcasting installation and put the transmitters out of action.¹⁵¹ Warrants were issued against the operators and the broadcasting installations were impounded. So far no penal action has been initiated against the owners or operators of the installations, nor has any civil action been brought by them against the Government. As far as can be ascertained, no state has protested against the Netherlands action against the R.E.M. structure.

10. CONCLUSIONS

One of the striking features of the topic analyzed in the present paper is its complexity. Apart from intricate matters, such as the law of telecommunications, fundamental questions of international law have to be answered, *e.g.*, the question of who is entitled to exercise jurisdiction on places which are not subject to the sovereignty of any state.

More particularly, the R.E.M. case eloquently illustrates how international law is developed through government decisions necessitated by new phenomena, in the present case the appearance of artificial structures built upon the seabed and owned and operated by private enterprises.

¹⁴⁶ Prof. Samkalden, *Handelingen I*, 1964-65, pp. 155-156 and 176. *Cf.* also V.V., *Handelingen I*, *Bijl.*, 1964-65, 7643, No. 13, p. 3.

¹⁴⁷ *M.v.T.*, p. 3 (left-hand col.).

¹⁴⁸ François Advisory Commission Report 24 (right-hand col.).

¹⁴⁹ *M.v.A.*, First Chamber, p. 3 (right-hand col.).

¹⁵⁰ *Staatsblad*, Nos. 459, 460 and 461 of Dec. 8, 1964.

¹⁵¹ See *New York Times*, Dec. 18, 1964.

Although it must be conceded that in most cases such decisions are dictated by national interests, this does not mean that in arriving at their decisions governments do not take account of legal considerations. For the objective observer, it is extremely difficult to give a clear-cut answer to the question of what the legal status of the said installations actually is. Positive international law simply has no *rule* governing the matter. Governments—or international tribunals, should they be called upon to give a decision—are in a position to *shape* the law by drawing upon the fundamental principles underlying the existing rules of international law. Such decisions are law-creating in exactly the same manner as the practice of states, and may, in the course of time, derogate from rules of customary international law. Is there any rule of thumb that will tell us whether such practices constitute violations of the law or first steps towards a new rule of customary law? It would seem that there is not. A twilight zone surrounds the appearance of the new phenomenon and makes a clear-cut decision impossible.

In determining their attitude in “open” situations like the present one, states have at their disposal an arsenal of legal concepts to which new concepts may be added. How these tools are used depends on many factors, of which the aims pursued by the governments concerned and the political possibility of realizing these aims, both at home and internationally, are among the most important.

The position of the Dutch Government was predetermined by a variety of particular circumstances, such as the peculiar Dutch legislation on the distribution and organization of broadcasting facilities, the different situations of the *Veronica* and the R.E.M. platform, and, last but not least, traditionalist views on the freedom of the seas, which, for that matter, is also a Dutch national interest.

Considering now the attitude finally adopted by the Government, it must be said at once that its position was most carefully chosen. The terms used, such as “jurisdiction” and not “sovereignty” or “sovereign rights,” were well thought out. From the outset the Government refused to base its direct action against the station exclusively on the necessity for enforcing legislation relating to broadcasting. Nor was it willing to rely upon a complete analogy with the continental shelf doctrine. Its approach was original in that it was ably built upon the combined force of three considerations, *viz.*, the legal vacuum theory, the protection of legal interests and the notion of contiguity. This implied the rejection of the analogous application of the principles governing the nationality or registry of ships and aircraft or the relevancy of ownership. The Government was certainly motivated by still another consideration, that of ensuring certainty as to the law applying to the installation.

There is, therefore, every reason to conclude that the action taken was based upon a *new* rule of international law, which may be summarized as being that a coastal state may exercise jurisdiction over all installations erected on the soil of its continental shelf, no matter for what purpose. Having regard to the fact that states may act simultaneously as subjects

of international law and as its creators,¹⁵² there is no hypocrisy in the statement by the Dutch Government that it was basing its action upon *existing* international law. A similar attitude is often adopted by tribunals. If it is true that no confirmation or approval of the Dutch measures by the international community is needed, as contended by the Government, it is no less true that the future practice of states might lead to a rejection of the (alleged) new rule. Having regard to the attitudes of other states towards the measures taken, however, there is no likelihood that this will be the case.¹⁵³

Those who accept this conclusion will have no difficulty in agreeing with the method adopted, *viz.*, the basing of the rule upon various considerations, each of which might have proved insufficient if taken by itself. The legal vacuum theory, for example, the independent value of which was certainly the greatest, would nevertheless not be strong enough to carry the entire construction, for it alone would give no title to the coastal state over installations erected by a foreign state on the former's continental shelf and to which the latter has applied its laws.

A crucial question is whether it is justifiable to draw such a sharp distinction between the establishment of installations and their use, as was done by the Netherlands Government. There are hardly any cases where objects or persons can be brought under the jurisdiction of a state against its will. This is certainly not the case with regard to granting a ship the right to carry a state's flag or the granting of nationality to individual persons. Once it is admitted that a state may extend its jurisdiction to all installations on its continental shelf, no matter of what kind, and that it may do so on the combined strength of the legal vacuum theory, the protection of the state's legal interests, and the concept of contiguity, it is hard to see why that state should not also be deemed to be entitled to require the licensing of the erection itself. This one small step would as a consequence pull down the thin wall that separates the concept of "jurisdiction" from that of "sovereign rights"!

The various attitudes adopted towards the concept of the freedom of the high seas are extremely interesting. One question is whether the rights and duties it contains only obtain between states or also between states and individual citizens. The view correctly taken by the Dutch Government was that the freedom of the seas may never be invoked to escape from any state authority. This does not, of course, mean that individual persons could not invoke the freedom of the seas against other states once they have been brought under the jurisdiction of a state.

A second question in this connection is what the freedom of the high seas comprises. Two extreme views can be contrasted, the one being that all peaceful uses of the seas are covered, and the other only admitting such uses as are recognized by the practice of states. Having regard to the

¹⁵² See also 8 Netherlands International Law Review 149 (1961) and 112 Hague Academy Recueil des Cours 16 (1964, II).

¹⁵³ It should be remembered that foreign interests were involved not only because of the ownership of the platform but also since the damage (assessed at approximately six million guilders) was covered by insurance with foreign underwriters.

fact that in Article 2 of the Convention on the High Seas the term "*inter alia*" was used and that the additional freedoms there referred to are not described as those which are recognized by rules of *customary* international law, but as "recognized by the general principles of international law," and seeing that traditionally the principle of the freedom of the high seas has always been regarded as a broad general term, the present authors are inclined to favor the former point of view.¹⁵⁴ One thing seems to be certain, however, that is, that if the opposite view were to be accepted as the correct one, the erection of installations on the continental shelf, even if this took place with the permission of the coastal state and under its jurisdiction, would not be allowed by international law except in some specific cases. This would then be the law until such time as a practice to the contrary could be demonstrated. Since no such practice exists with regard to installations built for the purpose of broadcasting, this point of view would mean that, in extending its jurisdiction to such installations, the coastal state would be duty-bound either to ensure that the installation was employed in a manner falling within the recognized freedoms of the high seas or to demolish it.

A third problem is the view advanced by the Government with regard to human activities on the high seas, that under existing international law such activities are either forbidden, protected, or not regulated at all. This view is open to criticism. It should be remembered that only those activities that have been brought under the jurisdiction of a state or of such other entities as may be recognized by international law to sail ships under their flags can possibly fall within the ambit of rules of international law protecting the freedom of the high seas. If that condition is satisfied, it is difficult to imagine a third alternative in addition to "forbidden" and "protected," although it must be granted that all systems of law know rules according a larger measure of protection to one activity than to another. Thus, this view does not, as a matter of principle, exclude the possibility of one mode of employment of the sea enjoying greater protection than another.

Finally, a few words must be said about the differentiation between the R.E.M. platform and the *Veronica*. After all that has been said and done about this question and especially in view of the European Agreement discussed in Section 8, there is every likelihood that *indirect* measures will be taken against the *Veronica*. Having regard to the wide measure of discretion left to states in extending the territorial scope of their penal law, probably no objections can be made to such action from the point of view of international law. In the opinion of the first author (van Panhuys) the absence of a genuine link between the flag state and the ship transmitting broadcasts would furnish a government desirous of taking *direct* action against the ship with a strong argument. The case of the *Lucky Star* shows that it is not at all certain that the flag state will oppose such action. Here again, the combined force of the legal vacuum theory,

¹⁵⁴ In addition, the reader may once again refer to McDougal and Burke, *op. cit.* 758-763.

the protection of legal interests, and the notion of contiguity might be invoked. As we have seen, there were serious reasons why the Netherlands Government did not act along these lines.

[The present authors regret that they could not take account of two articles dealing with the same topic which appeared after the printing of this article, *viz.*, Bos, "La Liberté de la Haute Mer, Quelques problèmes d'actualité," 12 *Netherlands International Law Review* 337 (1965), and Woodliffe, "Some Legal Aspects of Pirate Broadcasting in the North Sea," *ibid.* 365.]

ANNEX

Act of 3rd December 1964, concerning installations on the bed of the North Sea (North Sea Installations Act). [Staatsblad 1964, No. 447]

WE JULIANA, BY THE GRACE OF GOD, QUEEN OF THE NETHERLANDS, PRINCESS OF ORANGE-NASSAU, ETC., ETC., ETC.

To all those to whom these presents may come, greetings! Be it known that:

Whereas We have deemed it desirable to make provision for the protection of legal interests in respect of installations on the bed of that part of the North Sea the boundaries of which correspond with those of that portion of the continental shelf which appertains to the Netherlands, until such time as the matter is regulated by international agreement;

So We, having heard the views of the Council of State and with the advice and consent of the States-General, have approved and understood, and do approve and understand, the following:

Section 1. In this Act the term "sea installation" shall mean an installation erected outside territorial waters on the bed of that part of the North Sea the boundaries of which correspond with that portion of the continental shelf which appertains to the Netherlands.

Section 2. The criminal law of the Netherlands shall apply to all such persons as commit any offense on a sea installation.

Section 3. Provision may be made by Order in Council that any provisions of the statutory law of the Netherlands shall apply on and with respect to sea installations.

Section 4. Provision may be made by Order in Council for the extension to sea installations of the jurisdiction of authorities and officials entrusted with the implementation of the provisions referred to in Section 3 above, or with the investigation and prosecution of offenses or with the bringing to trial of those responsible or with the execution of any sentences that may be passed by any court.

Section 5. Provision may be made by Order in Council that the criminal law of the Netherlands and such statutory provisions as are referred to in Section 3 shall not apply to such sea installations as are described in such Order in Council or shall apply to such installations only to a limited extent.

Section 6. If, within three months of the coming into force of an Order in Council, issued in terms of Section 3 or Section 5 above, We have not had a bill laid before the States-General to replace such Order in Council, or if such bill is withdrawn or defeated, We shall without delay repeal such Order in Council.

Section 7. Regulations may be made by Order in Council in respect of installations erected or to be erected outside territorial waters on the bed of that part of the North Sea referred to in Section 1, in the interests of shipping, the fishing industry, the conservation of the living resources of the sea, pure scientific research, the laying and maintenance of submarine cables and pipelines, and the prevention of the pollution of the sea, as well as for the protection of such other interests as are recognized by international law.

Section 8. Any contravention of regulations made under Section 7 shall be punishable by a fine not exceeding ten thousand guilders. Such contravention shall be considered to be an "overtreding" [corresponding to the French *contravention*, i.e., a minor infringement of the criminal law].

Section 9. This Act may be cited as the "North Sea Installations Act."

Section 10. This Act shall come into force on the first day following the date of its publication in the *Official Gazette*.

Be it ordered that the above be published in the *Official Gazette* and that all government departments, authorities and officials concerned do conscientiously enforce it.

Given at Our Palace of Soestdijk, this third day of December 1964.

JULIANA

Y. SCHOLTEN,
Minister of Justice

V.G.M. MARIJNEN,
Acting Minister for Foreign Affairs

Published this fourth day of December 1964.

Y. SCHOLTEN,
Minister of Justice

[For discussion in the States-General see:

Bijl. Hand. II 63/64, 7643; Hand. II 63/64, pp. 2257-2267;
Bijl. Hand. II 64/65, 7643; Hand. II 64/65, pp. 18-66, 73-107;
Bijl. Hand. I 64/65, 7643; Hand. I 64/65, pp. 135-179.]

EDITORIAL COMMENT

TECHNICAL ASSISTANCE IN THE NEW INTERNATIONAL LAW

African and Asian diplomats at the United Nations are demonstrating a lack of confidence in legal education offered their students by the developed Powers, whether of East or West. They want United Nations programs staffed by experts from various schools of thought and including some former colonials to give guidance. In the words of the Tanzanian it is "necessary to renovate the law and make it possible for it to assimilate the traditions of the new peoples."¹

Diplomats from the East and West look with apprehension upon the programs proposed by the newcomers. Under arguments leveled at the costs, estimated by the Secretariat to be \$210,000 for the first year and \$280,000 for the second,² they have resisted supplementation of current bilateral programs providing legal education for men and women from the new nations. Not until the end of the debates in the Sixth Committee in November, 1965, did they acquiesce, and then somewhat hesitantly in the face of strong demand. The vote of 75 to 2, with 10 abstentions, on the resolution when it was presented to the Sixth Committee on November 5, 1965,³ and of 75 to 2, with 11 abstentions, when it was brought before the General Assembly on December 20, 1965,⁴ showed the measure of dissent, and the ones from whom it came. In stating their reasons for opposition or abstention, most of the non-supporters found it desirable to express their conviction in the intrinsic value of a program of technical assistance in legal education, but to object to its implementation by inclusion of the cost in the regular budget of the United Nations.⁵

The program adopted by the resolution is a compromise. It provides far less than "a kind of world university on a specialized subject" proposed by Cyprus,⁶ a United Nations University or school for higher studies in international law desired by Panama,⁷ Ecuador, Afghanistan and Ghana,⁸ or a "United Nations institute with branches in the principal geographical centers of the world," to which the United Arab Republic subscribed.⁹

Although rejecting the world university, the resolution provides a broader program than was desired by the rich countries. It is more than a reaffirmation of faith in the potential of the existing bilateral method of increasing teaching facilities. It seeks to break out of the limits of a pro-

¹ U.N. Doc. A/C.6/SR.869, Prov., Nov. 9, 1965, p. 12.

² U.N. Doc. A/AC.117/L.7, Add. 1, Jan. 26, 1965, p. 2.

³ U.N. Doc. A/C.6/SR.870, Prov., Nov. 11, 1965, p. 13.

⁴ General Assembly Res. 2099 (XX), Dec. 20, 1965.

⁵ Dissenters and abstainers explaining their vote in the Sixth Committee were France, Australia, Greece, Sweden, Canada, Ireland, New Zealand, United Kingdom, United States, U.S.S.R.

⁶ U.N. Doc. A/5455, Add. 4, July 25, 1963.

⁷ U.N. Doc. A/AC.117/L. 2, Nov. 24, 1964, p. 19.

⁸ U.N. Doc. A/AC.117/SR.6, Jan. 5, 1965, p. 13.

⁹ U.N. Doc. A/AC.117/L.2, Nov. 24, 1964, p. 19.

gram based upon exchange of African and Asian law students for European and North American anthropologists, musicians and artists. The new scheme is to be multifaceted, directed by an Advisory Committee named to assist the Secretary General in the substantive aspects contained in the report of the Special Committee and on the implementation of the program included in the resolution.¹⁰

The resolution calls for a regional training and refresher course of four weeks' duration to be held every two years in rotation in Africa, Asia and Latin America; ten fellowships to students from the developing countries in the first year and fifteen in the second; advisory service by up to three experts in the first year and up to five in the second; distribution of United Nations publications to up to fifteen institutions in developing countries in the first year and up to twenty in the second; preparation and publication of a survey of certain principal examples of the codification and progressive development of international law within the framework of the United Nations; and financing by voluntary contributions and, in their default, by allocations from the regular budget.

Few proposals presented to the Sixth Committee have been as carefully prepared as this. After General Assembly Resolution 1816 (XVII) of December 18, 1962, called upon the Secretary General to study ways in which Members could be aided in developing programs of training in international law, comments were solicited not only from Members but from fourteen organizations, some of them inter-governmental and some non-governmental. The replies from the long-established countries favored a modest plan, including an intern program at United Nations headquarters for legal officers of developing states,¹¹ an international law course in the new United Nations Institute for Training and Research,¹² promotion of bilateral inter-state exchanges of undergraduates, graduates and teachers,¹³ research seminars and refresher courses.¹⁴ The theme of all these was "no duplication" of existing programs and institutions. The developing countries in their replies were less modest. In addition to those indicated above, calling for a world university, there were intermediate proposals such as that of Mali, which asked for international law courses in the countries requesting it on the ground that "It is really more logical and economical for the professors, rather than the students to travel."¹⁵

The inter-governmental agencies which responded were few, but one proposed regional meetings of governmental experts to discuss specific problems of international law of mutual interest,¹⁶ while another said it

¹⁰ The members of the Advisory Committee are Afghanistan, Belgium, Ecuador, France, Ghana, Hungary, U.S.S.R., United Kingdom, United Republic of Tanzania, and the United States. See Report of the Sixth Committee on Agenda Item 89, A/6136, Dec. 4, 1965, p. 25.

¹¹ The United States, see U.N. Doc. A/5455/Add. 1, Aug. 12, 1963.

¹² Canada, see U.N. Doc. A/5455/Add. 2, Sept. 17, 1963.

¹³ The U.S.S.R., see U.N. Doc. A/5455/Add.6, Nov. 14, 1963.

¹⁴ Belgium, see U.N. Doc. A/5744/Add.1, Nov. 17, 1964.

¹⁵ U.N. Doc. A/5744, Oct. 22, 1964.

¹⁶ The Asian-African Legal Consultative Committee, U.N. Doc. A/5455, July 25, 1963.

had no means to participate actively in the program.¹⁷ UNESCO was prepared to initiate a publication on the teaching of international law to be based upon a survey of what was being done throughout the world and containing general conclusions by an expert.¹⁸ The non-governmental agencies had one theme: lack of money. The Academy of International Law at the Hague stated its need for funds immediately if it were to survive,¹⁹ while the International Political Science Association expressed interest but said it would require funds to expand.²⁰ The International Academy of Comparative Law saw the major need for "sufficient funds to assist scholars from the developing countries to attend our congresses," especially younger scholars from areas where funds were inadequate.²¹ The money theme reappeared in the reply of the International Association for the Teaching of Comparative Law, which described its extensive program of courses at various universities, but explained that the scholarships presently granted to students by their governments did not help the students from developing countries.²²

With the replies in hand the Sixth Committee at its 1963 session decided to ask the General Assembly to create a Special Committee for the purpose of drawing up a practical plan and proposals. The resulting General Assembly Resolution 1968 (XVIII) established a committee of representatives of each of the major groups in the United Nations, and these elected Ghana's Ambassador E. K. Dadze as chairman. Its meetings during March and April, 1964, sought an exchange of views from which the rapporteur, Mr. Eric Bal of Belgium, prepared a draft report for submission to the General Assembly one week prior to its scheduled Nineteenth Session in 1964.²³ For reasons of stalemate occasioned by the dispute over the non-payment of assessments, the Assembly could not examine the report so that the Special Committee had available additional months for preparation before the Twentieth General Assembly of 1965. The extra year was not wasted.

The Special Committee's final report proved to be a comprehensive study of possibilities.²⁴ Its members had received the Secretary General's report that no voluntary contributions had been made in response to his call,²⁵ and that the Technical Assistance Board of the United Nations had decided that "it was doubtful whether it would be possible to provide assistance in the field of international law in general in view of the terms of the Resolution of the Economic and Social Council on the subject." Also the Board thought international law not so closely related to the economic and social development of developing countries as other priority fields. The Technical Assistance Committee, in reporting the Board's views, threw more cold water by saying that it thought it undesirable to include inter-

¹⁷ The League of Arab States, U.N. Doc. A/5455/Add.1, Aug. 12, 1963.

¹⁸ *Ibid.*

¹⁹ U.N. Doc. A/5455, July 25, 1963.

²⁰ *Ibid.*

²¹ U.N. Doc. A/5455/Add.2, Sept. 17, 1963.

²² U.N. Doc. A/5455/Add.3, Sept. 25, 1963.

²³ U.N. Doc. A/AC.117/L.3, Nov. 25, 1964.

²⁴ U.N. Doc. A/5887, Feb. 17, 1965.

²⁵ U.N. Doc. A/5790, Nov. 20, 1964.

national law generally within the basic legislation on the Expanded Program of Technical Assistance. Finally, as a *coup de grace*, it doubted that international law could be fitted under the regular program of technical assistance financed by the regular budget. It noted, however, that governments were free to include specific requests for teaching aid among their priority proposals for development and these might include teaching of international law. Also governments might request assistance in international law under the existing human rights services program.²⁶

In short, no agency of the United Nations system could find an existing authorization under which technical assistance funds could be provided for the teaching of international law on a general basis. This left only one conclusion: if international law were to be made a program of technical assistance, the states interested would have to convince the majority of the Members of the United Nations of its merit and present a request directly to the full membership as a claim for the allocation of new funds. Otherwise all that could be offered were the incidental grants specifically requested as pertaining to programs for individual countries seeking aid in development.

The Special Committee at its meetings of late 1964 and early 1965 received a summary of views and proposals made in replies to the Secretary General's request for comments,²⁷ and three estimates of costs at different stages in the thinking of the committee.²⁸ It heard UNESCO report that it could not do more than prepare a survey of teaching in international law and exchange of information on libraries and publications, since it had no money for more.²⁹ The Ecuadorian tried once again to find favor for the Latin American desire for an international legal institute, and reserved his position on failure.³⁰ The Hungarian introduced an argument³¹ that was to become a recurrent theme in subsequent meetings of the Sixth Committee, namely, that the subjects proposed for lectures "did not reflect present-day trends in international law," and should be altered to include the item of "friendly relations and cooperation among states," and the Vienna Consular Convention. He wanted also to include the recommendation that jurists of all countries be invited to give lectures so that the teaching of international law might be truly international in character.

The theme of "no duplication" by the United Nations of programs carried on outside the United Nations was restated by the Belgian, who repeated also the theme that had appeared in several of the comments of states, namely, that the topics to be treated in seminars should be of a practical nature and not related to philosophy.³² Soon after he asked that no final commitment be made to the idea of a world program,³³ but the Ecuadorian

²⁶ U.N. Doc. A/5791, Nov. 20, 1964.

²⁷ U.N. Doc. A/AC.117/L.2, Nov. 24, 1964.

²⁸ U.N. Docs. A/AC.117/L.3, Add.1, Nov. 25, 1964; A/AC.117/L.6, Dec. 1, 1964; and A/AC.117/L.7/Add.1, Jan. 26, 1965.

²⁹ U.N. A/AC.117/SR.2, Jan. 5, 1965, p. 2, and *ibid.*, SR.3, Jan. 5, 1965, p. 3.

³⁰ U.N. Doc. A/AC.117/SR.2, Jan. 5, 1965, p. 10.

³¹ *Ibid.*, p. 12.

³² U.N. Doc. A/AC.117/SR.3, Jan. 5, 1965, p. 7, and *ibid.*, SR.6, Jan. 5, 1965, p. 3.

³³ *Ibid.*, SR.6, p. 3.

representative was not to be silenced. He noted that if an institute were established in Africa only, it would give Africa an advantage. He wanted a world institute with teachers and students from all countries, not only to treat world-wide subjects properly but to give new generations in Africa, Asia and Latin America an opportunity to know each other better and to strengthen ties between them.³⁴ The Ghanaian chairman then devised the ingenious reply that he had proposed Africa as the seat "because the African continent was midway between Asia and Latin America."³⁵ The Ecuadorian thereafter asked for some time to think over the matter of location.³⁶

The Tanzanian offered University College as the seat of any international institute or seminar that might be established and reported that his country would provide both board and lodging, and a library which was already adequate.³⁷ The offer was held for consideration with any other offers that might be received.

The themes sounded in the Special Committee reappeared at the 1965 session of the Sixth Committee, but with additional comment from a larger number of states. Regional patterns of thought could be discerned. On the one hand the long-established states of the Northern Hemisphere were phrasing their comments in terms of keeping United Nations costs at a minimum during a time of financial crisis. None seemed willing to admit that financing was not the real issue for a United Nations that can support all operations that it deems vital. What they were saying was that in their view the United Nations could not offer them an advantage in disseminating international law so great as to merit a sufficiently high priority to command precedence over other claims for funds. These states preferred to carry on with existing bilateral agreements and with existing non-governmental law faculties. The only debate was whether existing law faculties were sufficiently representative of U.S.S.R. views. Thus, the United States,³⁸ the U.S.S.R.,³⁹ the United Kingdom,⁴⁰ and The Netherlands⁴¹ asked that there be no duplication of existing facilities, and they expressed their satisfaction with the bilateral method of dissemination. France offered a variation in that its delegate hoped for greater publicity for bilateral action and for strengthening of that method, but he was willing to accept multilateral co-operation provided that it was co-ordinated and rationalized. His quarrel with United Nations' action was that he preferred co-ordination by the Academy of International Law at The Hague rather than by newly established institutions.⁴²

The developing nations on the other hand were strong in support of the contrary view. Ambassador Dadze, speaking for Ghana, argued that the United Nations could not be opposed as a duplicator of existing facilities in whatever it might do "because the scope of the latter was necessarily

³⁴ *Ibid.*, p. 13.

³⁶ *Ibid.*, p. 6.

³⁸ U.N. Doc. A/C.6/SR.861, Prov., Nov. 1, 1965, p. 7.

³⁹ *Ibid.*, SR.863, Prov., Nov. 3, 1965, p. 3.

⁴¹ *Ibid.*, SR.865, Prov., Nov. 4, 1965, p. 7.

³⁵ *Ibid.*

³⁷ *Ibid.*, SR.9, March 22, 1965, p. 9.

⁴⁰ *Ibid.*, SR.861, Prov., Nov. 1, 1965, p. 2.

⁴² *Ibid.*, p. 5.

limited and tainted with provincialism or excessive nationalism.”⁴³ His views echoed and re-echoed in the comments of others. The Philippine Delegation thought bilateral assistance “would never be a substitute for that offered by the United Nations or under its auspices.”⁴⁴ Thailand’s representative was willing to accept bilateral, multilateral, and international aid, as all could help, but he gave priority to the latter.⁴⁵ Tanzania thought that bilateral assistance was useful and generous but that it could not replace the United Nations’ method of financing, which was both more certain and more permanent.⁴⁶ The small Marxian Socialist countries varied in what they chose to emphasize. Czechoslovakia favored strengthening existing national and international institutions, and in the latter to assure the presence of legal doctrine and teachers from different systems.⁴⁷ The Hungarians concluded that bilateral assistance, however valuable, could not be a substitute for a program organized under United Nations auspices.⁴⁸ Rumania argued that international action should be merely complementary to the national programs.⁴⁹

The Special Committee’s proposal that UNESCO be invited to prepare a model curriculum⁵⁰ in international law evoked strong dissent. The United Kingdom said such a model “could lead to a loss of flexibility in teaching and might even encroach on the academic freedom of university teachers.”⁵¹ Greece agreed that a model curriculum would tend to undermine the principle of freedom of instruction and research.⁵² Mali considered it impossible to synthesize all existing legal systems in a model curriculum.⁵³ France, however, believed that the new United Nations Institute for Training and Research might work out a model curriculum.⁵⁴ Thailand also conceived the preparation of a such a curriculum possible, at least to the extent of fixing a priority of topics on the basis of law already developed by the United Nations and the generally accepted rules of the Charter, but its delegate warned that account must be taken of the changing structure of international law.⁵⁵

The subjects to be taught were controverted along lines that crossed both East and West and North and South. The Netherlands⁵⁶ joined the Belgian rapporteur⁵⁷ in proposing that the subjects be practical and not theoretical and controversial. Japan also wanted the subjects to be practical and realistic.⁵⁸ The United States was agreed that the material

⁴³ *Ibid.*, SR.864, Prov., Nov. 3, 1965, p. 14.

⁴⁴ *Ibid.*, SR.869, Prov., Nov. 9, 1965, p. 8.

⁴⁵ *Ibid.*, SR.867, Prov., Nov. 5, 1965, p. 14.

⁴⁶ *Ibid.*, SR.869, Prov., Nov. 9, 1965, p. 12.

⁴⁷ *Ibid.*, SR.867, Prov., Nov. 5, 1965, p. 11.

⁴⁸ *Ibid.*, SR.870, Prov., Nov. 11, 1965, p. 16.

⁴⁹ *Ibid.*, SR.862, Prov., Nov. 2, 1965, p. 13. ⁵⁰ Report, *cited* note 24 above, at par. 34.

⁵¹ U.N. Doc. A/C.6/SR.861, Prov., Nov. 1, 1965, p. 5.

⁵² *Ibid.*, SR.870, Prov., Nov. 11, 1965, p. 13.

⁵³ *Ibid.*, SR. 864, Prov., Nov. 3, 1965, p. 15.

⁵⁴ *Ibid.*, SR.865, Prov., Nov. 4, 1965, p. 5. ⁵⁵ *Ibid.*, SR.867, Prov., Nov. 5, 1965, p. 14.

⁵⁶ *Ibid.*, SR.865, Prov., Nov. 4, 1965, p. 7. ⁵⁷ *Ibid.*, SR.859, Prov., Oct. 27, 1965, p. 2.

⁵⁸ *Ibid.*, SR.865, Prov., Nov. 4, 1965, p. 9.

should be strictly legal and concern areas where law was well established.⁵⁹ In contrast the U.S.S.R. demanded that controversial subjects be not excluded,⁶⁰ and it was joined by Sweden, which wanted to include "every field, controversial or not."⁶¹

Bulgaria emphasized that too much emphasis was being given to the prospective place in the curriculum of "peaceful settlement," and proposed that the subjects be:⁶² "legal problems connected with the development of national independence movements and the decolonialization process (for example, legal aspects of the fundamental right of peoples to self-determination and national independence; problems of succession and the legal implications of the attainment of independence by former colonies; rights and obligations of new states with regard to treaties previously concluded by the administering Power; legal means of protecting the sovereignty of states over their national wealth and natural resources), legal aspects of the use and exploration of international rivers for purposes other than navigation (irrigation, hydroelectric and industrial exploration), principles and legal techniques for international co-operation in the economic, technical, social, humanitarian and cultural fields (international trade; international financial transactions; international transport and communications; legal aspects of technical co-operation and technical assistance), international institutions (legal capacity, international status, treaty practice and operational activities), national jurisdiction (the United Nations Charter and the principle of non-intervention)."

India,⁶³ likewise, emphasized subjects relating to the changing field of international law, and placed on the frontiers of that law: space law, the peaceful utilization of nuclear energy, for instance, the legal regime of nuclear-propelled ships, international trade and development, regional economic co-operation and integration, and the law of treaties. Also the delegate noted that new ideas were coming to light, "for example the principle of supra-nationalism in the European Economic Community." He reaffirmed what many had said, that "In modern times, no single region could have the predominant role in shaping the future course of international law." Consequently, he demanded that programs furnishing technical assistance should be international in spirit and free from any national bias. To assure this approach he came out strongly for direction of such programs by the United Nations and its specialized agencies. By extending the scope of international law to the developing countries, he believed that the United Nations would be helping them indirectly to make a more comprehensive and substantial contribution to the evolution of international law.

Pakistan⁶⁴ saw nothing controversial about the field of research and study in international law. Its delegate's worry was lack of knowledge of teaching methods, and the absence of textbooks written by scholars, particularly from developing countries, oriented toward the future. He added:

⁵⁹ *Ibid.*, SR.861, Prov., Nov. 1, 1965, p. 10.

⁶⁰ *Ibid.*, SR.862, Prov., Nov. 2, 1965, p. 4.

⁶² *Ibid.*, SR.863, Prov., Nov. 3, 1965, p. 6.

⁶³ *Ibid.*, SR.867, Prov., Nov. 5, 1965, p. 3.

⁶¹ *Ibid.*, SR.866, Prov., Nov. 5, 1965, p. 3.

⁶⁴ *Ibid.*, SR.863, Prov., Nov. 3, 1965, p. 4.

The international law which was to be disseminated must first of all be purified of its dross and its anachronistic elements, and that task could be carried out only by scholars from the developing countries.

Techniques to be used by the United Nations in providing technical assistance in international law concerned the delegates from many states. One of the most systematic and detailed statements came from Professor Stephen Verosta of the University of Vienna.⁶⁵ He reminded the committee of the part he had played in fostering thought on the subject. Three years earlier he had noted the inadequacy of discussion of items before the International Law Commission; and as a result of thought given subsequently, the Secretary General, in response to Resolution 1968 (XVIII), had sent to seventeen international organizations or institutions topics before the Sixth Committee, the International Law Commission or other organs of the United Nations so that they might include the topics in their programs of work.

He had also proposed in the past seminars similar to those held under the auspices of the United Nations in various regions of the world on human rights.

New measures being developed and meeting his approval were those of UNESCO, which had announced that its organization had already included dissemination of international law in its program. The newly established United Nations Training and Research Institute, under the direction of Gabriel d'Arboussier of Sénégal, had already indicated that its program of training for civil servants would include international law, and he urged that this Institute be made the center of planned activities in the field of international law, with the exception of bilateral agreements between states. Austria was ready to supplement the Institute's work by making available to it scholarships for its graduates to do postgraduate work in Vienna at the Diplomatic Academy.

Somalia saw the first step as the distribution of periodicals and books to libraries in strategic places,⁶⁶ and Turkey called for "pilot libraries."⁶⁷ Thailand thought libraries more necessary in some places than teachers.⁶⁸ The United States focused on distribution of United Nations publications more widely.⁶⁹ Italy,⁷⁰ Finland⁷¹ and Cyprus⁷² saw the need for translations.

Ambassador d'Arboussier rose to the opportunity offered by Professor Verosta to bring into the program the new Training and Research Institute.⁷³ He announced that, with the encouragement he had received, he would propose to the Institute's Board inauguration in 1967 of a course of from seven to eight months in international law to be given to from ten to fifteen persons. He would budget \$100,000 for such a course. By his action he created what could become the nucleus of a central teaching pro-

⁶⁵ *Ibid.*, SR.862, Prov., Nov. 2, 1965, pp. 9-11.

⁶⁶ *Ibid.*, SR.861, Prov., Nov. 1, 1965, p. 7.

⁶⁷ *Ibid.*, SR.862, Prov., Nov. 2, 1965, p. 15.

⁶⁸ *Ibid.*, SR.867, Prov., Nov. 5, 1965, p. 14.

⁶⁹ *Ibid.*, SR.861, Prov., Nov. 1, 1965, p. 7.

⁷⁰ *Ibid.*, SR.865, Prov., Nov. 4, 1965, p. 14.

⁷¹ *Ibid.*, p. 11.

⁷² *Ibid.*, SR.867, Prov., Nov. 5, 1965, p. 13.

⁷³ *Ibid.*, SR.869, Prov., Nov. 9, 1965, p. 2.

gram comparable to the international faculty demanded by many of the developing countries.

Debate on the financial provisions also separated the ardent advocates of a United Nations technical assistance program in international law from those who preferred to keep the United Nations out of legal education. A direct charge upon the budget of the United Nations supplemented by voluntary contributions was favored by some of the developing nations, including Tanzania⁷⁴ and Mali,⁷⁵ but they were supported also by Spain.⁷⁶ A modified position was that of The Netherlands,⁷⁷ which would accept a budget request, but only if there were no duplication with existing facilities. The third proposal was to request a budget allocation only after attempting to obtain voluntary contributions and exploring the possibilities of obtaining limited funds from the Technical Assistance Programs. This position was supported by Argentina,⁷⁸ Chile⁷⁹ and Ireland.⁸⁰ The fourth proposal was a modification of the first. Its proponents were willing to demand a budget allocation but only after a one-year try for voluntary contributions. In this column were found Australia,⁸¹ Canada,⁸² the United Kingdom⁸³ and the United States.⁸⁴ India⁸⁵ had its version in saying that it was willing to try voluntary contributions, but it noted that experience had shown that none had been forthcoming. Those wanting to limit the funds to voluntary contributions only were Czechoslovakia, France, Hungary and the U.S.S.R., although the latter was also ready to try to obtain funds from existing Technical Assistance Programs and at the end of the discussion seemed to be dropping money limitations altogether.⁸⁶ Finally, there was the group that wanted to try only for a budget line without making attempts to obtain voluntary contributions. These included the Philippines⁸⁷ and Thailand.⁸⁸

What are the merits in the schemes presented, and what financial demands should be favored by scholars? Proponents of the wide dissemination of international law throughout the world cannot but be enheartened by the world-wide thought given the subject. No member of the American Society of International Law would oppose wider dissemination, for his membership in a voluntary association bears testimony to his belief that international law supports a system of world order to be preferred over the peace maintained by a modern Rome or laissez-faire in international relations.

There can be real question, however, of the desirability of United Nations' participation in what is already an extensive program of dissemination

⁷⁴ *Ibid.*, p. 12.

⁷⁵ *Ibid.*, SR.864, Prov., Nov. 3, 1965, p. 16.

⁷⁶ *Ibid.*, SR.863, Prov., Nov. 3, 1965, p. 9.

⁷⁷ *Ibid.*, SR.867, Prov., Nov. 5, 1965, p. 7.

⁷⁸ *Ibid.*, SR.868, Prov., Nov. 8, 1965, p. 2.

⁷⁹ *Ibid.*, SR.867, Prov., Nov. 5, 1965, p. 6.

⁸⁰ *Ibid.*, SR.862, Prov., Nov. 2, 1965, p. 6.

⁸¹ *Ibid.*, SR.868, Prov., Nov. 8, 1965, p. 5.

⁸² *Ibid.*, SR.867, Prov., Nov. 5, 1965, p. 10.

⁸³ *Ibid.*, SR.866, Prov., Nov. 5, 1965, p. 6, and *ibid.*, SR.868, Nov. 8, 1965, p. 5.

⁸⁴ *Ibid.*, SR.868, Prov., Nov. 8, 1965, p. 3.

⁸⁵ *Ibid.*, SR.867, Prov., Nov. 5, 1965, p. 4.

⁸⁶ *Ibid.*, SR.870, Prov., Nov. 11, 1965, p. 12.

⁸⁷ *Ibid.*, SR.869, Prov., Nov. 9, 1965, p. 10.

⁸⁸ *Ibid.*, SR.867, Prov., Nov. 5, 1965, p. 15.

through bilateral arrangements. The debates in the Sixth Committee demonstrated that proponents of bilateralism lack faith in the wisdom of those who would devise the curriculum of the internationally conducted faculty. The bilateralists have cause to worry, for if they are to request funds from their parliaments to defray the costs of educating foreigners, they may have to show themselves in a position to control the teaching. The adage that "He who pays the piper calls the tune" still reigns in many lands. It must be recognized that deputies could be reluctant to vote funds to a school that might present positions detrimental to foreign policy objectives, the more so since international law has been cited in the United Nations not only to dampen tensions but even to support intervention in the affairs of old and new countries. The debates over technical assistance elicited comments showing that developed states, whatever their political orientation, had misgivings about the utility to them of publicly supported faculties. They were prepared to spend fortunes in disseminating international law, but they wanted to do so through their own universities.

To analyze the merits of the issue posed by the bilateralists in opposition to the internationalists, scholars can call upon considerable experience. Much of it comes from the Academy of International Law at The Hague, to which many speakers in the Sixth Committee gave endorsement. Members of the American Society of International Law know the experience, for many have taught and studied there during its long history. Teachers and students from Eastern Europe, Latin America, Africa and Asia have been attending increasingly in the last decade. Another source of experience is the International Faculty for the Teaching of Comparative Law, which has its seat at Strasbourg but which travels widely in Europe and abroad. It has included during the past decade among its teachers and students specialists not only in the traditional Romanist and common law systems but also experts on the law of Marxian Socialist, Islamic and the newly emerging states of Africa. In this Faculty, unlike the Hague Academy, the curriculum is established by a Council representative of the major legal systems. Harmony has prevailed.

Teachers at The Hague and at the Strasbourg Faculty quite naturally extol to their students the measures offered by their systems in solution of modern social problems and in resolution of international disputes, and students debate them not only with professors but with each other in the hostels and restaurants after class. In these debates the losers are only those institutions which in structure or in application debase the dignity of man, and the lessons are by no means one-sided. Proof has been provided that a faculty in which teachers and students come from many lands and from quite differing schools of political and legal thought can live and study together to the advantage of values cherished widely by academic people. A narrow political position is quickly identified as such in this forum, and its proponent is reduced in popular esteem.

On balance and in review of the experience of the two most broadly international faculties of law, legal education outside the confines of bilateral arrangements has proved its feasibility. Yet, a cautionary remark

is needed. Education by an international faculty is most effective when it follows an education in fundamentals. In short, it is the man or woman who already has an introduction to law who profits most by the interchange of ideas between proponents of differing schools of thought and differing systems of law. Unless the student has a base on which to build, he can only be confused by two or three rules, each presented by a proponent who pretends either that no other rule exists or that no other has merit. The student in an international faculty needs the critical sophistication of approach that comes from maturity within a system to evaluate what he hears. The international forum is to be recommended, then, only as a post-graduate experience. And in support of this conclusion may be added yet another argument: Since international faculties of necessity utilize the major internationally known languages of English and French, the student without knowledge of both understands only a part of what is being taught. He wastes his time when he might be using it to advantage at home or in a foreign faculty for which he has been prepared linguistically. For Africans this point is of major importance, for they cannot be expected to learn two languages in addition to that of their tribe in the few short school years available before entering a law faculty.

If, on the basis of what has been said, the decision is made to support an international postgraduate faculty offering a full course of subjects or the more limited program of a seminar in a given branch of law of current interest, the question posed is whether the desirable direction should be by an instrument of the United Nations or an existing school such as the Hague Academy or the Institute of Advanced International Studies of the University of Geneva, or some other academically oriented institution directed by scholars.

The division of thought between proponents of dissemination of international law by existing institutions and those wishing to create new United Nations organs suggests that the developing nations lack full confidence in what has been the system to date. They fear that the long established institutions may not keep pace with developments; that their long period of operations incline their teachers and governing bodies toward the conservation of old ideas; that they may be reluctant to employ daring young men to augment their staffs. The argument rings convincingly if taken in the abstract, but the experience of the Hague Academy, the Geneva Institute and the International Faculty for the Teaching of Comparative Law suggests that such conservation need not necessarily be enshrined in established teaching institutions. All three faculties have drawn their teachers from a wide variety of countries, both old and new, and have admitted students without regard to origin. What limitations there have been are based on lack of funds to bring teachers and students long distances. All three have been quick to include new subjects in the curriculum.

On the other hand the developed countries have exaggerated the dangers offered by international faculties as disseminators of heretical views. Politically oriented conclusions on the substance of international law have assuredly been expressed from their platforms, but these political views

have been muted since they come from the mouths of scholars. There is no strident cold war theme similar to the one often heard in the halls frequented by diplomats.

Scholars in the already developed states cannot but take note that the representatives of the newly developing states are not content with what has been offered, in spite of its quality. Africans and Asians want a program over which they will have influence through their preponderant weight in the United Nations. A crisis of confidence has emerged, and it cannot be dispelled easily; probably not without an experiment with a United Nations program. Since the proponents of international law's dissemination through existing arrangements face an almost overwhelming demand from the developing states for a United Nations program, and since such a program could be expected to build confidence among peoples who will be receptive to no other, acquiescence in the demand is indicated for those determined to advance the discipline. Existing international non-governmental institutions would not be killed, for they could do what was suggested by Professor Verosta, namely, provide an opportunity for those who have first attended the United Nations program to test their knowledge in the company of scholars less subject to the influence of governments than those participating in a program directed by the United Nations. Existing bilateral arrangements need not be set aside, for they could provide the training in introductory courses which would not be part of the post-graduate tuition by the United Nations.

If the United Nations is to have a program, how extensive should it be? Obviously, the size will be controlled by the funds made available, but the problem of money is essentially one of priorities. Those who spoke against drawing on the general budget included those who oppose all vigorous activity of the United Nations and attempt to keep its expenses at a minimum, and those who consider the United Nations useful but place a very low priority on international law as irrelevant to the solution of current problems along lines favored by them. The scholar who is enthusiastic about international law will know how to face such critics, for there is money to be had from the regular budget for those who are militant in their espousal of programs they deem vital.

While funds can be expected, the scholar cannot forget that he will espouse causes only if the means proposed to achieve his aim are efficient in their use of funds. His question will be: How much can be done advantageously by the United Nations beyond what is already being done by other agencies? The answer will vary with individuals, but majority agreement can be expected upon a common core. The experience gained by the Secretariat with human rights seminars has been universally acclaimed. So also have been the intern programs, and the provision of experts to the universities of countries requesting them. The voice of Mali deserves to be heard on this subject, when its delegate proposed that professors come to the developing countries rather than that students travel to a remote center for training. The voices of several delegates calling for improved library facilities also command attention, especially when heard

from the Asian countries where there are already international law teachers of note, handicapped by inadequate research and teaching resources.

Resolution 2099 (XX) finds a place for these limited features, but should there be more? The answer is dictated in considerable measure by the audience for whom the programs are to be directed. If it is to be primarily Asian, African and Latin American, the argument has been that a program must be conducted on those continents. Existing postgraduate programs conducted with international faculties are located in Europe. Occasionally a European-based institution has conducted a session with its international faculty transported elsewhere, as when the International Faculty for the Teaching of Comparative Law traveled in successive years to Mexico, Honduras and Chile. The visitors joined with the scholars of the Latin American host countries to present a combination of professors from the developed and developing countries. This is what the speakers in the Sixth Committee desire. The difficulty in the traveling international non-governmental faculties has been not with arrangements but with funds. Students could not afford to attend even from neighboring countries for lack of scholarships, and professors from abroad had to forego fees and find sufficient inspiration in the experience to make it worth their while to contribute their time. This situation is obviously inadequate for a sustained effort. The only presently foreseeable solution is financing from an international source whose budget is provided primarily by the powerful states. This need suggests United Nations sponsorship.

With such considerations in mind, there is strong ground to support extension of United Nations technical assistance to the conduct of a co-ordinated teaching program in international law to be given on the continents of the developing countries. This would require more than a seminar in a given subject limited to a brief two weeks. It would be comparable to the six weeks' or two months' sessions now being conducted by non-governmental institutions in Europe. It would bring together professors from various countries, including those from the developing regions, and would present a thorough course of lectures and discussions arranged in a curriculum which would be balanced to treat the major issues of the times and region in which it sat. It would be postgraduate in the sense that it would expect the students to have completed a course in law in their national or regional universities, in which they would have demonstrated proficiency in the usual programs introducing students to international law. It would require examinations and research papers to assure serious attention and to qualify those who completed the course for a testimonial to their proficiency.

Who might conduct such a program? Several delegates suggested the new United Nations Institute for Training and Research, although this Institute currently thinks in terms of a program for a very few individuals to be brought presumably to the headquarters in New York or to Geneva. Others have wanted to create a new unit within the Secretariat, or perhaps to fit the program under current technical assistance administrators. Again, the experience of those non-governmental institutions

which have sent their faculties to other continents suggests that the operation requires the patient and unflagging effort of a full-time staff both at headquarters and in the field. This staff must be experienced in the administration of educational projects. There is need for the highest professional dedication to the task, and for those who know the capacities of scholars throughout the world. Personal acquaintance is necessary to the choice of effective teachers, who cannot be evaluated upon the basis of biographies and letters of recommendation. It is because of fear that the United Nations is likely to be influenced by country quotas established for political balance or to make selection of teachers through bureaucratic procedures that some of the opposition to a United Nations program in legal education has been expressed. To overcome these fears, the directing agency must go more than halfway in avoiding the pitfalls. Perhaps a contract with the Hague Academy or with one of the other established faculties to organize the visiting sessions in Africa, Asia, or Latin America for the United Nations would be the solution at the outset until a pattern has been evolved. Then, if the emphasis given in the courses is not wholly what the developing countries desire, they could readapt the pattern to a United Nations operation, and the operating routines established by the scholars could be easily followed with such limited modification as might seem desirable.

To conclude: There are convenient means of meeting the expressed need for technical assistance in international law in the developing continents. A program directed to this end could spread widely knowledge of mankind's experience in seeking order and peace. Whether the result would be the peace that all desire cannot be predicted, but surely the scholars of the world who have devoted their lives to the premise that education makes for progress toward peaceful relations and co-operation would have reason to support the effort.

JOHN N. HAZARD

NOTES AND COMMENTS

FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES: DEBATE AT THE TWENTIETH GENERAL ASSEMBLY, UNITED NATIONS

The consideration of the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations is to continue.¹ The Report of the United Nations' Special Committee² appointed by the Eighteenth General Assembly on December 16, 1963,³ to consider this subject, and which sat in Mexico City in the late summer and fall of 1964, was debated at length by the Sixth Committee at the Twentieth General Assembly.⁴ (It could not be considered at the Nineteenth General Assembly because of the general stalemate resulting from the Big-Power conflict over the U.N. Expenses issue.)

The decision at the Twentieth General Assembly, strictly speaking, is not to continue the original Special Committee on Friendly Relations but instead to constitute a new Special Committee composed of all the members of the old committee plus four additional countries. The added members were a response to the view, strongly pressed in the Sixth Committee debate, that it was necessary to "correct a lack of geographical balance" in the original membership of the Special Committee which, it was contended, gave an "inadequate reflection of the trends prevailing in the General Assembly" and did not properly represent the newly independent states.⁵ By agreement, the four new seats on the Special Committee were to be allocated on the basis of two from Africa, one from Latin America, and one from Asia—later confirmed as Algeria, Kenya, Chile, and Syria.⁶ The actual designation of representatives of each country on the Special Committee was to be left, as before, to the country concerned, with, however, the admonition, as before, that "in view of the general importance and the technical aspect of the item," governments should appoint "jurists" as their representatives.⁷ The new Special Committee is to meet at United Nations Headquarters "as soon as possible" and, in any case, to report back to the General Assembly at its Twenty-First Session

¹ E. McWhinney, "The 'New' Countries and the 'New' International Law: the United Nations' Special Conference on Friendly Relations and Cooperation among States," 60 A.J.I.L. 1 (1966); and see also L. T. Lee, "The Mexico City Conference of the United Nations Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States," 14 Int. and Comp. Law Q. 1296 (1965).

² U.N. Doc. A/5746, Nov. 16, 1964.

³ Res. 1966 (XVIII), Dec. 16, 1963.

⁴ See Consideration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. Observance by Member States of the Principles relating to the Sovereignty of States, their Territorial Integrity, Non-Interference in their Domestic Affairs, the Peaceful Settlement of Disputes and the Condemnation of Subversive Activities. Report of the Sixth Committee, U.N. Doc. A/6165, Dec. 18, 1965.

⁵ *Ibid.* 27.

⁶ *Ibid.* 30.

⁷ *Ibid.* 33.

in the fall of 1966, for which the subject of "Friendly Relations" is once again to be on the provisional agenda.⁸ The agenda of the new Special Committee is, once again, to be the four principles set out in paragraph 3 of General Assembly Resolution 1815 (XVII)⁹ and actually considered in Mexico City, "having full regard to matters on which the previous Special Committee was unable to reach agreement and to the measure of progress achieved on particular matters"; plus the three additional principles set out in paragraph 5 of General Assembly Resolution 1966 (XVIII) which were never reached at Mexico City.¹⁰ The question of methods of fact-finding, which had been listed for study in the Mexico City meetings and actually reached as the last item on the agenda but never really discussed there because of lack of time,¹¹ was disposed of separately by asking the U.N. Secretary General to make a further study and report directly to the General Assembly at its Twenty-First Session, and also by inviting Member States to submit their views in writing to the Secretary General.¹²

The detailed debate in the Sixth Committee at the Twentieth General Assembly understandably went over a good deal of the ground already covered in detail in the Mexico City debates over the first four principles contained in paragraph 3 of General Assembly Resolution 1815 (XVII). Some of the comments, however, raised issues of general principle going beyond the particular principles being discussed, and having to do with the bearing of the international law of friendly relations, as such, on more general international law; the rôle of the Special Committee in the international lawmaking process and whether it was to be concerned only with the restatement of *lex lata* or with the development and elaboration of *lex ferenda* too; and finally the rôle of consensus in the establishment, or as evidence of the existence, of a rule of international law, and whether the working rule applied at Mexico City of insisting on unanimity before any particular legal formulation could be adopted by the Special Committee did not introduce a virtual right of veto out of harmony with the rules of procedure of the U.N. General Assembly. (The unanimity rule, as actually applied at Mexico City, had meant that on only one principle, equality of states, was there any decision by the Special Committee, while on the principle of the duty to refrain from the threat or use of force, a final decision had been prevented by the change of position of a single state, the United States.¹³

Perhaps these particular views are best represented by the Czechoslovak representative to the Sixth Committee, Dr. Vratislav Pechota,¹⁴ who had been one of the prime sponsors of Resolution 1966 (XVIII) in the Gen-

⁸ *Ibid.*

⁹ Res. 1815 (XVII), Dec. 18, 1962; and see 60 A.J.I.L. 1, at 5 (1966).

¹⁰ Res. 1966 (XVIII), Dec. 16, 1963; and see 60 A.J.I.L. 1, at 6 (1966).

¹¹ 60 A.J.I.L. 1, at 29, note 114 (1966).

¹² U.N. Doc. A/6165, Dec. 18, 1965, pp. 34-35.

¹³ 60 A.J.I.L. 1, at 15-16 (1966).

¹⁴ See Statement by Dr. Vratislav Pechota, Czechoslovak representative in the Sixth Committee, Nov. 8, 1965 (Czechoslovak Permanent Mission to the United Nations, New York).

eral Assembly. Dr. Pechota attacked the tendency, which he ascribed to the major Powers, to consider the law of coexistence (friendly relations) as applying only in their relations vis-à-vis other great Powers and not in their relations to smaller states. Though he did not identify this in terms, his attack was essentially on the concept of coexistence (friendly relations) as a set of specialized norms governing Soviet-bloc and Western legal relations, or Soviet-U.S. relations above all. Dr. Pechota also criticized the view that Soviet-Western legal relations today are posited on a series of more or less tacit understandings and *de facto* accords or "rules of the game"—a view, he said, which would deny the existence of the peremptory principles of international law that, in his view, cover all aspects of interstate relations. Dr. Pechota seemed here to be trying to dispose of several distinctively Western-based theories of law at the same time; for example, Dean Acheson's often published remarks on the inevitable relation between law and power,¹⁵ and some of the American legal realist emphasis on law as social fact and the necessary minimum correspondence of law to *de facto* conditions and demands in the contemporary World Community.¹⁶ At the same time, his reference to the "peremptory principles" of international law seems to be consciously tied in to an emerging Socialist-bloc emphasis on a *jus cogens* which, expanded beyond its original, more strict connotation in the law of treaties area, seems to embrace certain assertedly paramount (though as yet unspecified) principles of international law. In a later part of the same address, Dr. Pechota, arguing for an expanded lawmaking rôle for the Special Committee in its consideration of the principles of friendly relations, seemed to invoke American-type constitutional law arguments in contending that the Charter should not be viewed as a "static body of principles designed to safeguard a *status quo*," but that it should be interpreted "dynamically" so as to reflect what Dr. Pechota characterized as "qualitatively new and higher phenomena of international life," identified among other things as the ending of "colonial domination."

Another contribution of special interest to the deliberations of the Sixth Committee on friendly relations was made by the United States' delegate, the Honorable William P. Rogers. Mr. Rogers, in a speech to the Sixth Committee on November 17, 1965,¹⁷ made a graceful acceptance of the Mexico City draft consensus paper on the principle that states refrain from the threat or use of force, the adoption of which by the Special Committee at Mexico City had been prevented when the United States with-

¹⁵ See, for example, Dean Acheson, in 1963 Proceedings, American Society of International Law 13, 14.

¹⁶ For a somewhat different approach to the same problem, from the viewpoint of Continental European legal thinking, see F. Münch, "Brauch und Missbrauch der normativen Kraft des Faktischen," 15 Jahrbuch der Albertus-Universität zu Königsberg/Pr. 29 (1965); *idem* (book review), 25 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 142 (1965).

¹⁷ See Statement by William P. Rogers, U. S. representative in the Sixth Committee, Nov. 17, 1965 (U.S. Delegation to the United Nations, Press Release 4706, Nov. 17, 1965).

drew its original accord. Mr. Rogers' speech seemed effectively to recover all of the ground lost by the United States in its abrupt change of position on this particular point at Mexico City. In any case, as a result of Mr. Rogers' statement on behalf of the United States, the Mexico City draft consensus paper on the principle that states refrain from the threat or use of force has thus finally received the adherence of all the Mexico City Special Committee delegations.

Mr. Rogers explained the United States Delegation's *volte-face* at Mexico City in regard to the principle that states refrain from the threat or use of force,¹⁸ in part on the "imminent close of the [Mexico City] session . . . leaving inadequate time for further consideration." As he continued:

. . . The United States' difficulty in accepting paragraph 2(d) [of the draft consensus paper at Mexico City] was based on apprehensions about the use of the term "violate" in that paragraph—a term which carries with it a legal conclusion of guilt, but which says nothing about the nature of the acts upon which that legal conclusion is to be based. . . . We urged that a formulation more nearly in the language of fact rather than legal conclusion be worked out.

Mr. Rogers now accompanied his acceptance of the draft consensus paper on the principle that states refrain from the threat or use of force with the following formal explanation:

In so doing, we would wish to emphasize that it is our understanding that "to violate" a boundary does not encompass the lawful use of force. In our opinion, it is clear from the work of the [Mexico City Special] Committee and the text of the statement on the use of force, particularly paragraph 3, that the employment of force across frontiers in the exercise of the right of individual or collective self-defense, or any other lawful use of force consistent with the Charter, is not a "violation" of that frontier.

In connection with the United States' final change of position, and the accompanying formal explanation sought to be appended by Mr. Rogers to the announcement of change, Sir Kenneth Bailey, himself the head of the Australian Delegation to the Mexico City Special Committee conference, made some interesting and valuable comments on the techniques and procedures of international scientific legal conferences, on the occasion of his presiding at a session of the recent joint meeting of the American Society of International Law and the International Law Association (Canada), held in Toronto on December 4, 1965.¹⁹ As Sir Kenneth pointed out, there is no doubt that a necessary and useful flexibility in the give-and-take negotiations of an international legal drafting conference like that of the Mexico City Special Committee can be successfully combined with preservation of what are considered as legitimate national interests by the simple device of attaching limiting or qualifying "explanations" to one's adherence to otherwise too general and unqualified legal

¹⁸ 60 A.J.I.L. 1, at 15-16 (1966).

¹⁹ See note, "Regional Meetings of the Society," Joint Conference, Toronto, Canada, p. 379 below.

draft formulae. The proceedings at the Mexico City Special Committee sessions might well have been much speedier and the degree of formal consensus attained certainly far greater, if such a practice as recommended by Sir Kenneth Bailey had in fact been applied there.

The discussion in the Sixth Committee on the three principles of friendly relations not considered in Mexico City, namely, those set out in paragraph 5 of Resolution 1566 (XVIII), did at least open up some of the problems involved in trying to reach concrete agreement on what, after all, in comparison to the first four principles actually considered at Mexico City, seem to be principles that are either self-evident or else largely hortatory in tone and general significance.

On the principle of the duty of states to co-operate with one another in accordance with the Charter, many of the comments were of the nature that "good faith and a spirit of tolerance and understanding" were particularly important; or that co-operation should be "active, and not merely passive."²⁰ Other more specific suggestions were that political or other conditions should not be attached to technical assistance, and that economic barriers to co-operation should be removed; that the general and special principles adopted by the United Nations Conference on Trade and Development should be followed, and the gap between the developed and the developing countries narrowed; that barriers in cultural matters should be abolished and modern achievements in science and technology not left in the private domain of any state or group of states.²¹

The principle of equal rights and self-determination of peoples,²² was related by some representatives to the elimination of colonialism and to the rights of colonial peoples to independence and to decide freely on their political status and institutions, to choose their own economic, social and cultural systems, and to dispose freely of their natural resources. On one view, the administering Powers did not exercise full sovereignty over non-self-governing territories, but had a duty to help them to develop their own government.

A major and hitherto unsuspected problem of definition, but one necessarily inherent in postulated principles of such a wide level of generality and abstraction, was as to the entities or groups which were to enjoy the right of self-determination. Were "peoples" in the postulated principle merely synonymous with "states" or did they include minority groups within states, giving rise, for example, to a right of secession from an existing state, particularly in the case of states composed of more than one national community? And did the right of self-determination give rise to a right to use force in the exercise of that right, particularly against "colonial" repression or aggression; and, correlatively, were colonial Powers denied the right to use force against such movements? It is apparent, in connection with the discussion of this particular principle, that, as pointed out by Western jurists from the very outset of the technical legal debates over the issue of codifying the "law of Peaceful Co-

²⁰ U.N. Doc. A/6165, Dec. 18, 1965, p. 23.

²¹ *Ibid.* 23-24.

²² *Ibid.* 24-25.

existence," the mere iteration of an abstract, general legal principle can only be the beginning and not the end of scientific legal inquiry.

Finally, as to *the principle that states shall fulfill in good faith the obligations assumed by them in accordance with the Charter*,²³ it is clear that the new Special Committee will have some further semantic problems to attend to. It was suggested, for example, that the principle applied to "moral obligations as well as legal ones, including the moral duty to assume legal obligations." Other delegates took the view that the only obligations covered by the principle were those that were freely entered into and that were compatible with the Charter and with general international law; and that this would automatically exclude "obligations sanctioning aggression, colonial domination or inequality among States, unequal treaties, treaties imposed by force or fraud, or treaties which had been lawfully terminated." Another delegate suggested that any termination of treaties on the basis of *rebus sic stantibus* could not be grounded on any change of circumstances which the government seeking to terminate had itself brought about. In the light of this sweeping range of comments and suggestions, there seems merit in the conclusion by at least one delegate that the implications of this particular principle are such that they cannot be adequately clarified by general formulae.

EDWARD MCWHINNEY

THE WASHINGTON WORLD CONFERENCE ON WORLD PEACE THROUGH LAW

In a magnificent demonstration of capacity to agree on a world-wide basis, more than 3,200 of the leading jurists, lawyers, and law teachers from 121 countries worked together for a week, September 12-18, 1965, at the Washington World Conference, considered over 200 proposals, and approved nearly 100 of these as parts of a Work Program to strengthen international law rules and international legal institutions to advance the cause of world peace. That so many law leaders from all parts of the world representing nearly all creeds, languages, forms of government, traditions and customs could sit down at such a world conference and agree upon what must be done to make law a major factor for world peace demonstrates the commitment and dedication of the legal profession to the rule of law for the world community. The parade of plans and hopes, ideas and institutions which were presented at the Conference by participants from all over the world and then considered, approved or rejected, indicates how many are the agreements and how few the disagreements on what must be done to build a world ruled by law.

The Conference dealt with lofty ideals, but at the same time it decided to start at the bottom and build upwards rather than from the top down. For example, the Conference approved the idea of a *World Judicial System* but it then concretely approved a treaty creating "neighborhood" courts for the decision of minor disputes between two or more nations as the best, and a modest, beginning toward that *World Judicial System*. The

²³ *Ibid.* 26-27.

thought of the participants was that by creating the habit of going to court on minor matters on a "neighborhood" basis, the habit of using courts instead of force to decide disputes would become established as a habit of nations and they would be encouraged to submit their major disputes to the courts under the rule of law. Another major advance was the approval of the idea of a *World Law Code*. But here again in the more modest action was approval of the first of many volumes of the *Code*. The first volume is to contain those treaties which have the most world-wide acceptance as of now. Another concrete proposal which was approved was the World Bank's Convention setting up conciliation and arbitration rules and procedures for a *World Dispute Center* on foreign investments.

At plenary sessions, luncheons, and the banquet some 150 distinguished speakers, addressing large audiences, emphasized the imperative need of action by the legal profession to advance the rule of law internationally. These speakers included the President of the United States, the Chief Justice of the United States, the President of the International Court of Justice, the President of the United Nations General Assembly, and Chief Justices, Judges and Ministers of Justice from 59 nations. Ambassador Arthur Goldberg, Richard M. Nixon, Edward W. Kuhn, President of the American Bar Association, Attorney General Nicholas deB. Katzenbach, Senator Joseph Clark, Henry R. Luce, General David Sarnoff, and many other great leaders addressed the Conference. Prime Minister Wilson of England, King Constantine of Greece and most of the other heads of state sent messages of greeting and support to the Conference. The opening day was observed throughout the world as the first *World Law Day*. At special Conference *World Law Day* ceremonies, addresses were delivered by the Honorary Chairman, Chief Justice Kisaburo Yokota of Japan, the Chairman, Harold E. Stassen, and Lord Denning of England.

The Chief Justice of the United States, Earl Warren, in a landmark Inaugural Address, laid before the Conference an excellent summary of the facts which indicate to him that we of our generation have the capacity to create enough new law and new legal institutions to make law a major factor in world affairs. The Chief Justice said:

Achieving and maintaining a rule of law strong enough to regulate action of nations and individuals in the world community is no more dreamy, impossible or impracticable than was the idea of splitting the atom, or putting a man on the moon, or sending a missile to Mars a few years ago. I believe we of our generation can translate the centuries-old dream of a world ruled by law from dream into reality. In part, my belief is based upon the imperatives of our day which make this a necessity to save mankind from nuclear holocaust. In part, my belief is based upon the fact that there is more law and judicial institutions today, nationally and internationally, than ever before in the history of mankind. Given this knowledge and reliance and taking note of the necessity that we succeed in order to survive, I would like to comment upon factors we possess which should enable us to move forward in our quest for a world ruled by law.

He then cited the following: (1) We know more about law internationally and nationally than any other generation; (2) more and better law exists today within each nation; (3) more international law exists; (4) international judicial bodies have grown in number and usefulness; (5) extension of international law to the individual has developed a larger number of defenders and supporters of world law; (6) traditional international law concepts are being altered to encompass the history, traditions, customs and needs of newly independent nations; (7) heads of state are increasingly using world law in their dialogue and contacts in their conduct of foreign relations; (8) the peoples of the world are increasingly aware of what law can do for peace; (9) the legal profession is becoming organized to work co-operatively on a world-wide basis; and (10) the growing co-operation among judges.

President Johnson reaffirmed our Nation's "continuing dedication to the rule of law," saying: "We believe that is the surest road to a fruitful and secure peace." He also said:

Law is the greatest human invention. All the rest give him mastery over his world. Law gives him mastery over himself.

Commending the jurists and lawyers at the Conference for their initiative and leadership, he concluded:

If others join us, then the time may yet come when you and your colleagues will be honored as pathfinders toward the final armistice in man's war against himself.

The substantive work of the program was carried on primarily in panel sessions which discussed the following topics: Existing and Proposed International Courts, Space Law, International Law in Domestic Courts, International Communications, International Trade and Investment, Arbitral Tribunals, Human Rights, International Judicial Cooperation, Disarmament, Industrial and Intellectual Property (*i.e.*, patents, copyrights, and trademarks), Creative Research, Education in International Law, and the Expanding Structure of International Law: Peacekeeping, General Principles, and International Organizations. For each of these topics a Work Paper summary was prepared by one of the world's leading experts in which basic problems and trends were described and recommendations made for research and action. After the Work Paper had been presented, other panelists summarized prepared papers or commented informally on the topic. Participants were given the opportunity to speak from the floor after scheduled speakers had made their remarks.

At these work sessions the rôle of adjudication in the resolution of international disputes was delineated; suggestions were made for the improvement and expansion of international law and international legal institutions; and recommendations were made to continue studies on the possible usefulness of regional and specialized courts. Panelists on international law in the domestic courts emphasized the contribution that domestic courts could make to international law and dealt with the fundamental principle that international law is part of the law of the land. Speakers

on international communications stressed the need for law to govern an expanded global satellite system. The transnational trade panel urged the development and adoption of procedures for the effective resolution of investment disputes; a model international code was recommended. Work Paper summaries were written for both commercial arbitration and arbitration between states, with emphasis on the improvement of procedures. Panelists on human rights pointed out the need to improve procedural machinery and protect rights by substantive declarations, agreements, laws and treaties. The panel on creative research in international law stressed the importance of viewing international law from a universal rather than a national viewpoint, and endorsed the International Law Manual project of the Carnegie Endowment for International Peace. The panel on the expanding structure of international law emphasized the need to strengthen the United Nations. Chief Justice Warren presided over special sessions attended by the 254 high court judges from 103 nations and other Justices of the U. S. Supreme Court. They discussed co-operation among members of the high courts of the world to further world peace through law, future exchanges of opinions and the need for a World Judicial Conference at which judges could get to know each other and exchange ideas and experiences. They stressed that the Washington Conference was the first world-wide meeting ever held of national high court judges and urged further meetings as most beneficial for the rule of law nationally and internationally.

The above is but a brief sketch of a few of the outstanding suggestions, ideas and proposals which emerged from the speeches, panel papers and discussions in which distinguished jurists, lawyers and legal scholars made so many valuable recommendations for advancement of the rule of law. In addition, some of the Center's committees presented reports and held meetings to discuss their future programs. The Center plans to publish a volume which will include the papers, addresses and summaries of some of the informal comments presented at the panel sessions.

World-wide attention was focused upon the Washington World Conference through celebration of the first *World Law Day* in more than 100 nations. *World Law Day* was proclaimed by President Johnson, and other heads of state, governors of States, and more than 700 mayors and city councils. Some of the latter proclamations were done jointly by United States cities and their so-called "sister" cities abroad. The holding of the first World Exhibit of Law Codes and Historic Documents was a rather unique "first" for the Conference. Heading the historical documents on display in this exhibit was the original of the 1225 Magna Carta from England and the originals of the Declarations of the Rights of Man from France. Many other originals of ancient law documents were also forwarded by other nations for display. These great law instruments of other nations were displayed at the National Archives of the United States along with the originals of our Declaration of Independence, Constitution and other great law instruments. Never in all history had so many of the great law instruments from all over the world been displayed at one time under

one sponsorship. The leading law book publishers and suppliers of services to lawyers participated by displaying their books and services. This unprecedented display of the instruments of mankind's great law heritage gave great inspiration to those working through the Conference to develop a program to substitute law for force as a decision mechanism internationally. Many expressed the hope that a similar exhibit would take place at future world conferences.

A 292-page Work Paper summarizing international law and experience with international legal institutions was given to all delegates. An 850-page looseleaf document entitled *Law and Judicial Systems of Nations* was also given to many of the participants. This volume summarizes the facts about law, lawyers, judicial systems, and legal education in 110 countries. It also contains a partial directory of leading members of the legal profession of these countries, Bar associations and law schools.¹ This loose-leaf volume will be constantly updated as a basic work document of the World Peace Through Law Center and as a Directory of leading jurists and lawyers of each nation.

That so large and diverse a group of outstanding jurists from the four corners of the earth could meet and agree on a program to advance world law is in and of itself a tremendous accomplishment. In essence the Conference delegates represented all elements of the world community. That they agreed on so many specifics should enable rapid advances to be achieved on many aspects of world law. The importance of the Conference participants as leading jurists within their own nations should cause the Conference agreements to have a great impact upon public opinion and leaders of nations.

The announcement by the Executive Committee of its decision to set up headquarters of the World Peace Through Law Center in Geneva and maintain there a "world law library" and a "world law information clearing-house" for Center members is a giant step forward toward making law more available and thus more used and usable throughout the world.²

At the final plenary session of the Conference a "Work Program to Advance a World Rule of Law" was adopted. This document identified and recommended research projects which should be made and encouraged the support of certain principles, institutions and educational action. It also pointed out significant developments in world law since the Athens World Peace Through Law Conference in 1963. As stated above, over 200 proposals were presented and about one half of these are incorporated in the Work Program. Others requiring further study were noted for future consideration.

The proposals with respect to such things as courts of human rights on

¹ Due to the great expense of preparing and printing this volume, it was released at the Conference to foreign registrants, Charter and Sustaining members of the Center only. Both of these documents are unique in that such information has never been compiled in this form before.

² In December, 1965, announcement was made of the establishment in Geneva on January 3, 1966, of the International Secretariat of the Center, under Director General Horace E. Henderson.

continents other than Europe, a multilingual legal dictionary and scores of other law subjects should focus enough public and legal attention on these needs to force essential progress toward fruition of ideas into concrete law rules and institutions.

The World Peace Through Law Center hopes that scholars the world over will take the initiative in making these needed studies. It hopes to aid and encourage this essential research, particularly in the law schools of all nations. The Center itself will urge its committees to make useful studies and reports and will seek other means to finance and carry out these research proposals. Already many world law projects are being sent to the Center from all over the world.

The Conference closed with a "Declaration of Faith in World Order Under Law" which proclaimed the ties between universal concern over war and effective procedures for the peaceful decision of disputes, the responsibility of members of the legal profession to improve the means of settling disputes, recognition of the critical nature of many current disputes, and urged that only by the application of the rule of law can these objectives be achieved. In this Declaration of Faith the participants declared that they

1. Reaffirm the Declaration of General Principles for a World Rule of Law adopted by the first World Conference on World Peace Through Law in Athens, Greece;
2. Pledge our continuing active support of the World Peace Through Law Center, created at Athens, and its global work program;
3. Pledge our continuing, devoted effort with each other and within our respective nations and legal organizations, to achieve the objectives of strengthening and expanding world law rules and world, as well as regional, legal and judicial institutions; and
4. Declare our unshakable faith that, whatever transient disputes there may be, a just world order under law can be achieved, and that, with patient determination and hard work, it will be achieved.

By every yardstick of measurement the Washington World Conference was a tremendous success. It had inspiration, information, participation and hospitality in abundance. Its "firsts" include World Law Day, World Exhibit of Law Codes and Historic Law Instruments and the World Judicial Conference. It was by far the largest world conference of the legal profession in all history. Another world conference will be held in 1967, probably in Geneva, due to conditions making the first site, New Delhi, difficult. In the meantime the great emphasis by the World Peace Through Law Center will be upon concrete progress on the global Work Program and the next Conference.³

³ Membership in the World Peace Through Law Center is open to all members of the legal profession. Regular membership in the World Peace Through Law Center is \$10 per year, Charter membership is \$50, and Sustaining membership is \$100. Members receive a monthly bulletin, can serve on one of the Center's 95 committees, receive research pamphlets and, if Charter or Sustaining members, receive the *Law and Lawyers of Nations*, the loose-leaf directory which will be kept up to date on a rather constant basis by the appointment of editors in each nation. All members are listed in the Directory along with their addresses.

The foregoing demonstrates that the legal profession is indeed organizing itself to make a major contribution to mankind's future. This very successful program to strengthen law rules and legal institutions should in time succeed in speeding the day when law will replace force as the controlling factor in the fate of humanity.

Above all, the world-wide dialogue and friendships generated among law leaders of nations make this program a tremendous factor for world peace. These leaders agree with Chief Justice Warren that the dream of a world rule of law is within man's capacity to achieve. They are moving realistically to translate that dream into concrete reality.

CHARLES S. RHYNE

SEMINAR ON PROBLEMS OF INTERNATIONAL LAW AND ECONOMIC DEVELOPMENT
UNIVERSITY COLLEGE OF LAW, DAR ES SALAAM, TANZANIA

An understanding of the interrelated and complex nature of development is one of the urgent problems facing the less developed countries. As they seek to develop their human and natural resources, their infrastructure, and, building on these, their industries with the help of private foreign investment, multilateral and bilateral foreign aid and trade and exchange agreements, they find themselves in need of the expertise of individuals who are knowledgeable in these areas. This goes beyond the replacement, often without any period of transition, of departing experienced civil servants of the former colonial Power with local lawyers and other administrators. The list of the subjects that now play a major rôle in the relations between the developed and less developed countries are new matters which were outside the province of the traditional colonial administrator.

Almost the entire complex structure of foreign and international development aid has been a postwar product. Concession agreements of the old type are being transformed into economic development agreements, which the governments of the developing countries conclude with foreign individual investors or groups of investors, or quite often with international consortia in which private investors as well as governments and international institutions participate. These agreements are no longer just a matter of granting to a foreign entrepreneur the right to exploit certain minerals or other resources in return for the payment of a license fee or royalty. They are complex and important instruments in the process of national economic development. Often these agreements are underpinned by loans from the World Bank, the International Development Association, the Agency for International Development or some other international or national public lending agency. They are essentially mutual co-operation agreements in which the foreign investor undertakes not only to exploit certain resources and to share the profits with the host government but also to develop educational, social, medical and other facilities.

Trade agreements have also altered in character. The developing countries are seeking new trading relationships with the developed Western

countries. Moreover, they seek to open up new trade channels among themselves and with the Communist countries. The trade agreements concluded between the developing countries and Communist states are especially interesting in that they have many characteristics of barter agreements, in which a certain staple commodity is exchanged in bulk against machinery and the services of experts. The need to compromise between the strong urge of national sovereignty and economic independence and the need for foreign help often leads to joint international business ventures between the host government and foreign public or private enterprises.

These and many other matters, which are the urgent concern of developing countries, call for technical assistance. Not only governments but private foundations and research organizations, and above all the academic community, can render important services in this area.

It is with this objective in mind that, in 1963, the new Law Faculty of the University College of Dar es Salaam requested the undersigned to explore the possibilities of systematic instruction in this area. The visit was made possible by a grant from the Ford Foundation, which has also supported the resulting institution of seminars on problems of international law and economic development at the University College of Dar es Salaam for a period of three years, beginning in the summer of 1964. In view of the predominant responsibility of governments for the various international activities which have been briefly sketched out, the seminars have been designed for participation, primarily though not exclusively, by senior civil servants detailed by the government departments concerned in international economic transactions (foreign affairs, finance, commerce and industry, justice and some others).

In view of the scarcity of qualified civil servants and the many demands on their time, two successive seminars, each of two weeks' duration, were established, and this made it necessary for each group to meet for four and a half hours daily for ten days, apart from frequent informal meetings after class. The first two seminars were held in late June and early July, 1964, the second group of seminars from mid-August to mid-September, 1965. Participants are senior civil servants from Kenya, Uganda, Tanzania and Zambia (in 1964 also Malawi), and the East African Common Services Organization. The Ford Foundation's grant covered the library, the cost of travel and living expenses for the seminar participants, and the cost of bringing three senior instructors from overseas. For the first series of seminars the instructors were the undersigned as Director, Mr. Robert F. Meagher, Associate Director of the International Legal Research Program at Columbia University, Assistant Professor Dan Nyhart of M.I.T., and Mr. Hugh Scott, a legal counsel of the World Bank. In the second series of seminars, the undersigned and Mr. Meagher were joined by Mr. Gilbert Verbit, now also a Research Associate in the Columbia Law School's program, and Mr. Lester Nurick, Deputy General Counsel of the World Bank. This staff has been supplemented by occasional visits from the managers of regional or local enterprises.

The subjects covered in the lectures and discussions included the following: investment codes and local laws, joint ventures, bilateral and multi-lateral aid, concession agreements, African institutions (Economic Commission for Africa, African Development Bank, African Institute of Economic Development and Planning, Organization for African Unity), development banks, state trading, and international commodity agreements. In addition, discussions were held on some local institutions and ventures such as the Kilombero Sugar Project, the Kenya Tea Development Authority and the Tanganyika Development Finance Company, Ltd.

Although the participating countries and ministries are generally still very short of trained personnel and therefore on more than one occasion had to cancel participation at the last minute, the average participation in each seminar has been from eighteen to twenty. In the last group of seminars distribution between the participating four states was almost even. This means that, at the end of the forthcoming group of seminars in the summer of 1966, from one hundred to one hundred and twenty senior civil servants from four east and central African states and the East African Common Services Organization will have received advanced training in matters which are of great importance to their work and to the development of their countries. The instructors have also derived great benefit from the close and informal contact with these varied groups of officials.

Particular thanks are due to the Ford Foundation for its far-seeing support, to the World Bank for its active and generous participation in this venture, and to the Law Faculty of the University College of Dar es Salaam for its initiative.

Plans are under way to establish similar series of seminars, essentially for law teachers, for other parts of Africa. In due course it is hoped that the civil servants and law teachers who have participated in these seminars will themselves assume the responsibility of instruction. This is already beginning to be the case at the Law Faculty of Dar es Salaam, some of whose graduates have, apart from participation in the seminars, acquired an LL.M degree at Columbia with specialization on problems of law and economic development.

WOLFGANG FRIEDMANN

Columbia University School of Law

TIBET'S DECLARATIONS OF INDEPENDENCE

If one applies a low flame to a teapot on the 15,000-foot high Tibetan plateau, the water inside will bubble furiously without giving off much steam or heat. To master this concept is to understand China's influence in Tibet during the second decade of this century.

No matter how much blustering came from Peking, the external political pressures on Tibet were applied by Great Britain and Russia. China's rôle had become ancillary, and Chinese influence was determined and prescribed by whatever plan Great Britain considered would best eliminate

Russia's growing influence in Tibet. It is in this context that comments on any aspect of Tibet's legal status in 1912 must be viewed.

A decisive turning point in Tibet's status was the declaration of independence in 1912, existence of which is denied in a note in the July, 1965, JOURNAL by Alfred P. Rubin¹ purporting to correct "mistakes of fact" in the Sino-Indian border dispute analysis by Professor Surya P. Sharma in the January, 1965, JOURNAL.² Mr. Rubin states:

There does not seem to exist any document or recorded statement that can properly be called a "declaration of independence in 1912" issued by any Tibetan authority. . . . There is ample evidence that whatever statements were issued in 1912 (or at any other time until the 1940's) fell far short of claiming "independence" of China.³

There is clear and convincing evidence that Mr. Rubin's suggestion of fact is wrong.

I. On December 29, 1912, Tibet and Mongolia concluded a treaty at Urga which acknowledged mutual independence. The relevant language, in Article 2, states:

The ruler of the Mongol people, Chjebzun Damba Lama, approves and recognises [*sic*] the formation of on [*sic*] independent (Thibetan) State and the proclamation of the Dalai Lama as ruler of Thibet.⁴

While at least one commentator has reported that the Tibetan envoy lacked authority to conclude the Urga Treaty,⁵ no statements to this effect appeared prior to the Simla Conference of 1913-1914. At that time, the possibility of any alliance between Russia-courtied Mongolia and Tibet had become especially repugnant to Great Britain, whose policy was to maintain Tibet as a Russia-India buffer. It is probable that the idea of discrediting the treaty was developed to further this policy and to highlight Tibet's swing toward Great Britain.

II. Affirmation of the Urga Treaty's validity as evidence of Tibet's intent appears in several British Foreign Office file references to the fact that independence had been declared. Citation of each would be tedious, but one at least merits attention. Sir Henry McMahon, Britain's delegate to the Simla Conference, said in his final report:

At the commencement of the year 1913 Thibet was in arms against her neighbour and suzerain China; the Chinese Resident, with his escort and troops, had been driven from the country, and Thibet had declared its independence.⁶

III. Other evidence of a declaration of independence is contained in Tibet's opening brief at the conference:

¹ Rubin, "A Matter of Fact," 59 A.J.I.L. 586 (1965).

² Sharma, "The India-China Border Dispute: An Indian Perspective," *ibid.* 16.

³ Rubin, *loc. cit.* at 586-587.

⁴ Mongol-Thibetan Treaty, Foreign Office File F.O. 535/16, Enclosure 1 in No. 88, p. 66 (1914). Other versions of the treaty appear in Perry-Ayscough & Otter-Barry, *With the Russians in Mongolia* 10-13 (1914) and Bell, *Tibet Past and Present* 304-305 (1924).

⁵ Bell, *op. cit.* at 151.

⁶ McMahon, Final Memorandum of the Thibet Conference, Foreign Office File F.O. 535/17, Enclosure 1 in No. 231, p. 231 (1915).

It is decided that Thibet is an independent State and that the precious Protector, the Dalai Lama, is the Ruler of Thibet, in all temporal as well as in spiritual affairs.⁷

The logical conclusion is that by 1914 Tibet had expressly declared its independence at least twice. Contrary to what Mr. Rubin suggests, it is not necessary to analyze "all reported statements of the Dalai Lama in 1912"⁸ to show that at least one might possibly be construed as declaring independence. Such a task should be spared even the most diligent fact-finder.

DAVID A. McCABE

THE 1963/1965 AMENDMENTS TO THE CHARTER OF THE UNITED NATIONS:
AN ADDENDUM*

The amendments to the United Nations Charter increasing the number of the non-permanent members of the Security Council from six to ten, the total membership of that Council from eleven to fifteen and the membership of the Economic and Social Council from eighteen to twenty-seven were adopted by the General Assembly on December 17, 1963, and entered into force on August 31, 1965.¹ On the latter day the Secretary General signed a Protocol of Entry into Force of the Amendments in two original copies in the five official languages. One of the copies was deposited in the archives of the Secretariat of the United Nations and the other was transmitted to the Government of the United States as the depositary of the Charter.² An Annex to the Protocol of Entry into Force contained a list of the 95 Members which had deposited instruments of ratification as of August 31, 1965.³

⁷ Proceedings of the First Meeting of the Thibet Conference held at Simla on October 13, 1913. "Statement of the Thibetan Claims," Foreign Office File F.O. 535/16, Annex IV to Enclosure in No. 413, p. 393 (1914).

⁸ Rubin, *loc. cit.* note 1 above, at 587, note 7.

* See 59 A.J.I.L. 834 (1965).

¹ General Assembly Res. No. 1991 A and B (XVIII), Dec. 17, 1963, U.N. General Assembly, 18th Sess., Official Records, Supp. No. 15 at 21-22 (A/5515) (1963), 59 A.J.I.L. 985 (1965); Statement by the Secretary-General of Aug. 31, 1965, U.N. Press Release SG/SM/353, L/1443.

² Protocol of Entry into Force of the Amendments to Articles 23, 27 and 61 of the Charter of the United Nations adopted by General Assembly Resolution No. 1991 A and B (XVIII) of Dec. 17, 1963, annexed to U.N. Doc. A/6019, Sept. 27, 1965, General Assembly, 20th Sess., Agenda Items 15 and 16, Election of non-permanent members of the Security Council; Election of members of the Economic and Social Council, Report of the Secretary-General.

³ Among the instruments of ratification listed in the Annex to the Protocol of Entry into Force was also the instrument of ratification by China. With reference to this, the Permanent Mission of the U.S.S.R. stated in a *note verbale* that the ratification "by the Chiang Kai-shek clique . . . which represents no one and has no right to speak in the name of China" is illegal and contrary to the Charter of the United Nations (U.N. Doc. A/6031, Oct. 5, 1965). This was a continuation of the struggle the Soviet Government had waged against the adoption of any Charter amendment in the absence of the Chinese mainland authorities through seven years from 1956 to 1963. On this, see 59 A.J.I.L. at 835-837 and 842-844 (1965). The Soviet Mission did not,

Ratifications of the amendments by nine governments were received by the Secretariat of the United Nations after August 31, 1965.⁴ These additional ratifications had the effect only of recording the express consent to the amendments by the governments concerned. Since August 31, 1965, the amendments, by virtue of Article 108 of the Charter, have been in force "for all Members of the United Nations," including the governments which deposited their instruments of ratification after that date and governments which have never ratified.

The Implementation of the Amendments

There existed two alternatives as to when to give effect to the increase in the membership of the two Councils: the one was to arrange for the election of the additional members as soon as possible after August 31, 1965, and to seat them immediately; the other was to have the elections take place in the normal course of the proceedings of the Twentieth Regular Session of the General Assembly (September-December, 1965) and to let the terms of office of the new members begin on January 1, 1966. Following the lead given by the Secretary General, the General Assembly chose the second course. In his statement of August 31, 1965,⁵ in the Introduction to his Annual Report on the Work of the Organization (1964-1965),⁶ and in his report to the General Assembly relating to the elections to the two Councils,⁷ the Secretary General said:

In order to give effect to the amended Charter, elections will be held during the twentieth session of the General Assembly to fill both the new seats and those which will become vacant on 31 December 1965 on the Security Council and on the Economic and Social Council. This accords with the provisions of Assembly resolution 1991 (XVIII),⁸ which provides that elections to fill old and new seats should be held on the same occasion. In accordance with rule 140 of the rules of procedure of the General Assembly, the term of office of the members of the Councils will begin on 1 January 1966.

In the statement of August 31, 1965, the Secretary General also said that he had consulted with the candidates for the forthcoming elections to the

however, draw the conclusion to allege that the amendments had not entered into force. It recalled that the government of the People's Republic of China had announced that it will not object to the enlargement of the Councils "even before the restoration of the rights of the People's Republic of China in the United Nations" (*ibid.*). Similar statements were made by the representatives of Czechoslovakia (U.N. Doc. A/6139, Dec. 4, 1965) and Hungary (U.N. Doc. A/6185, Dec. 17, 1965). The (Nationalist) Chinese Government, on its part, stated that the allegations set forth by the Soviet Union were untenable both in law and in fact. The Protocol of Entry into Force was, it said, "a legally valid document in its entirety. If any part of the provisions of Article 108 were not fulfilled, the amendments would not be deemed to have entered into force." (U.N. Doc. A/6055, Oct. 19, 1965.)

⁴ Status of Multilateral Conventions. Signatures, ratifications, accessions etc. received by the Secretary General. Report No. 8 (1965), ST/LEG/3, Rev. 1. U.N. Press Release L/1507, Jan. 21, 1966.

⁵ Note 1 above.

⁶ General Assembly, 20th Sess., Official Records, Supp. No. 1A (A/6001/Add.1), sec. XI.

⁷ Note 2 above.

⁸ *I.e.*, with Arts. 23(2) and 61(3) of the Charter as amended.

Councils and that they were in agreement with the foregoing.⁹ The General Assembly accepted the recommendations of the Secretary General. It elected the four additional non-permanent members of the Security Council on December 10, 1965,¹⁰ and the nine additional members of the Economic and Social Council on December 15 and December 18, 1965.¹¹ In electing the members to the new seats, the General Assembly proceeded in strict compliance with the pattern of geographical representation laid down in the General Assembly resolutions of December 17, 1963.¹²

The additional members of the Councils took office from January 1, 1966. In this arrangement it was clearly intended to be implied that in the period between August 31 and December 31, 1965, the two Councils would be deemed to be legally constituted and able to act in spite of the fact that their composition was in accordance with the original provisions of the Charter and not with its amended provisions.

On September 3, 1965, three days after the entry into force of the amendments, the Security Council, composed of eleven members, was called upon to take action in the serious conflict between India and Pakistan and adopted shortly afterwards a series of resolutions "calling for" and later "demanding" a cease-fire, its honoring and "prompt and unconditional execution."¹³ In the period September-December, 1965, the eleven-member Security Council took decisions also on Southern Rhodesia, on the territories under Portuguese administration, on Cyprus and on the admission of new Members.¹⁴ In the same four-month period the Economic and Social Council, composed of eighteen members, adopted various important resolutions¹⁵ and elected the Governing Council of the United

⁹ For an examination of the constitutional and legal questions involved in the choice between the two alternatives listed in the text, see 59 A.J.I.L. 850-852 (1965). The consultation with, and the agreement of, the candidates for the (then) forthcoming elections to the Councils were, in themselves, not conclusive because not only these candidates, but every Member and, in the light of Arts. 32, 35(2) and 2(6) of the Charter in regard to the Security Council, even non-Members, have or may acquire a legal interest in the composition of the Councils.

¹⁰ U.N. Doc. A/P.V. 1392 (Provisional). See also Doc. A/P.V. 1393 (Provisional).

¹¹ U.N. Docs. A/P.V. 1396, 1400 and 1403 (Provisional). In the case of the elections to one of the nine new seats on the Economic and Social Council, recourse had to be had to the device of "splitting" the term between two candidates (Iran and Syria).

¹² On the legal status of the General Assembly decisions on the pattern of geographical representation, see 59 A.J.I.L. 852 (1965). The statements preceding the election process made by the President of the General Assembly in its 1392nd and 1396th meetings are illustrative of the fact that he and the General Assembly, which followed his guidance, treated the provisions of the 1963 resolutions on the pattern of geographical representation as binding.

¹³ U.N. Docs. S/P.V. 1237, 1233, 1242; Security Council Res. Nos. 209 (1965), 210 (1965), 211 (1965), 214 (1965) and 215 (1965) of Sept. 4, 6, 20 and 27, and Nov. 5, 1965.

¹⁴ Security Council Res. Nos. 212 (1965), 213 (1965), 216 (1965) Rev. 1, 217 (1965), 218 (1965) and 219 (1965).

¹⁵ *E.g.*, on the annual report of the Trade and Development Board of the United Nations Conference on Trade and Development, and on the World Food Program, Report of the Economic and Social Council on the first part of its resumed 39th Session,

Nations Development Program which had been established by General Assembly resolution on November 22, 1965.¹⁶

In none of these cases was the question of the composition of the two Councils raised either by a member of one of the Councils or by any of the parties in proceedings before the Security Council or by any other interested government or authority. Still less was it alleged that either of the Councils was, in the transitional period September–December, 1965, not properly constituted. It can, therefore, be said that there has been agreement between all concerned in support of the interpretation of the Charter amendments proposed by the Secretary General¹⁷ and that there was “subsequent practice in the application of the treaty [the Charter amendments] which clearly establishes the understanding of all the parties regarding its interpretation.”¹⁸ This agreement and this understanding are further corroborated by the fact that the General Assembly adopted amendments to its Rules of Procedure, consequential upon the Charter amendments, with effect from January 1, 1966.¹⁹

Consequential Changes—Amendment of Article 109

Article 109 of the Charter provides in paragraph 1 that a General Conference of the Members of the United Nations for the purpose of reviewing the Charter may be held at a date and place to be fixed *by a two-thirds vote* of the members of the General Assembly and by a vote of any *seven* members of the Security Council.²⁰ Paragraph 3 of Article 109 is to the effect that if such a conference has not been held before the tenth annual session of the General Assembly, the proposal to call such a conference shall be placed on the agenda of that session and the conference shall be held if so decided *by a majority vote* of the members of the General Assembly, and by a vote of any *seven* members of the Security Council.²⁰ As under the amended Charter the Security Council has fifteen members, Article 109, which has not been amended, would on its face mean that a minority of its members, *i.e.*, seven out of fifteen, would be able to decide upon the Council's concurrence in the calling of a General Conference. Pointing out that a discrepancy existed as between the amended text of Articles 23 and 27 of the Charter and the present text of Article 109, and that an amendment to the latter consequential to the amendments already approved was called for, the Secretary General requested the inclusion in the agenda of the Twentieth Session of the General Assembly of an item

General Assembly, 20th Sess., Official Records, Supp. No. 3 A (A/6003/Add. 1), Nov. 30, 1965.

¹⁶ General Assembly Res. No. 2029 (XX), Nov. 22, 1965; U.N. Doc. A/6003/Add.1, note 15 above.

¹⁷ In his statements referred to in notes 1, 2 and 6 above.

¹⁸ Cf. Art. 69, par. 3(a) and (b) of the Draft Articles on the Law of Treaties as prepared by the International Law Commission at its 1964 session. General Assembly, 19th Sess., Official Records, Supp. No. 9 (A/5809).

¹⁹ General Assembly Res. No. 2046 A, B, C (XX), Dec. 8, 1965. See below at note 41.

²⁰ Emphasis added.

entitled "Amendment to Article 109 of the Charter of the United Nations."²¹ The General Assembly included the proposed item in its agenda.²²

When he introduced the item in the Sixth Committee of the General Assembly²³ the Legal Counsel reported that, subsequent to the adoption of the amendments to Articles 23, 27 and 61 of the Charter, a Latin American delegation had drawn the Secretariat's attention to the fact that the General Assembly had made no mention of the need to amend Article 109 so as to increase from seven to nine the number of Members of the Security Council whose affirmative vote was required on any decision regarding the holding of a conference for the purpose of reviewing the Charter. The Secretariat consulted delegations on the point of amending Article 109. Originally delegations were not unanimous about the need for this consequential amendment. However, the fact that an error had been made was held to be no reason for it to be perpetuated in the Charter and, after some hesitation, the Secretary General decided to request the inclusion of an appropriate item in the agenda. Once this step had been taken, the question of how paragraph 1 of Article 109 was to be amended did not give rise to any problem or doubt. The solution was very simple: in Article 109, paragraph 1, the word "seven" was to be replaced by the word "nine," as had been done earlier in regard to paragraphs 2 and 3 of Article 27.

The Problem of Article 109, paragraph 3

What to do about paragraph 3 of Article 109 is probably of very little practical importance or, possibly, of no practical importance at all. It raised legal problems of particular difficulty all the same. Article 109(3) is a special provision which, on its face, concerns only the Tenth Session of the General Assembly which took place in 1955 and a meeting of the Security Council which was held in the same year. Referring to the fact that a decision under Article 109, paragraph 3, had been taken by the General Assembly in 1955²⁴ and concurred in by the Security Council on December 16, 1955,²⁵ the Secretary General originally submitted that the paragraph could now be considered as obsolete and suggested that it should be deleted.²⁶ The alternative solution to replace, by an amendment to the Charter, the word "seven" by the word "nine" in the existing third paragraph of Article 109 would, in the Secretariat's view, serve no practical

²¹ Note by the Secretary-General and Explanatory Memorandum, Sept. 16, 1965, U.N. Doc. A/5974.

²² Provisional Verbatim Record of the 1336th plenary meeting, Sept. 24, 1965, U.N. Doc. A/P.V. 1336 at 47. For the relevant proceedings in the General Committee, see the Provisional Summary Record of the 159th meeting of the General Committee, Sept. 22, 1965, U.N. Doc. A/BUR/SR. 159.

²³ Provisional Summary Record of the 897th meeting of the Sixth Committee, Dec. 14, 1965, U.N. Doc. A/C.6/SR. 897.

²⁴ General Assembly Res. No. 992 (X), Nov. 21, 1955, U.N. General Assembly, 10th Sess., Official Records, Supp. No. 19, at 49 (A/3116)(1955).

²⁵ Security Council, Tenth Year, Official Records, 707th meeting, par. 171, Dec. 16, 1955, Docs. S/3503 and S/3504.

²⁶ U.N. Doc. A/5974, par. 4, note 21 above.

purpose and its technical and legal correctness could be questioned.²⁷ However, the Legal Counsel stated to the Sixth Committee that since the drafting of the Secretary General's note of September 16, 1965,²⁸ a number of delegations had expressed the view that, for historical reasons, paragraph 3 should not be deleted. This, as will be reported presently, was the solution which was chosen.

On the question whether paragraph 3 of Article 109 of the Charter is now obsolete, a question which is distinct from that concerning the probability of its future application, the following observations may be pertinent. In its resolution of 1955²⁹ the General Assembly, "believing that it is desirable to review the Charter in the light of experience gained in its operation," but "recognizing that such a review should be conducted under auspicious international circumstances," decided "that a General Conference to review the Charter shall be held at an appropriate time." The General Assembly further decided to appoint a committee consisting of all the Members of the United Nations "to consider . . . the question of fixing a time and place for the Conference, and its organization and procedures." This committee, known as the "Committee on Arrangements for a Conference for the Purpose of Reviewing the Charter," has repeatedly reported that international circumstances were not propitious for the holding of the conference. The most recent report to this effect was submitted in September, 1965,³⁰ and on the committee's recommendations the General Assembly decided on December 21, 1965, to keep the committee in being and to invite it to report with recommendations to the General Assembly at its Twenty-Second (*i.e.*, 1967) Session.³¹ It follows that the action of which Article 109(3) is the legal basis has not yet been completed by the General Assembly. Moreover, if the General Assembly, in 1967 or at a later session, should complete its action and decide upon the date and place of the conference, then it would be for the Security Council to express its concurrence or otherwise in the Assembly's decision. In 1955 the Security Council expressed its agreement with the decision of principle only, which had then been taken by the General Assembly. When the matter was considered in the Security Council on December 16, 1955, the representative of Belgium on that Council raised the question whether under Article 109 a further decision of the Security Council would not be required at the time when the question arises of actually convening the conference in pursuance of the recommendations made by the committee.³² It is, therefore, to say the least, arguable that in the improbable case of the General Assembly deciding to convene the conference in pursuance of its decision of 1955, the matter would have to be referred to the Security Council for concurring

²⁷ *Ibid.* A suggestion to change "seven" into "nine" was, at a later stage of the proceedings, made by the representative of Mali (U.N. Doc. A/C.6/SR. 897 (Provisional)).

²⁸ Notes 21 and 26 above.

²⁹ Note 24 above.

³⁰ U.N. Doc. A/5897, Sept. 22, 1965.

³¹ General Assembly Res. No. 2114 (XX), Dec. 21, 1965.

³² *Loc. cit.* note 25 above.

action.³³ While, as already indicated, it is not probable that the General Assembly will, in the foreseeable future, decide to complete the action it started in 1955 and actually convene the conference under Article 109, paragraph 3, it perhaps goes too far to claim, as was done in the Sixth Committee, that the General Assembly (and the Security Council) would never again be called upon to apply that paragraph. The further argument was made that amending paragraph 3 to bring it into line with paragraph 1 might give readers of the Charter the false impression that it was still in force like the remaining provisions of the Charter. This argument is not convincing either, because that impression is not "false." This is not to say that the retention of the original text of paragraph 3 ("by a vote of any *seven* members of the Security Council") amounts to a tragedy. In the improbable contingency of the Security Council being called upon to concur in a decision of the General Assembly to convene a conference under paragraph 3, common sense would, no doubt, prevail and governments would see to it that the resolution is carried in the enlarged Council by nine or more votes, although under a literal interpretation of paragraph 3 only seven votes would be required.

The Secretariat's revised suggestion that Article 109, paragraph 3, should remain unchanged was supported by various speakers in the Sixth Committee, by some (Czechoslovakia, United Kingdom) because they believed that it had no further purpose, by others (Australia, China) because the measures taken under Article 109, paragraph 3, were still under way and the deletion of that paragraph might cast doubt on their legal status.³⁴ Thus for different and, as just indicated, even contradictory reasons, delegations were unanimous in their desire that the proposed amendment should be restricted to Article 109, paragraph 1, of the Charter, and a proposal by Greece to this effect³⁵ was unanimously adopted by the Sixth Committee³⁶ and by the General Assembly.³⁷ In its resolution³⁸ the General Assembly decided to adopt, in accordance with Article 108 of the Charter, the amendment to replace the word "seven" in the first sentence of Article 109, paragraph 1, by the word "nine" and to submit the amendment for ratification by the states Members of the United Nations. The Assembly also called upon all Member states to ratify this amendment, in accordance with their respective constitutional processes, "at the earliest possible date." The General Assembly did not fix or suggest a time limit for the ratification of the amendment.

³³ In 1958 this writer expressed the opinion that the point made by the Belgian representative in 1955 seemed well taken and that the reply to his question was in the affirmative. Schwelb, "Charter Review and Charter Amendment—Recent Developments," 7 *Int. and Comp. Law Q.* 321 (1958).

³⁴ U.N. Doc. A/C.6/SR. 897, note 23 above.

³⁵ U.N. Doc. A/C.6/L.584, Dec. 14, 1965.

³⁶ U.N. Doc. A/C.6/SR. 897; Report of the Sixth Committee, U.N. Doc. A/6180, par. 14.

³⁷ Provisional Verbatim Record of the 1404th plenary meeting, Dec. 20, 1965, U.N. Doc. A/P.V. 1404.

³⁸ General Assembly Res. No. 2101 (XX), Dec. 20, 1965.

Consequential Amendments to the Rules of Procedure of the General Assembly. The Uniting for Peace Resolution

The Uniting for Peace Resolution provides that an emergency special session of the General Assembly shall be called, *inter alia*, "if requested by the Security Council on the vote of any *seven* members."³⁹ The resolution added to the Rules of Procedure of the General Assembly a series of new rules, among them one (Rule 8(b)) which incorporates the quoted provision of the resolution in the rules by providing that Emergency Special Sessions pursuant to General Assembly Resolution 377 A (V) shall be convened on the receipt of a request for such a session "from the Security Council, on the vote of any seven members thereof." Other rules (143 and 146) provide for the election each year of three non-permanent members of the Security Council and of six members of the Economic and Social Council.⁴⁰ Under the amended Charter the election of five members of the Security Council and of nine members of the Economic and Social Council is now required.

On the request of the Secretary General an item "Amendments to the Rules of Procedure of the General Assembly consequent upon the entry into force of the Amendments to Articles 23, 27 and 61 of the Charter of the United Nations" was included in the Agenda of the 1965 session of the General Assembly and the required changes in the Rules of Procedure were made. The adjustment to the amended Charter of the rules on the number of members of the two Councils to be elected each year was non-controversial and the appropriate changes were decided upon unanimously. The amendment of the rule which incorporates the Uniting for Peace Resolution in the Rules of Procedure gave rise to a debate on the well-known question of the constitutionality of that resolution and was adopted in the Sixth Committee by 68 votes to eight, with two abstentions, and in the plenary meeting by 69 votes to nine, with two abstentions.⁴¹ An amendment to the Uniting for Peace Resolution itself was not proposed.

EGON SCHWELB

ACADEMY OF AMERICAN AND INTERNATIONAL LAW

The Third Annual Session of the Academy of American and International Law will be held for seven weeks from June 6 to July 22, 1966,

³⁹ General Assembly Res. No. 377(V); sec. A, Nov. 3, 1950, General Assembly, 5th Sess., Official Records, Supp. No. 20 (A/1775) at 10; 45 A.J.I.L. Supp. 1 (1951).

⁴⁰ Rules of Procedure of the General Assembly (embodying amendments and additions adopted by the General Assembly up to Dec. 31, 1963). U.N. Pub. Sales No. 64.I.18, U.N., Doc. A/520 Rev. 7, June, 1964.

⁴¹ Request for the inclusion of the item in the agenda, Note by the Secretary-General, U.N. Doc. A/5973, Sept. 14, 1955; proceedings in the Sixth Committee, U.N. Docs. A/C.6/SR.873, 878 and 879; draft resolution by Peru, U.N. Doc. A/C.6/L.573; Report of the Sixth Committee, U.N. Doc. A/6132, Dec. 3, 1965; Provisional Verbatim Record of the 1391st plenary meeting, Dec. 8, 1965; General Assembly Res. No. 2046 A, B and C (XX), Dec. 8, 1965.

at the Southwestern Legal Center on the campus of Southern Methodist University in Dallas, Texas. The Academy is conducted under the auspices of the International and Comparative Law Center of the Southwestern Legal Foundation.

Fifteen internationally known jurists, economists and attorneys will lecture on basic principles of Anglo-American law, conflict of laws, international business transactions and various subjects of United States Constitutional and municipal law. Courses will also be given on the continental shelf and the Geneva Conventions on the Law of the Sea, and on legal research and use of lawbooks, the last-named course to be conducted by Miss Hibernia Turbeville, Law Librarian of Southern Methodist University.

The last three days of the third week of the session will be devoted to a symposium on structures and safeguards of private investments abroad.

Additional information regarding the Academy may be obtained from the Registrar, Southwestern Legal Foundation, 3315 Daniels, Dallas, Texas.

E. H. F.

REGIONAL MEETINGS OF THE SOCIETY

Joint Conference, Toronto, Canada

On December 4, 1965, the Canadian Branch of the International Law Association, with the co-sponsorship of the American Society of International Law, held a joint meeting with the Society in the Moot Court Room of the Faculty of Law of the University of Toronto. The Toronto Section of the International Law Association (Canadian Branch), of which Professor Edward McWhinney is President, acted as host for the meeting, which was attended by over one hundred persons from eight States of the United States, seven Commonwealth or foreign countries and six of the Canadian Provinces. The general theme of the conference was "International Law: Evolution or Revolution?" and the proceedings were conducted in the two national languages of Canada.

Two panel sessions were held; one beginning at 9:30 a.m. dealt with "Federalism, Nationalism, and International Legal Integration." The second panel discussed "Soviet-Western Relations: Friendly Relations (Co-existence)."

The speakers on the first panel were Mr. Marcel Faribault, Q. C., President of the Trust Général du Canada, who spoke on "Federalism and Biculturalism in Canada," and Professor Brunson MacChesney, President of the Society, who discussed "Federalism and Supranational Integration." Dean Louis Sabourin of the University of Ottawa, as commentator, presented observations on the implications of national and international federalism for Canada. Professor McWhinney presided as chairman of the panel, and delivered remarks on federalism and international law.

Sir Kenneth Bailey, Q. C., High Commissioner of Australia, was chairman of the second panel and spoke on "The United Nations and the Concept of Friendly Relations." Professor Richard Baxter of Harvard University Law School discussed "Legal Aspects of Non-Intervention,"

while Dr. Vratislav Pechota, Principal Legal Adviser of the Czechoslovak Foreign Office, spoke on "The Concept of Friendly Relations and Non-Intervention." Dr. Francis Deak, of the Carnegie Endowment for International Peace, discussed "Friendly Relations and the Accommodation of Soviet-Western Interests-conflicts." The commentator on this panel was Mr. Allan E. Gotlieb, Head of the Legal Division of the Canadian Department of External Affairs, whose remarks were directed to "Friendly Relations with special reference to Disarmament."

The meeting closed with a banquet in the Convocation Hall of Osgoode Hall, at which Major L. M. Bloomfield, Q. C., President of the Canadian Branch of the International Law Association, presided. The principal speaker was Sir Francis Vallat, K.C.M.G., Q. C., Principal Legal Adviser of the British Foreign Office, who spoke on "Peaceful Settlement with special reference to Peacekeeping." Dr. Gerald F. FitzGerald, Chairman of the Executive Committee of the Canadian Branch of the International Law Association, and Professor McWhinney, President of the Toronto Section, also spoke.

Southeastern Regional Conference, Durham, North Carolina

On February 18-19, 1966, a meeting was held under the auspices of the Duke International Law Society and the American Society of International Law at Duke University School of Law. The meeting, designated as a "Conference on the International Law of Propaganda," constituted the annual conference of the Duke International Law Society, and was arranged by that society with the co-operation of the Duke University School of Law, the Rule of Law Research Center, and the Duke University Committee on International Relations.

On Friday, February 18, at 1:30 p. m. the participants in the conference were welcomed by the President of Duke University, Douglas M. Knight, and by the Dean of the Law School, Elvin R. Latty. Mr. Arthur Larson, Director of the Rule of Law Research Center, delivered an address on "Present Status of the Law of Propaganda."

From 2:45 to 6:00 p. m. a symposium panel was held on the subject of "Impact of Philosophies of Propaganda." Dr. Kazimierz Grzybowski, Senior Research Associate of the Rule of Law Research Center, acted as moderator. Mr. Yuri I. Bobrakov, Second Secretary of the Soviet Embassy, discussed "Communist Commitment to Propaganda." Mr. Richard T. Davies, Assistant Director for Soviet Union and Eastern Europe of the United States Information Agency, spoke on "American Commitment to Public Propaganda," and Mr. Richard C. Rowson, Director of Policy and Planning of the Free Europe Committee, discussed "American Commitment to Private Propaganda."

Following dinner, a debate was held from 8:00 to 10:30 p. m. on "Liberation Propaganda." Professor William V. O'Brien, Chairman of the Institute of World Polity of Georgetown University, presented "A Case for Unlimited Propaganda." Professor Gerhard von Glahn, Chairman of the Department of Political Science, University of Minnesota, gave "A Case for Controlled Propaganda."

On Saturday, February 19, from 9:00 to 11:00 a. m., a symposium was held on "Constitutional Restrictions on Agreements Curbing Propaganda." The moderator was Professor Arghyrios Fatouros, of Indiana University Law School. The principal address was delivered by Professor Wade J. Newhouse of New York State University School of Law. Critical comments were presented by Professor Nathaniel L. Nathanson of Northwestern University Law School, and Professor William W. Van Alstyne of Duke University School of Law.

From 1:30 to 5:30 p. m. another symposium considered "Remedies for Problems of International Propaganda." Mr. Luke T. Lee, Director of the New York Office of the Rule of Law Research Center, presided as moderator. The two speakers on the subject were Richard A. Falk, Albert G. Milbank Professor of International Law and Practices, Princeton University, and John B. Whitton, Emeritus Professor of International Relations at Princeton University.

All the sessions were followed by a general discussion.

Syracuse, New York

The third regional meeting of the Society to be held at Syracuse took place on March 19, 1966, at the Ernest I. White Hall, Syracuse University College of Law. The meeting was co-sponsored by the Society and the International Legal Studies Program of Syracuse University College of Law. Arrangements were handled by the International Law Club of the College of Law, under the direction of Professor Richard B. Lillich. The general topic of discussion at the meeting was the European Common Market.

At the first session, held at 9:30 a.m., Dean Ralph E. Kharas of the College of Law welcomed the participants. Mr. Dennis Thompson, Assistant Director, British Institute of International and Comparative Law, and Editor of the *Common Market Law Review*, spoke on "The Common Market: The New Legal Order in Europe." Professor Albert H. Garretson, of New York University School of Law, discussed "The Foreign Relations Law of the Common Market." Comments were made by Professor Robert A. Anthony of Cornell Law School, Director of International Legal Studies there.

The second session at 2:30 p.m. heard introductory remarks by Gerard J. Mangone, Acting Dean and Director, International Organization Research Program, Maxwell Graduate School of Citizenship and Public Affairs of Syracuse University. Professor Peter E. Herzog of the College of Law discussed the organization and procedure of the Court of Justice of the European Communities. Mr. Lawrence F. Ebb, Special Counsel, General Electric Company and sometime Professor of Law at Stanford University School of Law, spoke on "The Development of Common Market Law: Some Lessons from American Constitutional Experience." Comments were made by Professor D. A. Soberman, of Queen's University, Kingston, Ontario, Canada.

The meeting concluded with a reception at 5:30 p.m. followed by a banquet.

ELEANOR H. FINCH

SIXTIETH ANNUAL MEETING OF THE SOCIETY APRIL 28-30, 1966

STATLER HILTON HOTEL, WASHINGTON, D. C.

PROGRAM

INTERNATIONAL LAW AND DEVELOPING COUNTRIES

THURSDAY, APRIL 28, 1966

12 noon

Lunch meeting, Section of International and Comparative Law, American Bar Association

2:15 p.m.

The Relevance of International Law to the Development Process

Chairman: John B. Howard, *Ford Foundation*

Speakers: Harold D. Lasswell, *Yale Law School*

Wolfgang Friedmann, *Columbia University School of Law*

César Sepúlveda, *Dean, Faculty of Law, University of Mexico*

5:15 p.m.—Reception

8:15 p.m.

*The Role of International Business in the Transfer of
Technology to Developing Countries*

(Joint Session with the Section of International and
Comparative Law, American Bar Association)

Introduction: Edward D. Re, *Chairman, Foreign Claims Settlement Commission, and Chairman, Section of International and Comparative Law, American Bar Association*

Chairman: Sigmund Timberg, *District of Columbia Bar*

Speaker: Karl E. Lachmann, *Chief, Fiscal and Financial Branch, United Nations*

Commentators: Gerard Swope, Jr., *General Electric Company*

M. Gopala Menon, *Indian Investment Centre, New York City*

Samuel V. Goekjian, *District of Columbia Bar*

The International Regulation of Internal Conflict in Developing Countries

Chairman: Myres S. McDougal, *Yale Law School*

Panelists: Richard A. Falk, *Princeton University*

F. V. García-Amador, *Director, Department of Legal Affairs, Pan American Union*

Peter Solbert, *New York Bar*

FRIDAY, APRIL 29, 1966

9:15 a.m.

*Tariff Preferences and Developing Countries*Chairman: Stanley D. Metzger, *Georgetown University Law Center*Panelists: K. S. Sundara Rajan, *Economic Minister, Embassy of India*Robert L. McNeill, *Deputy Assistant Secretary for Trade Policy, Department of Commerce**State Succession in the New Nations*(Joint Session with the American Branch of the International
Law Association)Introduction: Cecil J. Olmstead, *President, American Branch, International
Law Association*Chairman: Oliver J. Lissitzyn, *Columbia University School of Law*Speaker: Gerard V. La Forest, *University of New Brunswick Faculty of
Law*Commentators: Gilbert P. Verbit, *Columbia University School of Law*Sam Okunribido, *Office of Legal Affairs, United Nations*Robert Delson, *New York Bar*

2:15 p.m.

*International Monetary Reform and the Developing Countries*Chairman: Joseph Gold, *General Counsel, International Monetary Fund*Panelists: Oscar Gass, *Economic Consultant*Ansel F. Luxford, *District of Columbia Bar*Amon Nikoi, *Ghana, Executive Director of I.M.F.**Problems of Self-Determination and Political Rights
in the Developing Countries*Chairman: Thomas M. Franck, *New York University Law School*Panelists: Derek W. Bowett, *Cambridge University*Rupert Emerson, *Harvard University*Robert K. Woetzel, *Center for Democratic Institutions*

6:15 p.m.—Reception

7:15 p.m.

ANNUAL DINNER

Presentation of the Manley O. Hudson Medal, awarded to The Honorable
Charles De Visscher—Remarks by His Excellency Baron Louis
Scheyven, *Ambassador of Belgium to the United States*Speakers: Brunson MacChesney, *President of the Society*The Honorable George W. Ball, *Under Secretary of State*

SATURDAY, APRIL 30, 1966

9:30 a.m.

Business Meeting and Election of Officers

2:15 p.m.

The Philip C. Jessup International Law Moot Tribunal Competition

(Arranged by the Association of Student International Law Societies)

THE UNITED NATIONS *v.* AFRANIA

Case arising out of presence of U. N. Force in the mythical state of Afrania and the seizure of U. N. property by Afrania as compensation for damages for wrongful murder of the Afranian Premier by forces under U. N. Command.

PROFESSOR BISHOP'S APPOINTMENT TO THE EDWIN DE WITT DICKINSON
PROFESSORSHIP OF LAW

The University of Michigan has recently conferred upon Professor William W. Bishop, Jr., the Editor-in-Chief of the JOURNAL and Vice President of the Society, the title of Edwin DeWitt Dickinson University Professor of Law. This honor has followed closely upon the Distinguished Faculty Achievement Award conferred upon Professor Bishop by the University. This latter award was one of five given on a University-wide level in the fall of 1965. In 1961, he was elected an Associate of the *Institut de Droit International*.

The establishment of the Edwin DeWitt Dickinson Professorship at the University of Michigan honors the late distinguished teacher and publicist in international law, who was also a member of the Board of Editors of this JOURNAL for many years and served as President of the American Society of International Law in 1952-1953. As the Board of Regents of the University of Michigan stated in announcing the Professorship, it is conferred on professors who "shall have attained national and international recognition for originality and scholarly achievement; and . . . shall have demonstrated teaching skill and recognized breadth of interest as well as depth of achievement."

The Editors and readers of the JOURNAL, as well as the members of the Society, will, I am sure, share my own pride and satisfaction that the Editor-in-Chief has received this justly deserved recognition of his distinction in the field of international law, and will join in congratulating him as well as in expressing their appreciation for his invaluable contributions to the JOURNAL and the Society.

BRUNSON MACCHESNEY

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section is compiled by Charles I. Bevans, Assistant Legal Adviser, Department of State. Alfred P. Rubin, of the Office of the General Counsel, Department of Defense, and Bruno A. Ristau, of the Department of Justice, provide material originating in their respective Departments.

ALIENS

Notification to consular officers of arrest of fellow nationals—treaty provisions

The Department of State transmitted to the Governors of the States, the Governors of Puerto Rico, Guam, the Virgin Islands and American Samoa, and the Chairman of the Commissioners of the District of Columbia, the following compilation prepared December 1, 1965, by the Office of the Assistant Legal Adviser for Treaty Affairs of the Department of State, entitled "Treaty Provisions in Force between the United States of America and other Countries Regarding Notification of Consular Officers of the Arrest of Their Fellow Nationals."

ALGERIA. Convention of establishment with protocol and joint declaration between the United States and France and applicable to Algeria, signed at Paris November 25, 1959. (TIAS 4625, UST 2398.) Section 1 of protocol, paragraph 1 (a); see *infra* p. 387 for text.

Continued application to Algeria has not been determined since its independence on July 3, 1962.

BELGIUM. Treaty of friendship, establishment and navigation and protocol, signed at Brussels February 21, 1961. (TIAS 5432, 14 UST 1284.)

Article 3 (paragraph 4)

If a national of either Party is taken into custody within the territories of the other Party, the nearest consular representative of his country shall on the demand of such national be immediately notified and shall have the right to visit and communicate with such national without arbitrary delay.

CHINA. Treaty for the relinquishment of extraterritorial rights in China and the regulation of related matters, signed at Washington January 11, 1943. (TS 984, 57 Stat. 767.)

Article VI

. . . The consular officers of each country shall have the right to interview, to communicate with, and to advise nationals of their country within their consular districts; they shall be informed im-

mediately whenever nationals of their country are under detention or arrest or in prison or are awaiting trial in their consular districts and they shall, upon notification to the appropriate authorities, be permitted to visit any such nationals; . . .

It is likewise agreed that the nationals of each country, in the territory of the other country, shall have the right at all time to communicate with the consular officers of their country. Communications to their consular officers from nationals of each country who are under detention or arrest or in prison or are awaiting trial in the territory of the other country shall be forwarded to such consular officers by the local authorities.

COSTA RICA. Consular convention, signed at San Jose January 12, 1948. (TIAS 2045, 1 UST 247.)

Article VII

2(b) A consular officer shall be informed immediately by the appropriate authorities of the receiving state when any national of the sending state is confined in prison awaiting trial or otherwise detained in custody within his consular district by such authorities.

CYPRUS. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Cyprus, signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394 for text.

In the treaty between the United Kingdom, Greece, Turkey, and the Republic of Cyprus, signed August 16, 1960, it was agreed that all international obligations, responsibilities, rights, and benefits of the United Kingdom would, in so far as they might be held to have application to Cyprus, be assumed by the Republic of Cyprus.

DENMARK. Treaty of friendship, commerce and navigation, with protocol and minutes of interpretation, signed at Copenhagen October 1, 1951. (TIAS 4797, 12 UST 908.)

Article III

2. If, within the territories of either Party, a national of the other Party is accused of crime and taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified. . . .

ETHIOPIA. Treaty of amity and economic relations, signed at Addis Ababa September 7, 1951. (TIAS 2864, 4 UST 2134.)

Article VI

2. Nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party. When any such national is in custody, he shall in every respect receive reasonable and humane treatment;

and, on his demand, the diplomatic or consular representative of his country shall be immediately notified and accorded full opportunity to safeguard his interests. He shall be promptly informed of the accusations against him, allowed ample facilities to defend himself and given prompt and impartial disposition of his case, in accord with modern standards of justice.

FRANCE. Convention of establishment with protocol and joint declaration, signed at Paris November 25, 1959. (TIAS 4625, 11 UST 2398.)

Section 1 of protocol

1. (a) The protection provided in Article 1 engages the competent authorities of each High Contracting Party to inform immediately the consuls of the other High Contracting Party of the arrest or detention of any of its nationals, if the latter so requests. The consul may then be authorized to visit such national, in conformity with the regulations of the institution of detention, and to confer with him. The competent authority will assure the transmission to the consul of all correspondence directed to him by such national.

GAMBIA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Gambia, signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394 for text.

Continued application to Gambia has not been determined since independence on February 18, 1965.

GERMANY. Treaty of friendship, commerce and navigation with protocol and exchanges of notes, signed at Washington October 29, 1954. (TIAS 3593, 7 UST 1839.)

Article III

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified and shall have the right to visit and communicate with such national. . . .

GHANA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to the Gold Coast (with exception of paragraph (1) of Article 7), signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394 for text.

By notes dated September 4 and December 21, 1957, and February 12, 1958 (TIAS 4966), the United States and Ghana agreed that the rights and obligations of various treaties and agreements, including this convention and protocol, entered into between the United States and the United Kingdom, would continue in force between the United States and Ghana.

IRAN. Treaty of amity, economic relations, and consular rights, signed at Tehran August 15, 1955. (TIAS 3853, 8 UST 899.)

Article II

4. Nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party. When any such national is in custody, he shall in every respect receive reasonable and humane treatment; and, on his demand, the diplomatic or consular representative of his country shall without unnecessary delay be notified and accorded full opportunity to safeguard his interests.

IRELAND. Treaty of friendship, commerce, and navigation, signed at Dublin January 21, 1950. (TIAS 2155, 1 UST 785.)

Article II

2. If, within the territories of either Party, a national of the other Party is accused of crime and taken into custody, the diplomatic representative or nearest consular representative of his country shall on the demand of such national be immediately notified. . . .

Consular convention, signed at Dublin May 1, 1950, and supplementary protocol, signed at Dublin March 3, 1952. (TIAS 2984, 5 UST 949.)

Article 16

(1) A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison, is awaiting trial or is otherwise detained in custody within his district, unless such national shall request that such information not be given. A consular officer shall be permitted to visit without delay, to converse privately with and to arrange legal representation for, any national of the sending state who is so confined or detained. Any communication from such a national to the consular officer shall be forwarded without delay by the authorities of the territory.

ISRAEL. Treaty of friendship, commerce, and navigation, signed at Washington August 23, 1951. (TIAS 2948, 5 UST 550.)

Article III

2. If, within the territories of either Party, a national of the other Party is accused of crime and taken into custody, the nearest diplomatic or consular representative of his country shall on the demand of such national be immediately notified. . . .

JAMAICA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Jamaica, signed

at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394 for text.

The United Kingdom and the Government of Jamaica exchanged notes August 7, 1962, agreeing that all responsibilities, rights and benefits of the Government of the United Kingdom which arise from any valid international instrument shall henceforth be assumed by the Government of Jamaica in so far as such instrument may be held to have application to Jamaica.

JAPAN. Treaty of friendship, commerce and navigation, signed at Tokyo April 2, 1953. (TIAS 2863, 4 UST 2063.)

Article II

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified.

...

Consular convention and protocol, signed at Tokyo March 2, 1963. (TIAS 5602, 15 UST 768.)

Article 16

(1) The appropriate authorities of the receiving state shall, at the request of any national of the sending state who is confined in prison awaiting trial or is otherwise detained in custody within his consular district, immediately inform a consular officer of the sending state. A consular officer shall be permitted to visit without delay, to converse privately with, and to arrange legal representation for any national of the sending state who is so confined or detained. Any communication from such a national to the consular officer shall be forwarded without undue delay by the authorities of the receiving state.

KENYA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Kenya, signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394 for text.

The Government of Kenya made a declaration to the United Nations that it is willing to be a successor to bilateral treaties validly extended to its territory for a period of two years from independence (*i.e.*, until December 12, 1965) on a basis of reciprocity, and that they may be abrogated or modified by mutual consent before December 12, 1965.

KOREA. Treaty of friendship, commerce and navigation with protocol, signed at Seoul November 28, 1956. (TIAS 3947, 8 UST 2217.)

Article III

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified

and shall have the right to visit and communicate with such national:

...

Consular convention, signed at Seoul January 8, 1963. (TIAS 5469, 14 UST 1637.)

Article 5

(2) The appropriate authorities of the receiving state shall, at the request of any national of the sending state who is under arrest or otherwise detained in custody, immediately inform a consular officer of the sending state, who shall be accorded full opportunity to visit and communicate with such a national in order to safeguard his interests.

KUWAIT. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Kuwait, signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394 for text.

Upon assumption by Kuwait of responsibility for its foreign relations, the Government of Kuwait informed the Government of the United States that it would continue to apply the provisions of the 1951 convention pending the conclusion of a consular convention between the two countries.

LUXEMBOURG. Treaty of friendship, establishment and navigation, and protocol, signed at Luxembourg February 23, 1962. (TIAS 5306, 14 UST 251.)

Article III

4. If a national of either Party is taken into custody within the territories of the other Party, the nearest consular representative of his country shall on the demand of such national be immediately notified and shall have the right to visit and communicate with such national without unnecessary delay.

MALAWI. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Malawi, signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394 for text.

The Government of Malawi made a declaration to the United Nations that it is willing to continue to apply within its territory on a basis of reciprocity the terms of bilateral treaties validly extended to the territory of the former Nyasaland Protectorate for a period of eighteen months from date of independence (*i.e.* until January 6, 1966).

MALAYSIA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Malaya (now Malaysia), signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394, for text.

An exchange of notes October 1 and 17, 1964, between the United States

and Malaysia confirms that the Malaysian Government considers the 1951 convention continues in force between the two Governments.

The United Kingdom and the Federation of Malaya (now Malaysia) exchanged notes September 12, 1957, transferring to Malaya on August 31, 1957 (date of independence), rights and obligations of treaties and agreements between the United Kingdom and any other government that may be held to have application to Malaya. The United States and the Federation agreed by exchange of notes January 7 and February 2, 1960, that the consular convention of 1951 continues in force between them.

The British colonies of North Borneo and Sarawak and the State of Singapore federated with the Federation of Malaya by agreement between them and the United Kingdom, signed at London July 9, 1963, to form the federation of Malaysia which was proclaimed on September 16, 1963. The constitution of the federation was amended by Malaysia Act of 1963 to provide for Malaysia's assumption of rights and obligations of treaties and agreements between the United Kingdom and any other government on behalf of the Borneo States and Singapore. On August 7, 1965, the Governments of Malaysia and Singapore signed the Independence of Singapore Agreement, 1965, the independence to be effective August 9, 1965.

MALTA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Malta, signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394 for text.

The United Kingdom and the Government of Malta exchanged letters December 31, 1964, agreeing that all obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument shall, as from September 21, 1964, be assumed by the Government of Malta insofar as such instruments may be held to have application to Malta.

MUSCAT. Treaty of amity, economic relations and consular rights, signed at Salalah December 20, 1958. (TIAS 4530, 11 UST 1835.)

Article II

2. Nationals of either Party shall receive all possible protection and security within the territories of the other Party. When any such national is in custody, he shall receive reasonable and humane treatment, and, on his request, the nearest consular representative of his country shall be notified as soon as possible. . . .

NETHERLANDS. Treaty of friendship, commerce and navigation with protocol and exchange of notes, signed at The Hague March 27, 1956. (TIAS 3942, 8 UST 2043.)

Article III

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of

his country shall on the demand of such national be immediately notified and shall have the right to visit and communicate with such national. . . .

NICARAGUA. Treaty of friendship, commerce and navigation and protocol, signed at Managua January 21, 1956. (TIAS 4024, 9 UST 449.)

Article III

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on demand of such national be immediately notified.

. . .

NIGERIA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Nigeria, signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394 for text.

The United Kingdom and the Federation of Nigeria exchanged notes October 1, 1960, agreeing that all obligations, responsibilities, rights, and benefits of the Government of the United Kingdom which arise from any valid international instrument shall be assumed from October 1, 1960 (date of independence) by Nigeria in so far as such instrument be held to have application to Nigeria.

PAKISTAN. Treaty of friendship and commerce, and protocol, signed at Washington November 12, 1959. Entered into force February 12, 1961. (TIAS 4683, 12 UST 110.)

Article III

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified and shall have the right to visit and communicate with such national.

. . .

PHILIPPINES. Consular convention, signed at Manila March 14, 1947. (TIAS 1741, 62 Stat. 1593.)

Article VII

2. Consular officers of either High Contracting Party shall, within their respective districts, have the right to interview, to communicate with, and to advise nationals of their country; to inquire into any incidents which have occurred affecting the interest of such nationals; and to assist such nationals in proceedings before or relations with authorities in the territories of the other High Contracting Party. Consular officers of either High Contracting Party shall be informed immediately whenever nationals of their country are under detention or arrest or in prison or are awaiting trial in their consular districts and they shall, upon notification to the appropriate authorities, be

permitted without delay to visit and communicate with any such national.

SIERRA LEONE. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Sierra Leone, signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394 for text.

The United Kingdom and the Government of Sierre Leone exchanged notes May 5, 1961, agreeing that all obligations, responsibilities, rights and benefits which arise from any valid international instrument shall be assumed from April 27, 1961 (date of independence) by Sierra Leone in so far as such instrument may be held to have application to Sierra Leone.

SINGAPORE. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Singapore, signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394 for text.

The British colonies of North Borneo and Sarawak and the State of Singapore joined with the Federation of Malaya by agreement between them and the United Kingdom, signed at London July 9, 1963, to form the federation of Malaysia which was proclaimed on September 16, 1963. The constitution of the Federation was amended by Malaysia Act of 1963 to provide for Malaysia's assumption of rights and obligations of treaties and agreements between the United Kingdom and any other government that had been entered into on behalf of the Borneo States and Singapore. An exchange of notes October 1 and 17, 1964, between the United States and Malaysia confirms that the Malaysian Government considers the 1951 convention continues in force between the two governments.

On August 7, 1965, the Governments of Malaysia and Singapore signed the Independence of Singapore Agreement, the independence to be effective August 9, 1965. Article 13 of the Constitution and Malaysia (Singapore Amendment) Act, 1965, incorporated by reference in the Independence of Singapore Agreement, 1965 (Article IV), states:

Any treaty, agreement or convention entered into before Singapore Day between the . . . Government of Malaysia and another country or countries, including those deemed to be so by Article 169 of the Constitution of Malaysia shall in so far as such instruments have application to Singapore, be deemed to be a treaty, agreement or convention between Singapore and that country . . .

TANZANIA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Tanganyika and Zanzibar (now Tanzania), signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394 for text.

The continued application of the Convention to Tanzania is under negotiation.

TRINIDAD AND TOBAGO. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Trinidad and Tobago, signed at Washington, June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* p. 394 for text.

The Government of Trinidad and Tobago has agreed to assume all obligations, responsibilities, rights and benefits of the United Kingdom arising from any valid international instrument in so far as such instrument may be held to have application to Trinidad and Tobago.

UGANDA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Uganda, signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *infra* for text.

The continued application to Uganda has not been determined.

UNITED KINGDOM. Consular convention with protocol of signature, signed at Washington June 6, 1951.¹ (TIAS 2494, 3 UST 3426.)

Article 16

(1) A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district. A consular officer shall be permitted to visit without delay, to converse privately with and to arrange legal representation for, any national of the sending state who is so confined or detained. Any communication from such a national to the consular officer shall be forwarded without delay by the authorities of the territory.

VIET-NAM. Treaty of amity and economic relations, signed at Saigon April 3, 1961. (TIAS 4890, 12 UST 1703.)

Article I

. . .

2. Nationals of either Party shall receive the most constant protection and security within the territories of the other Party, in no case less than that required by international law. When any such national is in custody, he shall in every respect receive reasonable and humane treatment; and, on his demand, the diplomatic or consular representative of his country shall be immediately notified and accorded full opportunity to safeguard his interests. . . .

ZAMBIA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Northern Rhodesia (now Zambia), signed at Washington June 6, 1951. (TIAS 2494, 3 UST 3426.) Article 16, par. (1); see *supra* for text.

Zambia has assumed obligations and responsibilities of the United Kingdom arising under any treaty or agreement and applicable to Northern Rhodesia (now Zambia).

¹ The convention applies on the part of the United States to all territories subject to the sovereignty or authority of the United States, excepting the Panama Canal Zone, and on the part of the United Kingdom to Great Britain and Northern Ireland, Southern Rhodesia, to all colonies and protectorates, to all territories under the protection of the United Kingdom, and to all territories under trusteeship administered by the Government of the United Kingdom.

AVIATION

Private air law—Warsaw Convention—denunciation by United States

On November 15, 1965, the Department of State issued a press release relating to United States denunciation of the Warsaw Convention on the Unification of Certain Rules Relating to International Transportation by Air. The press release reads, in part, as follows:

The United States today gave formal notice of denunciation of the Warsaw Convention on the Unification of Certain Rules Relating to International Transportation by Air.

The Warsaw Convention was signed in 1929 and entered into force for the United States in 1934. The principal effect of the Convention is to limit the liability of air carriers for personal injury or death of passengers in international air transportation to approximately \$8,300 per passenger in most cases. The Convention was amended by a Protocol signed at the Hague in 1955 which raised the limits of liability to approximately \$16,600 per passenger, but the United States has never ratified this Protocol.

Today's action was taken under Article 39 of the Convention, which provides that any member country may denounce the Convention upon six months' notice. The notification carries out a decision, made known previously, that the United States would give notice of denunciation of the Warsaw Convention on November 15, unless by that time satisfactory provisional arrangements for the protection of international air passengers had been worked out among the principal international air carriers. A plan for a provisional arrangement whereby the international carriers serving the United States would waive their limits of liability up to \$50,000 per passenger was recently proposed by the International Air Transport Association. However, the IATA proposal would have applied only to transportation to and from the United States covered by the Hague Protocol. Since the United States has not ratified the Hague Protocol, the IATA proposal would thus have been inapplicable to the great majority of United States travelers. In addition, it was felt that a ceiling of only \$50,000 on recovery by victims of air disasters would not justify continued adherence by the United States to the Warsaw Convention.

The United States would be prepared to withdraw the notice of denunciation deposited today if prior to its effective date of May 15, 1966 there is a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of \$100,000 per passenger or on uniform rules but without any limit of liability, and if, pending the effectiveness of such international agreement, there is a provisional arrangement among the principal international air lines waiving the limits of liability up to \$75,000 per passenger.

As stated in the note delivered today by the American Embassy in Warsaw to the Polish Government, the United States wishes to make clear that the action to denounce the Warsaw Convention is taken solely because of the Convention's low limits of liability for injury or death to passengers,

and in no way represents a departure from the long-standing commitment of the United States to the tradition of international cooperation in matters relating to civil aviation.

In this connection, the United States notes that the Council of the International Civil Aviation Organization has called an international conference in Montreal beginning on February 1, 1966 to consider revision of the limits of liability for passengers under the Warsaw Convention. The United States welcomes the recognition by ICAO of the need to reconsider the question of compensation to victims of international air disasters. The United States will participate fully in the Montreal Conference, and hopes that it will be possible to arrive at an international consensus on this important question.

(Dept. of State Press Release No. 268, Nov. 15, 1965;
53 Dept. of State Bulletin 923 (1965).)

Private air law—Warsaw Convention—U. S. reservation

The case of *Warren et al. v. Flying Tiger Line, Inc.*, which was the subject of notes in the report on contemporary practice of the United States relating to international law in the April and July, 1965, issues of this JOURNAL, was heard before the United States Court of Appeals for the Ninth Circuit. The Government of the United States filed a brief as *amicus curiae* supporting the proposition that the limitation on liability contained in the Warsaw Convention was not applicable to the benefit of the airline in the facts of the case. On October 25, 1965, the court came to the same conclusion and remanded the case for further proceedings consistent with its opinion.

PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

Mediation of British Honduras dispute by United States

On November 18, 1965, the Department of State issued a press release regarding the agreement of the United States to mediate the British Honduras dispute. The press release reads as follows:

At the request of the Governments of Guatemala and the United Kingdom, the Government of the United States has undertaken to mediate the dispute between those two countries over British Honduras (or Belize). The United States Government has appointed as its mediator, Mr. Bethuel Matthew Webster, of New York City, a prominent lawyer familiar with government matters. The President has accorded Mr. Webster the personal rank of Ambassador for the purpose of this mediation. Representatives of the British and Guatemalan Governments are meeting informally in Washington with Mr. Webster and officials of the Department of State, to make procedural arrangements for the mediation of this long-standing problem.

(Dept. of State Press Release No. 269, Nov. 18, 1965;
53 Dept. of State Bulletin 901 (1965).)

PANAMA

Treaty negotiations

On September 24, 1965, the President of the United States made a statement regarding the areas of agreement which have been reached in treaty negotiations with Panama. The statement is quoted, in part, below:

.

In order to meet their present and future needs the two countries are negotiating separately a new and a modern treaty to replace the 1903 treaty and its amendments—a base rights and status of forces agreement—and a treaty under which there might be constructed across Panama a new sea level canal.

The two countries recognize that the primary interest of both countries lies in ensuring that arrangements are provided for effective operations and defense of the existing Panama Canal and any new canal which may be constructed in Panama in the future.

With respect to the status of the negotiations on a new treaty to replace the 1903 Treaty and its amendments, general areas of agreement have been reached. The details of these areas of agreement are the subject of current negotiations.

The purpose is to ensure that Panama will share with the United States responsibility in the administration, management, and the operation of the Canal as may be provided in the treaty. Panama will also share with the United States in the direct and the indirect benefits from the existence of this canal on its territory.

The areas of agreement reached are the following:

1. The 1903 Treaty will be abrogated.
2. The new treaty will effectively recognize Panama's sovereignty over the area of the present Canal Zone.
3. The new treaty will terminate after a specified number of years, or on or about the date of the opening of the sea level canal, whichever occurs first.
4. A primary objective of the new treaty will be to provide for an appropriate political, economic and social integration of the area used in the canal operation with the rest of the Republic of Panama. Both countries recognize that there is a need for an orderly transition to avoid abrupt and possibly harmful dislocations. We also recognize that certain changes should be made over a period of time. The new canal administration will be empowered to make such changes in accordance with the guidelines in the new treaty.
5. Both countries recognize the important responsibility they have to be fair and helpful to the employees of all nationalities who are serving so efficiently and well in the operation of this very important canal. Appropriate arrangements will be made to ensure that the rights and the interests of these employees are safeguarded.

The new treaties will provide for the defense of the existing canal and any sea level canal which may be constructed in Panama. United States forces and military facilities will be maintained under a base rights and status of forces agreement.

With respect to the sea level canal, the United States will make studies and site surveys of possible routes in Panama. Negotiations are continuing with respect to the methods and the conditions of financing, constructing and operating a sea level canal, in the light of the importance of such a canal to the Republic of Panama, to the United States of America, to world commerce, and to the progress of all mankind.

The United States and Panama will seek the necessary solutions to the economic problems which would be caused by the construction of a sea level canal.

The present canal and any new canal which may be constructed in the future shall be open at all times to the vessels of all nations on a non-discriminatory basis. The tolls would be reasonable in the light of the contribution of the Republic of Panama and the United States of America and of the interests of world commerce.

.

RECOGNITION OF DE FACTO GOVERNMENTS

Resolution adopted at Second Special Inter-American Conference

A resolution establishing an informal procedure on the recognition of *de facto* governments was adopted, among other resolutions, on November 30, 1965, by the Second Special Inter-American Conference, held in Rio de Janeiro, Brazil from November 17 to 30, 1965.¹ The text of the resolution follows:

INFORMAL PROCEDURE ON THE RECOGNITION OF DE FACTO GOVERNMENTS

WHEREAS:

The various instruments of the inter-American system have established and reiterated the principle that, in order that there may be real harmony and solidarity among the American states, it is essential that the effective practice of representative democracy be exercised in each one of them;

Consequently, the overthrow of a government and its replacement by a *de facto* government could be dangerous to the peace and solidarity of the hemisphere, and is therefore the subject of concern on the part of all the American states;

Through Resolution XXXVI, the Ninth International Conference of American States charged the Inter-American Council of Jurists with the preparation of a draft statute on the recognition of *de facto* governments, a task which it has not yet been possible to carry out; and

¹ For other resolutions adopted, see Official Documents below, p. 445.

Until such time as said statute has been drafted, it is desirable that an informal procedure on the recognition of de facto governments be established.

The Second Special Inter-American Conference

RESOLVES:

1. To recommend to the member states that, immediately after the overthrow of a government and its replacement by a de facto government, they begin an exchange of views on the situation, giving due consideration to whether or not the overthrow of the government took place with the complicity and aid of one or more foreign governments, or of their respective officers or agents.

2. To recommend that the governments [of] member states, in the exchange of views provided for in the preceding article, consider the following circumstances:

- a. Whether the de facto government proposes to take the necessary measures for the holding of elections within a reasonable period, giving its people the opportunity freely to participate in the consequent electoral process; and
- b. Whether the de facto government agrees to fulfill the international obligations assumed previously by its country, to respect the human rights expressed in the American Declaration of the Rights and Duties of Man, and to comply with the commitments assumed by the signatories of the Declaration of the Peoples of the Americas and the general principles of the Charter of Punta del Este.

3. To recommend that, once opinions have been exchanged, each government decide whether it will maintain diplomatic relations with the de facto government.

(Final Act of the Second Special Inter-American Conference, OAS Official Records, OEA/Ser.E/XIII.1, Doc. 150, Nov. 30, 1965, p. 52.)

JUDICIAL DECISIONS

BY JOHN R. STEVENSON *

Of the Board of Editors

UNITED STATES COURTS

(A) PUBLIC INTERNATIONAL LAW CASES

Sovereign immunity—waiver of immunity extends to separate action for declaratory judgment seeking collateral review of extradition hearing in which demanding government intervened

WACKER v. BISSON. 348 F. 2d 602.

U. S. Ct. App., 5th Cir., June 23, 1965.

[Excerpts from the opinion by Wisdom, J., and the dissent by Rives, J., follow. Multiple citations have been eliminated and the footnotes re-numbered.]

The appellant, J. Samuel Wacker, awaiting extradition to Canada, brings this off-beat declaratory judgment action attacking the validity of an unappealable extradition order. Since Wacker is in custody, he might just as well have cast the action in the form of an application for habeas corpus. Wacker, however, has twice tried that approach without success. In the complaint and on appeal, the plaintiff advances on all fronts, attacking the constitutionality of numerous international treaties and conventions, challenging the extradition statute (as written and as applied), and making other contentions based on all possible, and some impossible, reasons for the invalidity of the extradition. Wacker names as defendant the Consul General of Canada, the demanding state. The District Court dismissed the complaint for lack of jurisdiction over the subject matter and over the person of the defendant. We reverse and remand, taking the view that the District Court has jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §2201 ff., to review collaterally the validity of the extradition proceeding.

[The Court of Appeals first decided that the action satisfied the Constitutional requirement that it involve a "case or controversy." The court rejected an argument that there could be no true controversy in an action where Wacker's custodian—the United States Marshal—was not a defendant, reasoning that Canada, as the demanding government, was the real party in interest. It further held that the courts had power to review the legality (but not the wisdom) of extradition proceedings of the Executive Branch.]

[The court next found that the action for declaratory judgment was an appropriate method of review of the extradition hearing, despite the fact that there had been two prior reviews by habeas corpus hearings. The

* Assisted by John E. Donnelly, Cornelius B. Prior, Jr., and William J. Williams, Jr., of the New York Bar.

court held that an action for declaratory judgment was an "optional, alternative remedy" and was a useful method of review in extradition cases which permitted a direct confrontation between the real parties in interest. It noted, however, that the remedy was discretionary and that, if the District Court should determine on remand that Wacker had had a "full and fair hearing" in the prior habeas corpus proceedings, there would be no necessity for any further evidentiary hearing.]

The court below upheld the defendant's plea of sovereign immunity. The State Department here makes no suggestion of immunity. Compare *Rich v. Naviera Vacuba*, 4th Cir. 1961, 295 F. 2d 24. Nor is there any question of the capacity of a consul general to plead the sovereign immunity of his government in an extradition case.¹ The crucial question is whether Canada's participation in the extradition hearing and habeas proceedings constitutes a waiver of immunity.

The Dominion of Canada initiated Wacker's extradition, intervened in the extradition proceedings, appeared in both habeas proceedings, and, although designated as the defendant in the second habeas petition, did not plead sovereign immunity or protest against its designation as defendant. Canada's plea of immunity comes very late in the day. Unlike a domestic sovereign, a foreign sovereign waives immunity if it appears and fails to make a timely plea. *Richardson v. Fajardo Sugar Co.*, 1961, 241 U. S. 44 . . . Restatement, Foreign Relations Law (Proposed Official Draft 1962) section 74(3); 2 Hackworth, Digest section 176. If the foreign sovereign waives immunity in the court of first instance, it also waives immunity to any *appeal* from an adverse judgment. Ordinarily a waiver of sovereign immunity does not extend to a separate and unrelated lawsuit. See, e.g., *In re Creditors of Hughes & Co.*, N. Y. Sup. Ct. 1957, 9 Misc. 2d 16 . . . This declaratory judgment action is *not* a direct appeal from the extradition hearing or the previous habeas actions. Nor is it a completely separate and unrelated lawsuit; it is a collateral review of the extradition hearing.

We take our guidelines from the latest and most comprehensive Supreme Court discussion of waiver of immunity by a foreign state, *National City Bank v. Republic of China*, 1955, 348 U. S. 356. . . . The immunity of a foreign state is judge-made law. It does not rest on the Constitution or any federal statute. As the Court pointed out: "the privileged position of a foreign state is not an explicit command of the Constitution. It rests on considerations of policy given legal sanction by this Court." *Id.* at 359. . . . The scope of sovereign immunity has contracted in recent years. Sovereign immunity "is a legal doctrine which has not been favored by the

¹ A consul is not a diplomatic officer. Normally a consul cannot assert the immunity of a sovereign state. Restatement, Foreign Relations Law sec. 74(2)(a) and Comment a. But the Canadian consul has *consular* immunity for all acts within his official capacity, including the initiation of extradition proceedings. Restatement, Foreign Relations Law sec. 85(1). In the hearing and the prior habeas corpus suits, the nominal party was the Canadian Government, not the consul general. The consul general has acted throughout on behalf of the Canadian Government. For purposes of this opinion we see no reason to distinguish between the personal immunity of the consul and the sovereign immunity of the Dominion of Canada.

test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment." *Ibid.* In spite of some differences, there is a basic similarity between the *National City Bank* case and the present case. The Republic of China sued a private citizen. The private citizen set up a counterclaim based on a separate and unrelated transaction. The Republic of China asserted sovereign immunity as to the counterclaim, but the Court held that China waived immunity by making a voluntary appearance: "The short of the matter is that . . . we have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice." *Id.* at 361-362 Broadly phrased, the *National City Bank* case holds that a foreign government cannot intervene voluntarily, obtain an advantage over a private citizen, and then retire behind a shield of immunity when the private citizen attempts to restore the status quo. The case stands for the general principle that a voluntary appearance by a foreign government waives immunity as to any essentially defensive measures taken by the private citizen.

The principle applies to the present case. The *National City Bank* case permits a completely unrelated counterclaim against a foreign government in the same lawsuit. The instant case is in the nature of a "counterclaim" in a separate lawsuit arising out of the same transaction. We take a step, but a very small step, beyond the *National City Bank* case. Like the counterclaim in the *National City Bank* case, this declaratory judgment action is entirely defensive. If Wacker succeeds, he will not obtain an affirmative recovery against the Dominion of Canada. He will only nullify the results of prior litigation of the Dominion of Canada. In *National City Bank* the Court permitted an unrelated counterclaim, because the private citizen had no other judicial recourse against the foreign government. Wacker here has no appeal from the extradition hearing; his only recourse is collateral review by habeas corpus or declaratory judgment.

There is no unfairness to the demanding government in an implied waiver of immunity to suit in a collateral attack on the extradition hearing. The foreign government which intervenes in an ordinary lawsuit subjects itself to an appeal. The appeal reviews all errors of law and some errors of fact. Here there is no direct appeal, and the only review is by collateral attack. The scope of review, in declaratory judgment or habeas corpus, is much narrower than the normal scope of review on an appeal. The implied waiver of immunity here is therefore much narrower than the waiver in the normal, appealable case.

Foreign cases also support our conclusion. The courts of Great Britain zealously protect the immunity of foreign sovereigns. But the British courts hold that a waiver of sovereign immunity extends to subsequent collateral review if there was no direct appeal from the original lawsuit. *Sultan of Johore v. Abubakar*, Judicial Committee of the Privy Council 1952, 19 International Law Reports No. 38 at 182.

We rest our holding on the fact that the demanding government was a

party to the extradition hearing. If the demanding government intervenes in the extradition hearing, the demanding government waives its immunity to subsequent actions to review the validity of the hearing.

* * * *

RIVES, Circuit Judge, dissenting:

The district court sustained the motion of the defendant Consul General, Dominion of Canada, to dismiss for lack of jurisdiction, and succinctly stated its reasons as follows:

“Reasons.

“Plaintiff’s counsel in oral argument announced that the suit against Beeson [*sic*], defendant, was not in the nature of a personal action against Beeson but one against Beeson in his representative capacity as Consul General of the Dominion of Canada, this being the only way plaintiff’s counsel believed he could obtain service of process against the Dominion of Canada. This Court is without jurisdiction to entertain a suit against a foreign nation or sovereign such as the Dominion of Canada or against its New Orleans Consul General as the representative of the sovereign, the Dominion of Canada. *National City Bank of New York v. Republic of China*, 348 U.S. 356 . . . (1955), reh. den. 349 U.S. 913 . . . Since the Consul is being sued in his representative capacity as representative of the Dominion of Canada, the Consul enjoys the same immunity to suit. *Arcaya v. Paez*, S.D. N.Y., 1956, 145 F.Supp. 464, affirmed 244 F.2d 958;”

* * * *

I agree with the learned district judge.

* * * *

When there is a treaty or convention for extradition the power is vested in the executive to surrender the person to a foreign government. See *Valentine v. United States ex rel. Neidecker*, 1936, 299 U.S. 5

* * * *

It is important that the treaty obligations of the United States be honored without unnecessary delay, and this cause well illustrates how permitting review by declaratory judgment in addition to habeas corpus may result in unreasonable, if not interminable delay, not consistent with the prompt performance of our treaty obligations.

I would affirm the judgment of the district court, and therefore respectfully dissent.

(B) PUBLIC INTERNATIONAL LAW CASE NOTES

International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels—salvage claims maintainable against United States by Greek national

A libel was commenced in the District Court for the Southern District of New York by the owners of two Greek tugs, seeking an award for sal-

vage services performed for two United States naval vessels. The suit was based upon the Public Vessels Act of 1925 (46 U.S.C. §§781-790), because the Suits in Admiralty Act of 1920 (46 U.S.C. §§741-752) does not apply to salvage services rendered to naval vessels. A condition of the Public Vessels Act, however, is that suit could be maintained "by a national of any foreign government" against the United States only if "it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its courts." (46 U.S.C. §785.) On appeal, the Court of Appeals for the Second Circuit, Friendly, J., upheld the overruling of the United States Government's defense of sovereign immunity and held that the action could be maintained under the Public Vessels Act.

While noting that the expert testimony as to whether the Greek courts would entertain an action by a United States national for salvage services to a Greek naval vessel was "exceedingly unsatisfactory," the court found help in the case of *Nicholas Eustathiou & Co. v. United States*, 154 F. Supp. 515 (E.D. Va., 1957), and concluded that under the Greek Civil Code a national of the United States could maintain such an action.

The United States argued that even if the local law of Greece permitted such an action, the International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, signed at Brussels on April 10, 1926, and ratified by Greece on May 19, 1951, prohibited Greece from permitting salvage claims by United States nationals against Greek naval vessels.¹ This argument was based on Article 6 of the Convention, which provides in relevant part as follows:

Extension of Provisions to Non-Contracting States—Reciprocity. The provisions of the present Convention may be applied in each Contracting State for the benefit of non-Contracting States and their nationals only on the basis of reciprocity.²

This argument was rejected by the court in the following paragraph:

Both in this translation and in the official French text, Article 6 seems to constitute an agreement by the Greek Government not to allow a non-contracting party—here the United States—to benefit from a waiver of immunity which Greece makes in favor of contracting parties unless the United States reciprocates to Greece. That is a sensible reading; the parties to a treaty, each of whom makes a sacrifice for a countervailing benefit, do not want the other parties to extend the same benefits to a state not making such sacrifices. The question then becomes whether the condition of reciprocity is satisfied by the Public Vessels Act. The Government says it is not, because the United States has not waived immunity save to a country which has waived immunity with respect to it, the Brussels Convention forbids Greece to waive immunity in favor of the United States unless the United States has waived it as to Greece, and we thus "encounter an endless Circle," since "neither Government has taken the necessary first step." We see no reason why the willingness of both

¹ The United States is not a party to this treaty.

² The English text of the Convention can be found in 6 Benedict, Admiralty 239-242 (7th ed. Knauth, 1958).

governments to allow suits by nationals of the other should be frustrated by any such Gaston-Alphonse approach. If, as we have concluded, Greece is prepared to allow suits by our nationals for salvage to its naval ships save as the Brussels Convention requires it to obtain the very reciprocity that Congress has offered, the condition of §5 of the Public Vessels Act, 46 U.S.C. §785, is sufficiently met. (349 F. 2d at 470)

Nicholas E. Vernicos Shipping Company v. United States, 349 F. 2d 465 (U. S. Ct. App., 2nd Cir., June 21, 1965).

Treaty of Friendship, Commerce and Navigation with Ireland—exemption from compulsory military service—Selective Service Act and Immigration and Nationality Act not inconsistent with treaty

Article III, Section 1, of the Treaty of Friendship, Commerce and Navigation with Ireland, 1 U.S. Treaties 785, T.I.A.S., No. 2155, provides that "Nationals of either Party shall . . . be exempt from compulsory service in the armed forces of the other Party. . . ." Title I, Section 4(a), of the Selective Service Act of 1948, 62 Stat. 604, provided that

Any citizen of a foreign country . . . shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability . . . , but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States.

Section 315 of the Immigration and Nationality Act of 1952, 8 U.S.C. §1426, provides that

any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

The court found that the treaty did not impose any limitation on the power of Congress to formulate conditions of eligibility for naturalization and, accordingly, there was no inconsistency between the treaty with Ireland and the applicable Acts of Congress and their implementing executive orders. *In re Petition for Naturalization of Regan*, 244 F. Supp. 664 (U. S. Dist. Ct., E.D.N.Y., Aug. 24, 1965).

(C) PRIVATE INTERNATIONAL LAW CASE NOTES

Judicial jurisdiction—venue and personal jurisdiction over foreign corporations—extraterritorial service of process

Hoffman Motors Corp. (Hoffman), a Delaware corporation, authorized to do business and having its principal office in New York, commenced an action in the United States District Court for the Southern District of New York against Alfa Romeo S.p.A. (Alfa S.p.A.), an Italian corporation, claiming relief under the Robinson-Patman Price Discrimination Act, 15 U.S.C. §13. §22 of the U. S. Code as cited provides that a suit against

a corporation under the antitrust laws may be brought "in any district wherein it . . . transacts business" and process may be served "in the district of which [defendant corporation] is an inhabitant, or wherever it may be found." Rules 4(e) and 4(f) of the Federal Rules of Civil Procedure allow a party not an inhabitant of the State or found therein to be served with process in the manner and under the circumstances prescribed by the statute or rule of court of the State in which the district court proceeding is held. Section 302(a) of the New York Civil Practice Law and Rules (the so-called "long-arm statute") provides that personal jurisdiction may be obtained over a "non-domiciliary" as to causes of action arising from specified acts, including transacting "any business within the state" in person or through an agent, by out-of-State personal service "in the same manner as service is made within the state, by any person authorized to make service by the laws of the . . . country in which service is made or by any duly qualified attorney . . . or equivalent in such jurisdiction." Alfa S.p.A. was served by registered mail in Italy. In addition, its general manager was personally served in Italy by an Italian attorney designated by the Clerk of the United States District Court to serve process and Alfa S.p.A.'s New York attorneys were personally served in New York. Alfa S.p.A. moved to dismiss for improper venue and want of personal jurisdiction.

The District Court found that Alfa S.p.A. had been consistently carrying on business in the Southern District of a substantial nature and thus "transacts business" within the venue requirements of 15 U.S.C. §22:

The activities of S.p.A. employees with regard to sales, promotion and warranties alone seem sufficient to meet the relatively minimal contacts necessary to constitute transacting of business under the liberally construed requirements of 15 U.S.C. §22

But in addition to its direct activities S.p.A. has transacted business through Alfa Inc., its New York subsidiary. Alfa Inc. was an instrumentality used by its foreign parent to perform essential local operations. The parent completely controlled the subsidiary, setting its policies in Italy, appointing its own officers and employees as directors, officers and employees of the subsidiary and paying their salaries. Under such circumstances, the foreign corporate parent will not be permitted to hide behind its local instrumentality. Cognition will be taken of the fact that the foreign corporation through its subsidiary is actually transacting business within the contemplation of 15 U.S.C. §22. . . .

In addition, the franchise relationship between S.p.A. and Hoffman Corp. further indicates that S.p.A. transacts business within this district. A foreign manufacturer of cars transacts business by promoting the sale of its products through a distributorship system when the manufacturer retains some control over the distributor. . . .

* * * * *

It is thus plain that S.p.A. through its own employees, through its subsidiary, and through Hoffman Corp. as its distributor, transacts business within this district within the meaning of 15 U.S.C. §22. Venue on the Robinson-Patman claims is proper.

The District Court held that Alfa S.p.A. could be validly served in Italy, since the language of 15 U.S.C. §22 permitting service of process wherever defendant was "found" should not be limited "to apply only to service within the United States"; the constitutionally required minimal contacts with the jurisdiction out of which process issued were present; and service had been made in a manner reasonably calculated to give Alfa S.p.A. actual notice of the proceedings against it.

Service was also valid under Federal Rules 4(e) and 4(f) and New York's "long-arm" statute, since Alfa was transacting business in New York within the requirements of Section 302 of the New York Civil Practice Law and Rules and the suit was one "arising" from such business. *Hoffman Motors Corporation v. Alfa Romeo S.p.A.*, 244 F. Supp. 70 (U.S.D.C., S.D.N.Y., July 28, 1965).

Foreign state as private litigant—comity—foreign guardianship decrees not binding on courts in United States

The Republic of Iraq brought an action for declaratory judgment in the District Court for the Northern District of Illinois seeking a declaration that decrees of the Court of Personal Affairs of Baghdad were entitled to recognition by the Probate Court of Cook County, Illinois, under principles of comity. The suit named as defendant the Chicago bank appointed as guardian of the estates of children of an Iraqi father and British mother after the father's death. The family was residing in Chicago at the time of the death. Iraq claimed that the decrees of its court, appointing a paternal uncle guardian of the children and dividing the estate among the children and their paternal grandmother, should have been given effect by the Illinois court.

The District Court held that it had no jurisdiction to entertain a collateral attack on the Illinois probate proceedings. The Court of Appeals for the Seventh Circuit affirmed the result reached by the District Court, but on the ground that no "justiciable controversy" was presented and that Iraq had failed to state a claim upon which relief could be granted.

The Court of Appeals found there was no controversy because Iraq had not brought its suit against a party against whom the requested relief could be granted and because Iraq had no "personal, immediate and substantial interest in the matter presented to the Court." On the question of the kind of interest a foreign nation must have, the court said:

A further fundamental objection to the plaintiff's assertion of the claims of the mother and the children is its lack of standing to assert these claims. Federal courts will not entertain a suit at the instance of the United States if the suit is in reality one between private individuals.

In all the decisions to which we have just referred it is either expressed or implied that this interest or duty of the United States must exist as the foundation of the right of action. Of course, this interest must be made to appear in the progress of the proceedings, either by pleading or evidence; and if there is a want of it, and the fact is

manifest that the suit has actually been brought for the benefit of some third person, and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail.

United States v. San Jacinto Tin Co., 125 U.S. 273, 286 . . . (1888). . . . We think the same rule applies in the case of a foreign nation. If a sovereign nation chooses to assert against a foreign nation private claims of its individual citizens it does so as sovereign *vis-à-vis* the foreign nation, not as a private litigant.

United States v. Diekelman, 92 U.S. 520, 524 . . . (1875). Cases dealing with the assertion by States of rights of their citizens under the original jurisdiction of the United States, e.g., State of New Hampshire v. State of Louisiana; State of New York v. State of Louisiana, 108 U.S. 76 . . . (1883) . . . illustrate the type of interest which a government must show in order to be entitled to maintain an action in its own name—an interest which the Republic of Iraq does not possess in this case.

As to the question of whether comity required recognition of the Iraqi guardianship decrees, the Court noted that it was bound to follow Illinois law in this diversity case, and that where the children had never been in Iraq and had been residing in Chicago with their parents for several years prior to the father's death, it was clear that Illinois law would not recognize such foreign decrees. *Republic of Iraq v. First National Bank of Chicago*, 350 F. 2d 645 (U. S. Ct. App., 7th Cir., Aug. 12, 1965).

Brazilian limitation on liability for death in airplane accident applicable where Brazil's interest outweighs forum's—exchange rate on judgment date used in converting cruzeiro limit to dollars

In an action in the United States District Court involving the death of a Maryland resident in a plane crash in Rio de Janeiro, Brazil, the defendant Brazilian airline Varig consented to judgment for the plaintiff in the amount of \$170.00 (the value of 100,000 cruzeiros on the date of judgment), the limit of liability for injury in aviation accidents set by the Brazilian Air Code.

The plaintiff argued that the Brazilian limitation on damages should not apply, on the ground that it was contrary to the strong public policy of the forum, the District of Columbia. The court rejected this argument on the ground that the

interest underlying the application of Brazilian law seems to outweigh any interest of the District of Columbia. Not only is Brazil the scene of the fatal collision, but Varig is a Brazilian corporation which, as a national airline, is an object of concern in terms of national policy. To Brazil, the success of this enterprise is a matter not only of pride and commercial well-being, but perhaps even of national security. The limitation on recovery against airlines operating in Brazil was enacted in the early days of commercial aviation, no doubt with a view toward protecting what was then, and still is, an infant industry of extraordinary public and national importance.

The court also rejected the argument that the Brazilian limitation should be disregarded because of the marked decline in the dollar value

of the cruzeiro, since this would import "an unpredictable and virtually immeasurable factor . . . into the decision of international conflict of laws cases."

Finally, the court declined to follow the New York and English rule that tort damages be measured by the rate of exchange in effect on the date of the wrong, in favor of the "day of judgment" rule, on the authority of the Restatement (Second), Conflict of Laws §612a (Tent. Draft No. 11, 1965), and the 1926 decision of the United States Supreme Court, *Die Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U. S. 517. It reasoned that this rule "provides the plaintiff with the dollar equivalent of the amount he would recover if he had sued in the country whose law determines his right to recover, and it thereby ensures that he neither suffers nor benefits from the fact that he chose another forum in which to litigate his claim." *Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense*, 350 F. 2d 468 (U. S. Ct. App., D. C. Cir., June 10, 1965).

Brazilian limitation on liability for injuries in airplane accident applied in action by New York resident

Plaintiff, a United States citizen domiciled and resident in New York, purchased in Rio de Janeiro from Serviços Aereos Cruzeiro do Sul, S.A. ("Cruzeiro"), a Brazilian airline wholly owned by nationals and residents of Brazil, a ticket for a flight to São Paulo, Brazil. Plaintiff was injured when the plane crashed in landing at São Paulo. Plaintiff brought an action against Cruzeiro in the United States District Court for the Southern District of New York and averred in the complaint that "any limitation on the amount of damages recoverable which may be contained in the Brazilian Air Code is inapplicable or unenforceable." In defense Cruzeiro pleaded that the Air Code limited liability of the carrier to 100,000 cruzeiros (equivalent to about \$140 at the time of the accident). It was stipulated that Cruzeiro had already paid in excess of 100,000 cruzeiros for the account of plaintiff. Plaintiff moved for an order striking the defense.

Applying New York law and construing New York cases, the District Court held that the limitation of damages in the Brazilian Air Code was applicable and enforceable:

In the light of these decided cases, it seems reasonably clear to me that at least a majority of the New York Court of Appeals, and probably all of the judges of that Court, would apply the law of Brazil, including that part of Brazilian law limiting damages against an air carrier, to the case at bar.

Because of its relationship (geographical and otherwise) to the accident in the case at bar and to defendant as a Brazilian air carrier, Brazil "has the greatest concern with the specific issue raised in the litigation" . . . namely, the issue of limitation of liability. The contract between plaintiff and defendant was made in Brazil. The flight began in Brazil, was to end there, and did end there. . . . At no time was defendant's plane over or even near New York. Plaintiff "had come to rest" . . . in Brazil even though his onward journey

to Sao Paulo (not planned beforehand) began on the day of his arrival. The trip being made by plaintiff was occasioned by activities in Brazil—the operations of Honeywell's Brazilian subsidiary and plaintiff's participation in Brazil in those operations. That the place of the accident was Brazil was thus in no sense "fortuitous" . . . Defendant is not a New York corporation; it is a thoroughly Brazilian corporation, owned by Brazilians, and conducts only very limited activities in New York. While it has been held liable to suit here . . . its activities in New York relate entirely to the purchase of materials and not to the solicitation or even the encouragement of passenger business. . . . Cruzeiro (defendant here) does not deal with the public in New York and of course never dealt with plaintiff in New York. While plaintiff is a resident of New York, there is no likelihood of his becoming a public charge to affect the policy of this State; the accident in suit occurred in the course of his employment and he is covered by the Workmen's Compensation Law of New York. His employer is not a New York corporation. . . .

What the case at bar comes down to is that the *only* relationship or contact of New York is the fact that plaintiff is a resident of New York. Surely this is not enough, standing alone, to warrant the application of New York law to the issue of measure of damages.

It has been suggested that if the forum state has no interest in the application of its law while the state of the place of the conduct and the injury does have such an interest, the law of the latter state should be applied. . . . New York seems to have no interest here. This is not a wrongful death action. The New York Workmen's Compensation Law covers plaintiff. Such law must embody the policy of New York so far as he is concerned and so far as concerns the prevention of his dependents from becoming public charges.

But if New York does have an interest in the application of its law because of the residence here of plaintiff, the contrary interest of Brazil in the issue involved (limitation of damages) seems clearly "the greater and more direct", "the strongest interest in the resolution of the particular issue presented" . . .

For the reasons set out, the conclusion is that the law of Brazil as to the measure of damages must be applied.

Ciprari v. Servicos Aereos Cruzeiro do Sul, S.A., 245 F. Supp. 819 (U. S. Dist. Ct., S.D.N.Y., Sept. 29, 1965).

Judicial jurisdiction—jurisdiction over subject matter—admiralty court has jurisdiction over tort occurring in airspace over Atlantic Ocean

Libellant commenced an action in admiralty for personal injuries sustained in the course of a flight from Rome to New York when the airplane jolted violently. Defendant moved to dismiss on the grounds that the airplane made no contact with the water and therefore was not includible in admiralty and that the action was controlled by the provisions of the Warsaw Convention. The court held that, since it appeared that the libellant was injured in the airspace over the Atlantic Ocean, admiralty was the proper forum for an adjudication of the action. The court also

stated that the Warsaw Convention, if applicable, determines the countries, not the places within the countries, in which actions resulting from international airplane flights should be litigated. *Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874 (U.S.D.C., W.D. Pa., June 23, 1965).

Decedent's estates—law governing rights of after-born children

Testator, who was married but had no children, executed his will while domiciled in Ontario, Canada, leaving his entire estate to his wife. Testator and his wife then moved to New York State, where they continued to reside until his death. Two children were born to the couple during this period. The Surrogate's Court of Erie County, New York, considering the rights of the two after-born children to participate in the distribution of the testator's estate, the situs of which was New York, ruled that their rights were determinable by the law of New York, which allows their participation, rather than by the law of Ontario, which does not. *In re Harris' Will*, 263 N.Y.S. 2d 393 (Surr. Ct., Erie County, Oct. 1, 1965).

REPUBLIC OF CHINA COURTS

PUBLIC INTERNATIONAL LAW CASE NOTES *

Legal status of legation's premises—fictitious territory—jurisdiction over crimes committed abroad.

PUBLIC PROSECUTOR *v.* WANG MIN-YAO AND SUNG CHEN-WU.

District Court of Taipei, Nov. 8, 1965. File No.: 54th Year, Shu—2107.

The defendants were Chinese nationals doing business in Seoul, Korea. On July 8, 1965, they led a number of Chinese nationals to the Chinese Embassy protesting the Embassy's sale of some lands to Koreans. After having forcibly entered the Embassy, they led those Chinese in destroying the Embassy's gate and furniture. They were arrested by Korean police and later handed over to Chinese authorities in Taiwan. They were prosecuted for interference with public functions and were sentenced to four and three years' imprisonment, respectively, in accordance with Article 136 of the Chinese Criminal Code.

One defendant argued that the place of committing the offense—Korea—was a foreign territory outside the jurisdiction of the Republic of China.¹ The court, however, rejected the argument and held:

Although a legation is located in a foreign country, it is not subject to the jurisdiction of the host country. It is still within the reach

* Reported and translated into English by Dr. Hungdah Chiu, Associate Professor of International Law at National Taiwan University College of Law. Footnotes added.

¹ Art. 7 of the Chinese Criminal Code provides: "This Code shall apply to an offense . . . which is committed by a citizen of the Republic of China beyond the territory of the Republic of China and for which the minimum basic punishment is imprisonment for not less than three years. . . ." The defendants were prosecuted under Art. 136 where the minimum basic punishment is imprisonment for one year; therefore, the court cannot assume jurisdiction under Art. 7.

of Chinese law. This is the so-called "fictitious territory" in legal theory and this is also a principle generally recognized by international law. As the defendant's place of committing the offense was within the premises of the Chinese Embassy in Korea . . . there is no doubt that he should be subject to the jurisdiction of Chinese law.

Air intrusion—INFRINGEMENT OF SOVEREIGNTY OVER AIRSPACE—Convention on International Civil Aviation—Articles 16 and 95 of Chinese Civil Aviation Law

PUBLIC PROSECUTOR *v.* MATSUMOTO.

District Court of Taipei, Nov. 24, 1965. File No.: 54th Year, Yi—11165.

On October 27, 1965, the defendant, a Japanese aircraft pilot, flew a plane to Taipei and landed at the airport without getting advance approval from the Chinese Government. He was prosecuted for illegal intrusion of Chinese airspace and landing at a Chinese airport in violation of Article 16 of the Chinese Civil Aviation Law. The District Court of Taipei sentenced him to one year's imprisonment with two years' suspension of punishment. The court held:

Both China and Japan are contracting parties to the Convention on International Civil Aviation. In accordance with that Convention² China enacted the "Regulation Governing Flights over National Territory by Civil Aircraft" which provides in Article 4 that aircraft should not fly over Chinese territory without getting advance approval. Moreover, Article 16 of the Chinese Civil Aviation Law explicitly provides that: "No foreign civil aircraft shall fly over, or land in the territory of the Republic of China without obtaining special permission from the Ministry of Communications."³ As the defendant has worked as an aircraft pilot for more than ten years . . . he should have known of the existence of the Convention. Even if he does not know that Japan is a party to the Convention and does not know the relevant provisions of the Chinese Civil Aviation Law, he still cannot be exempted from criminal responsibility as the offense was committed within Chinese territory and according to Article 16 of the Chinese Criminal Code [ignorance of law does not remit criminal liability].

² Art. 5 of the Convention provides: "Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. . . ." The court does not seem to realize that, according to this article, the defendant is not required to apply for special permission to fly over or land in Chinese territory. However, it should be noted that on July 26, 1949, the Chinese Government notified all countries concerned that flights over Chinese territory by all foreign aircraft, except those undertaken pursuant to bilateral agreements on air transportation concluded between China and other countries, or those specially authorized by the Chinese Government through diplomatic channels, would be temporarily prohibited in accordance with Art. 9 of the Convention. China Handbook, 1951, at 140 (Taipei, 1951).

³ It is doubtful whether this article is consistent with Art. 5 of the Convention cited in note 2 above.

The court concluded that the defendant "had infringed upon the integrity of Chinese sovereignty over airspace and the consequence of his criminal offense was not negligible." For this he should be sentenced to one year's imprisonment in accordance with Article 95 of the Chinese Civil Aviation Law.⁴

INTERNATIONAL ARBITRATION

International air transport—treaty interpretation

ITALY-UNITED STATES AIR TRANSPORT ARBITRATION. ADVISORY OPINION OF TRIBUNAL.¹ July 17, 1965.

Arbitral tribunal of Professor Otto Riese, President, Professor Stanley Metzger, and Professor Riccardo Monaco. 4 International Legal Materials 974 (September, 1965).

After a dispute had arisen between the United States and Italy as to the rights of American air lines to operate all-cargo services to Italy, the question was submitted to the arbitral tribunal: "Does the Air Transport Agreement² between the United States and Italy of February 6, 1948, as amended, grant the right to a designated airline of either party to operate scheduled flights carrying cargo only?"

Under this Agreement, each party granted the other party the right to carry on air services as stipulated in the Annex, the Schedule to which specified routes. Section III of the Annex provides:

One or more air carriers designated by each of the contracting parties under the conditions provided in the present Agreement and the Annex thereto will enjoy, in the territory of the other contracting party, rights of transit and of stops for non-traffic purposes, as well as the right of commercial entry and departure for international traffic in passengers, cargo *and* mail at the points enumerated on each of the routes specified in the Schedules attached. [Emphasis added.]³

Although all-cargo services to and from Italy had been operated by American carriers both before and after the date of the Agreement

⁴ Art. 95 provides: "Any aircraft pilot or navigator who violates the provisions of Article 16 of this Law shall be liable to imprisonment for a term not exceeding three years or to penal servitude or to a fine not exceeding the sum of 3000 *yuan* [U.S. \$225.00]." The remaining part of the decision explains why the defendant's sentence should be suspended.

¹ Digested by Wm. W. Bishop, Jr. Art. 12 of the Air Transport Agreement provides in part: "any dispute between the contracting parties relative to the interpretation or application of the present Agreement or its Annex, which cannot be settled through consultation, shall be submitted for an advisory report to a tribunal of three arbitrators, one to be named by each contracting party, and the third to be agreed upon by the two arbitrators so chosen, provided that such third arbitrator shall not be a national of either contracting party."

² T.I.A.S., No. 3513; 73 U.N. Treaty Series 113.

³ In the Italian text the carriers are to enjoy rights "di transito e di scalo per fini non di traffico, così come del diritto di caricare e di scaricare passeggeri, merci e posta in traffico internazionale, nei punti indicati in ciascuna delle rotte specificate negli elenchi allegati."

(though suspended in 1950, 1951 and 1952 during the Korean hostilities), and although the United States contended that the proper interpretation of the Agreement gave the right to operate such services, in 1963 the Italian Government objected to proposed increases in cargo flights. Its argument was based on the emphasized word "*and*" in the Agreement phrase "passengers, cargo *and* mail" as limiting the rights granted in the Agreement to flights carrying passengers and/or mail in addition to cargo.

The tribunal, by a two-to-one vote, gave an affirmative answer to the question. Professor Monaco gave a dissenting opinion.

The Opinion of the Tribunal stated:

(1) An Arbitral Tribunal called upon to rule on the interpretation of an international agreement must, in accordance with the principles generally recognised, in the first place analyse *the text* of the provisions in dispute.

It found that this called for study of the Agreement as a whole, and permitted reference to Article 96, paragraph (a) of the Chicago Civil Aviation Convention of 1944, under which "air services" were defined as services "for the public transport of passengers, mail *or* cargo" [emphasis added]. The Tribunal continued:

If the formula "transport of passengers, cargo *and* mail" is interpreted purely on grammatical methods, it must be held that the word "*and*" does not normally have the same meaning as the word "*or*".

As has been shown by numerous citations from dictionaries and grammars and by a detailed philological study in the course of the written and oral proceedings, in ordinary language and in legal terminology the word "*and*" is a conjunction, having a cumulative sense, co-ordinate or co-ordinating; this holds equally good both for the English word "*and*" and the Italian word "*e*".

However, closer analysis of the text of Section III reveals that, if we accept this meaning of the word "*and*", the wording by no means implies that all-cargo services are excluded and not covered by the provisions of this Section.

Again, the Italian text of Section III merely states that the air carriers have in particular the right to embark and disembark passengers, cargo and mail ("*il diritto di caricare e di scaricare passeggeri, merci e posta in traffico internazionale*").

Attributing its normal cumulative sense to the word "*and*", the text merely declares that the carriers have the right to embark and disembark one *and* the other of these three types of load, i.e. that they can embark and disembark passengers, embark and disembark cargo, embark and disembark mail. The text thus enumerates cumulatively possible types of load for carriage by air and grants the *right*—without, however, imposing any obligation!—to carry them all; on the other hand, this text does not pronounce on the type of the means of transport to be employed—the nature, equipment, type or utilisation of the aircraft performing the carriage, nor of the kind or character of service. It therefore does not follow directly from the text that only combination services are permitted.

If it were desired to interpret the text in another fashion, namely

to the effect that it only permitted passengers, cargo and mail to be embarked or disembarked at one and the same time, such an interpretation would be incompatible with the objective of the Agreement, as will be illustrated below. It is furthermore clear that the text does not in any way specify an obligation to embark or disembark simultaneously the three types of load. Such a requirement would in any case be meaningless, since it would be absurd to introduce into an Agreement governing scheduled air services between the two countries a provision to the effect that an aircraft which was not carrying passengers as well as cargo and mail could not disembark what it was carrying or that the carrier performing the air transport could not, for example, embark passengers and cargo if there were no mail for carriage at the same time. Nor, in these circumstances, can it be concluded that there exists an obligation that the aircraft involved should be scheduled for combination service offering at least the possibility of carrying these three types of load together. The text is silent on this point and, on the basis of its wording, does not justify such a conclusion.

The same interpretation must be given to the English text ("the right of commercial entry and departure for international traffic in passengers, cargo and mail"). The system of commercial rights applies to all carriage by air regardless of the means of transport employed, or of the kind or character of service, so that it includes both combination services and all-cargo or all-mail services, as will be explained in greater detail below, under No. 5.

Thus neither the English nor the Italian text of Section III of the Annex, interpreted in the normal sense of the terms used, exclude all-cargo services. In consequence any conclusion to that effect cannot be founded on the text; it could only rest on a deduction concerning the scope of the text, thus on interpretative reasoning according to which the two texts of Section III necessarily determined both the type of the means of transport to be employed and the kind or character of service. But since the text is silent on this point, such an interpretation would be purely gratuitous, unless it were based, not on the text, but rather on the real intentions of the parties, which as will be seen hereinafter, do not support such an interpretation.

Accordingly, even on a bare textual analysis, using the word "and" in Section III in its normal cumulative sense, all-cargo services are included in, not excluded from the right of commercial entry and departure for international traffic on the part of designated air carriers.

It should be stated at this point that since the Tribunal is of the opinion, for the reason stated herein both above and below, that the meaning of the Agreement is clear and not ambiguous, neither the theory of interpretation *contra proferentem* nor the principle according to which the interpretation to be placed on an international agreement should be that which least restricts the sovereignty of States, can be applied to the case in point; in these circumstances, it is not necessary for the Tribunal to pronounce on these principles, the second of which, in particular, is fairly controversial.

* * * * *

The affirmative answer to the question asked of the Tribunal which thus appears to be called for by the foregoing analysis is supported, not contradicted, by an analysis of other evidence relating to the mean-

ing of the Agreement to which the attention of the Tribunal has been called by the parties.

* * * * *

(4) The conclusion that all-cargo services are covered by the 1948 Agreement is also ineluctable if it is accepted that the text of Section III of the Annex established that the word "and" has, in the case in point, the meaning of "or" ("o"), which has the sense of an alternative.

This appears to be the case in the matter before us.

It is apparent that the word "and" is sometimes used as an equivalent to the word "or", as the Permanent Court of International Justice stated in the case concerning Certain German Interests in Polish Upper Silesia (Chorzow Factory Case), in its Decision of August 25, 1925 (P.C.I.J., Series A, No. 6, p. 14), when it declared: "the word 'et' . . . in both ordinary and legal language, may, according to circumstances, equally have an alternative or cumulative meaning".

This statement was made in respect of a case in point, but it can also be applied in the matter now before us. In point of fact the case before us embraces circumstances which reveal that the word "and" has been used in Section III of the Annex as equivalent to the word "or". In these circumstances the natural and ordinary meaning of the term must be set aside.

* * * * *

In the present case it appears from the context, the objective aimed at in the Agreement and from the intentions of the parties, that the word "and" was employed as equivalent to the word "or":

(a) At several points in the text of the Agreement, of its Annex and of the Chicago Convention, the words "and" and "or" have been employed indiscriminately, as if they were interchangeable.

Thus it may well be asked if the word "and" does not mean "or" in the Italian text immediately preceding the formula used in Section III of the Annex "passeggeri, merci e posta", i.e. in the phrase "diritto di caricare e di scaricare"; in point of fact this right is obviously granted for the two operations, embarkation and disembarkation, in an alternative sense, since it is clear that disembarkation can be effected without simultaneous embarkation and vice-versa.

Yet other examples could easily be cited; but it is sufficient to mention the following cases:

In Article 6 of the 1948 Agreement the word "or" used in the English text is in the Italian text sometimes rendered by "e" and sometimes by "o", as if the two terms were interchangeable.

Similarly, the Chicago Convention, on which the Agreement in dispute is based, employs in Article 5 (2) the word "or", whereas in Article 7 the same formula recurs using the word "and"; again, Article 96 speaks of "transport of passengers, mail *or* cargo", whereas the note drawn up at Chicago in the course of the conference and appended to the Form of Standard Agreement for Provisional Air Routes, to which the Resolution contained in the Final Act of the Conference refers (*Revue française de droit aérien*, 1947, p. 61) speaks of the right to embark and disembark passengers, cargo *and* mail.

(b) For the reasons set forth above under No. (2), Sections I and II of the Annex must be taken into account also in interpreting Section III.

These Sections grant to the respective Governments the right to conduct air transport services ("servizi di trasporto aereo") on specified routes.

The concept of air services is defined in Article 96(a) of the Chicago Convention as "scheduled air service performed by aircraft for the public transport of passengers, mail *or* cargo".

Since the text of Sections I and II of the Annex do not contain any provisions derogating therefrom, this definition applies to these two Sections in virtue of Article 1 (d) of the 1948 Agreement.

The fact that Section III of the same Annex employs a different formula, i.e. "and" instead of "or", does not by any means hinder the application of the above-mentioned definition to Sections I and II, since Section III does not speak of "air services", the definition of the concept of which is at issue here.

It would however be incomprehensible for the Annex to permit carriers to operate only combination services, while at the same time granting the Governments the right to operate all-cargo services as clearly results from the alternative sense of the word "or" which must be attributed to the text of Sections I and II in virtue of the above-mentioned definition.

The fact that such a divergence certainly cannot respond to the intentions of the parties constitutes another indication of the way in which the word "and" is used in Section III as an equivalent to the word "or".

* * * * *

. . . Neither in the Chicago Convention, nor in the Bermuda Agreement, nor, finally, in the Italo-American Agreement, do we find all-cargo services excluded from a régime intended to benefit international civil aviation as a whole. If it had been intended to exclude all-cargo services from this régime, this would certainly have been stated clearly, since this form of air transport was already known and practised, even if only to a limited extent—only later did it attain its present large scale; this is clearly shown by the study of trends and developments in the air cargo industry throughout the world, published by I.C.A.O. (document 8235-C/937), included in the submissions of the Italian Government. At all events, all-cargo air services were already known and being operated at the time the Bermuda Agreement and the 1948 Italo-American Agreement were concluded, and this fact is decisive. Besides, it is a well-known fact that the jurists called upon to establish a régime for international air navigation, being conscious of the never-ending technical advances and of the possibilities of its future evolution, have hitherto always tended to allow for future developments insofar as they can be foreseen. Yet, when the Agreements in question were concluded, the establishment of all-cargo services was not only foreseeable but indeed already practically an accomplished fact. In these circumstances it cannot be contended that the authors of these Agreements wished to exclude this type of transport, leaving it without any legal basis, or reserving it for subsequent agreements. If such had been their intention they would not have failed to state so clearly.

* * * * *

(6) Another indication that the parties did not intend to exclude all-cargo services from the application of the 1948 Agreement is to be found in their subsequent conduct.

(a) The conduct of the parties in their application of the 1948 Agreement is not, of course, in itself decisive for the interpretation of the disputed text; it can however serve as additional evidence as regards the meaning to be attributed to the text on the basis of the objective sought and the intentions of the parties.

* * * * *

For this purpose only the conduct of the parties subsequent to the conclusion of the 1948 Agreement can be taken into consideration.

United States carriers operated all-cargo services from 1948 to 1950, when they had to suspend them as a result of the Korean crisis; these services were resumed in 1958 and continued until 1963 when notice of the present dispute was first given by the Note Verbale of the Italian Ministry of Foreign Affairs dated July 3, 1963 (Appendix J to the American Memorial).

In 1961 Alitalia inaugurated its all-cargo service.

Now, all these services were notified simply by letter (for example, Appendix LL to the American Memorial) without one side or the other having ever requested or granted special permission.

From such practice it appears that both parties acted from 1948 up to July 1963 on the basis that the 1948 Agreement did cover all-cargo services.

If the parties had been of the opinion that such services were not covered by the Agreement they would have been obliged to apply for special permission before operating them. Such permission would certainly not have been superfluous because if the services in question were not covered by the Agreement they could not legally have been performed without it. This results clearly from Article 6 of the Chicago Convention. . . .

(b) It has been put forward as an objection that the all-cargo operations in question lacked continuity. It is correct that only a constant practice, observed in fact and without change can constitute a rule of customary international law.

However, in the case in point the matter at issue is not to deduce a legal standard from the practice followed but merely to reveal the interpretation the parties gave to the provisions in dispute, which can serve as additional evidence in ascertaining the intentions of the parties and illustrate their intent as of the time the Agreement was concluded. For this purpose a shorter period of continuity is sufficient.

BOOK REVIEWS AND NOTES

LEO GROSS

Book Review Editor

The Roosevelt-Litvinov Agreements: The American View. By Donald G. Bishop. Syracuse, N. Y.: Syracuse University Press, 1965. pp. x, 298. Index. \$7.50.

Diplomatic relations with any but close friends test patience. Those with the Soviet Union have been exasperating, especially to the officers of the Department of State destined to rub elbows daily with Soviet counterparts. Soviet diplomats under Stalin were suspicious and took evident delight in making things difficult in spite of President Roosevelt's efforts at the time of recognition to establish some basic principles to which men could turn at moments of friction to ease tension. Professor Bishop has used the National Archives and many auxiliary sources to explore the negotiations at the time of recognition and the practice during thirty subsequent years. Never before has such a glimpse of diplomatic intercourse with the U.S.S.R. been provided in such detail, whether related to major or petty disputes.

Here is the record of efforts to sever the link between the Soviet Government and the American Communist Party; to protect Americans in Soviet prisons; to gain visas and housing for American priests ministering to the diplomatic community; to collect debts owing American citizens; to clear customs formalities for incoming and outgoing members of the mission; to obtain permission to make a trip outside of Moscow; to exchange dollars for rubles at reasonable rates; to protect blueprints of visiting American engineers; to avoid charges of espionage when making routine reports of crops or production; and finally to construct an Embassy building.

This is not the record of relations in war and peace, and only rarely, as with the problem of the Communist International, of headline-catching events. It is in the main the humdrum of United States representation abroad, which in Oslo or Canberra would excite no one, but which under Stalin in Moscow became such a source of annoyance that even Ambassador William C. Bullitt gave up his post in disgust and turned emotionally against men with whom he expected to be able to work when he assumed his duties in 1933.

Professor Bishop is not wholly discouraged. He hopes that the thirty years have taught the Department of State a new technique, and also that they have brought to the fore a new generation of Soviet diplomats devoid of revolutionary emotion, lacking in a desire to pester Americans as representatives of a capitalist enemy, and appreciative of the gains to be achieved through co-operation rather than daily confrontation. He

offers some guides, however, even should times have changed, for the record is impelling. He suggests: never agree solely in "principle" but work out details; put every agreement in writing, no matter how petty, or confirm by memorandum immediately after a conversation; harbor no expectation that the Soviet diplomat shares your understanding of what has been agreed or that, even if he does, performance in full will follow; do not expect reciprocation of kindness on other than a personal level; exercise patience at all times; do not let frustration lead to breach of diplomatic relations, since the Embassy is far more valuable than what could be achieved through withdrawal.

In historic perspective Professor Bishop finds gains exceeding tribulations resulting from Soviet failure to perform the agreements between Roosevelt and Litvinov. The very failures, especially on the agreement to sever Comintern relations with the American Communist Party, have exposed, in Bishop's view, as nothing else could, the menace of international Communism both to Americans and to the world. Those finding it necessary to choose sides in a polarized world see more clearly the nature of the choice. In a reverse sense, then, failures have become successes.

While the book achieves its principal purposes, there are gaps. No mention is made of the effect of the war upon the German treaties with the U.S.S.R., even though the treaties are the reference to which most-favored-nation treatment is keyed. The Department of State seems to have felt their right to visit Frederick C. Barghoorn and Francis Gary Powers in prison no longer to rest on the Litvinov Agreement. The reader should know why.

A more important gap is in the treatment accorded President Roosevelt's attitude toward the Department of State at the time of recognition. Like John F. Kennedy, he thought it represented a static approach inappropriate to a time for dynamism. He took matters into his own hands with Mr. Bullitt, and vital negotiations were held in his office without the presence of experts or record-keepers. Bullitt was later to rue the day that he worked without a record, but it did not cure Roosevelt's self-confidence in his ability to introduce dynamism into Soviet-American relations. During the war Harry Hopkins came to epitomize his approach, which was the antithesis of diplomacy in the professional sense. Hopkins operated on the basis of a sense of historical destiny, of flare, of personal evaluation of men, of expectation that, while frustrations would be many, they were a small price to pay for bringing Stalin into the community needed to keep the peace.

History supports the diplomats in Professor Bishop's record. Nothing but frustration followed from President Roosevelt's approach. Perhaps the revolution was too recent to have permitted Roosevelt to succeed. In that proposition lies what comfort can be found for the future. Modern Soviet diplomats may be different, as Bishop thinks they are. Those in the United Nations Secretariat and in the younger ranks of the diplomatic service provide some evidence that there is a new sense of maturity, less

emotion and a desire to push coexistence toward co-operation. Yet more time is needed to be sure. Meanwhile, diplomats of every foreign office, not only those in the Department of State, have reason to ponder Professor Bishop's account and his recommended negotiating techniques.

JOHN N. HAZARD

The Canadian Yearbook of International Law. Volume II, 1964. Edited by C. B. Bourne. Vancouver, B. C.: University of British Columbia Publications Centre, 1964. pp. x, 354. Index. \$10.00.

The second volume of this *Yearbook* maintains the high standard set in the initial volume and provides material of great usefulness for students and practitioners of international law. In organization, nature and variety of materials, and timeliness of subjects selected it merits high commendation. The material comprises (in addition to book reviews) seven leading articles, more than a hundred pages of "Notes and Comments," a brief statement relating to the publication of documents on Canadian external relations, and a 45-page section on Canadian practice in international law during 1963.

In his article entitled "*Vers une nouvelle limite de responsabilité dans le transport aérien international*" Professor Michel Pourcellet contrasts the position of the United States with that of certain other countries, points out lack of uniformity, and examines the thesis of an objective responsibility apart from ideas of fault. Writing on "The Developing Relationship between Superior and Subordinate Political Bodies at the International Level," Professor R. St.J. Macdonald proceeds from an observation by Prime Minister Pearson in the United Nations General Assembly in 1963 concerning correlation of United Nations and regional agencies. All of the cases in Professor Macdonald's list have involved the Organization of American States; three of them (including the confrontation of 1962) have involved Cuba. There is emphasis upon "balance and a sense of proportion" in decision-making, and a suggestion that the process of "engineering precise accommodations on the international level is just beginning . . ." (p. 54).

Two articles in the *Yearbook* relate to fisheries; one is by A. E. Gotlieb of the Department of External Affairs on "The Canadian Contribution to the Concept of a Fishing Zone in International Law"; and the other, "*La zone de pêche exclusive du Canada*," is by Professor Jacques-Yvan of the University of Montreal. The former notes the general direction of development in this field of law as well as underlining Canadian practice. The latter article suggests (p. 106) the need for adaptation of traditional rules of the law of the sea in order that account may be taken of legitimate interests of all states.

Readers with special interest in the history of Canadian-United States relations will find instructive Professor Ivan L. Head's article on "The Stranger in Our Midst: A Sketch of the Legal Status of the Alien in

Canada." One section of the paper deals with the nationality status of immigrants from the United States to Canada from 1775 to 1820; other sections touch upon discriminations against Orientals and upon judicial remedies of aliens. Also enlightening is the article by Charles Bédard of the Department of External Affairs on "*Les Armements sur Les Grands Lacs*." The author shows that there have been many derogations from provisions of the Rush-Bagot Agreement, but submits that the "*fond*" has been preserved intact, while the greater part of the original agreement has fallen into desuetude. In an article entitled "International Legislation," Jochen Erler, Rechtsreferendar at the University of Heidelberg, examines some problems of terminology in the field of international organization, along with the force and effect (as municipal law) of instruments designed to implement actions taken by international agencies.

In the "Notes and Comments" section of the *Yearbook* Judge John E. Read's paper on "The World Court and the Years to Come" includes three proposals for the improvement of the Court's functioning, all of these proposals being realizable without formal amendment of the basic instruments. Professor Edward McWhinney has contributed a useful critical commentary on "Soviet Bloc Publicists and the East-West Debate." Louis M. Bloomfield of the Montreal Bar examines the Mordan-Negev project of Israel. Gerald F. FitzGerald, Senior Legal Officer of the ICAO, writes on "Offenses and Certain Other Acts Committed on Board Aircraft"; problems examined are largely technical, but very practical ones growing out of the Tokyo Convention of 1963. From his background as Chief of Assembly and Council Secretariat, ICAO Poeliu Dai writes on the Headquarters Agreement between Canada and the ICAO; this note also considers the agreement between the Organization and the Province of Quebec. Brian Flemming of the Bar of Nova Scotia, writing on preliminary objections in the case before the International Court of Justice concerning the Northern Cameroons, praises the majority's comprehensive statement on the nature of the international judicial function, but notes the absence of a comprehensive analysis of trusteeship (p. 232). Professor G. V. LaForest of the University of New Brunswick makes a decision of the Supreme Court of Nova Scotia (in *Re Dominion Coal Company and County of Cape Breton*) the occasion for critical comment; he observes, *inter alia*, that a federal executive decision tending to reduce the territory of a province should not be accepted (pp. 243-244). The question of enforceability in Canada of a foreign judgment in a tax claim, as passed upon by British Columbia courts, has provided occasion for a comment on "Foreign Revenue Laws" by K. Lysyk of the Law Faculty of the University of British Columbia; the author foresees no prospect in Canada of judicial repeal of the rule against enforcement of foreign revenue laws (p. 256). Under the title "Some Thoughts on Law and Public Order in Space," René H. Mankiewicz of the ICAO Legal Office notes that, although the United Nations General Assembly in its resolution of December 13, 1963, has laid down principles concerning the exploration

and use of outer space, "lawyers have been surprisingly reluctant to define that restriction and to state the methods to enjoin non-peaceful uses" (p. 259); to the author an empirical approach to the problems involved in defining and preventing unlawful uses of space appears to be the only possible one.

The *Yearbook* has (at p. 270) a brief announcement concerning the plans of the Department of External Affairs to publish in 1964 (in English and in French) the first of a series of volumes (documents) on Canadian external affairs. The first of these volumes is to cover the years 1909 to 1918. "No documents which would throw light on Canadian policy," the announcement states, "have been withheld."

A part of the *Yearbook* which should be of particular interest to practitioners of international law is that prepared by Professor Hugh J. Lawford of Queens University, who is a Special Assistant to the President of the Privy Council at Ottawa. This is a survey of Canadian practice in international law during 1963. The compiler explains that the material has not been examined or approved by the Canadian External Affairs Department or any other agency of the Government of Canada, and that it consists in the main of extracts from official Canadian Government statements, such as those in the House of Commons, in United Nations bodies, and in Canadian courts. One of the topics listed is participation by the Provinces in treaty-making and in treaty implementation. Another is the non-recognition of Communist China (despite continuing agreement for sale of wheat to China, commercial negotiations between the two governments, agreement between the Canadian Wheat Board and the China National Cereals, Oil and Foodstuffs Import and Export Corporation, and contracts pursuant to these agreements). Still other material relates to jurisdiction with respect to flights over Canada by nuclear armed aircraft of the United States, sovereignty over Arctic islands, an agreement between the Federal Government and the British Columbia Government concerning the Columbia River, a Soviet position concerning the Canadian-American-Japanese Treaty with respect to North Pacific fisheries, treatment of Canadians in Cuba (denial of counsel), a question concerning extraditing a paroled person, the possibility of Canada's entering the Organization of American States, Commonwealth representation on the United Nations Security Council and the Economic and Social Council, and Canadian answers to a United Nations questionnaire concerning the teaching and wider appreciation of international law.

A 31-page section of book reviews and an 8-page index comprise the remainder of the volume. The volume as a whole impresses the reader with the importance to contemporary international law of Canada, a country which, as Prime Minister Pearson observed in the Canadian House of Commons on June 4, 1963, is the seventh largest fishing nation in the world, is the fourth largest trading nation, and possesses the world's longest coastlines.

ROBERT R. WILSON

L'Utilisation à des Fins Autres que la Navigation des Eaux des Fleuves, Lacs et Canaux Internationaux. By Marc Wolfrom. Paris: Éditions A. Pedone, 1964. pp. viii, 263.

Mr. Wolfrom has made a valuable contribution to the rapidly growing literature in the important field of international river law. Its value is both as an able view of the content of that law and as a survey in French of the "raw material" in the field, comparable to that contained in a number of works available in English and to *Rios Internacionales (Utilización para fines industriales y agrícolas)*, published last year by the Organization of American States.

The work is divided into two principal sections, the first devoted to the separate use of international waters by riparian states, and the second devoted to the co-operative development of such waters by two or more co-riparian states. This method of organization seems unfortunate for two reasons. First, there is no clear dividing line between the two types of use, most case histories presenting elements of both; thus the author's scheme requires dividing between the two sections his treatment of particular river systems or treaties that might more appropriately be treated singly or divided according to a more meaningful principle. Second, once one has said that joint or co-operative development, while highly desirable, is not a legal duty and is sometimes, for political reasons, impossible, one has pretty much exhausted what joint development as such has to teach us about principles of existing law. The usefulness of the second section of the book, therefore, tends to be limited to its value as a collection of factual data and its analysis, often acute and revealing, of the existing conventional regimes on some of the world's leading river systems. An interesting appendix deals with the problem of pollution.

Mr. Wolfrom surveys the work of the leading authors and associations that have been active in the field, the few relevant international and quasi-international decisions, treaties, state practice, and the work of international agencies. There are particularly thorough and illuminating discussions of the principal treaties between the United States and its neighbors to the north and south, the present regimes of the Nile and the Indus and their backgrounds, and the still-unsolved problem of the Jordan (included, ironically, in the section on co-operative development). However, the treatment of decisions of the United States Supreme Court in litigation between States of the Union is somewhat oversimplified; and compacts between states of federal systems—a useful source of learning and experience—are hardly mentioned.

Mr. Wolfrom's legal conclusions are restrained, relatively few and in this reviewer's opinion almost entirely well founded. He follows the best modern scholarship in viewing an international river system as a physical and economic unit and in recognizing the international character of all the waters in the system, including wholly national tributaries, underground streams and ground water, since utilization of any of them may have effects across national frontiers. He is on sound ground, too, when he rejects the doctrine of absolute priority for navigation as outdated and

arbitrary, and holds that priorities among uses must be established for each river system in the light of its history and economic circumstances.

Mr. Wolfrom aligns himself with the vast majority of authorities in rejecting both the principle of "absolute territorial sovereignty" (a state may do whatever it likes with international waters within its frontiers) and that of "absolute territorial integrity" (a state is entitled to receive at its boundaries the flow of waters unaltered from a state of nature). Instead he endorses the view that co-riparian states have reciprocal rights and duties. The exact content of these rights and duties is initially a bit vague, but it fairly quickly becomes clear that what Mr. Wolfrom is expounding is the principle that has come to be known in English as the doctrine of equitable apportionment. It seems that no simple phrase for this principle has become common in French, and Mr. Wolfrom in his next work might render a useful service by inventing one.

The author is skillful in delineating those corollaries of the doctrine of equitable apportionment that have acquired such standing and acceptance as to be recognizable as principles of existing law. Each state is entitled to the maximum use of waters in its territory compatible with the equal and corresponding right of each co-riparian state. In determining the reasonable and equitable shares of the riparians, recognition must first be given to vested rights deriving from agreements, adjudications or awards, or prior appropriation creating a lawfully established beneficial use, and then to such factors as the extent of dependence of each state on the waters in question, and the possibilities for future development.

Mr. Wolfrom is aware, moreover, that substantive rights are of little value in this crucial area without procedural rights by which they are safeguarded. He holds that a state proposing a serious change in the regime of an international river is obliged to give prior notice thereof to all possibly affected co-riparian states, together with sufficient information concerning the project to enable them to assess its effects. In case of objection, the proposing state is obliged to refrain from carrying out its project until the disagreement is resolved through negotiations or, these failing, by the peaceful means of settlement laid down in Article 33 of the United Nations Charter. While the discussion of these procedural duties is brief (p. 145), the essential principles are clear enough. These are, Mr. Wolfrom obviously believes, essential corollaries of the doctrine of equitable apportionment and represent the only way to avoid investing either the proposing or objecting state with a power of unilateral veto over the contentions of the other.

The present reviewer's only disagreement with Mr. Wolfrom's view of the law relates to his conclusion (p. 143) that a state commits an international delinquency only by making a change in the regime of waters that works "serious and permanent harm" (*un dommage grave et permanent*) on another state. The existence of an international wrong is not usually thought to depend on matters of degree, though the degree of seriousness might well affect the legal consequences of the wrong and the proper remedy therefor. Moreover, an effect—such as large-scale flooding

—might be most serious without being permanent, but would surely be illegal nonetheless.

BRICE M. CLAGETT

Les Actes Juridiques Unilatéraux en Droit International Public. By Eric Suy. (Bibliothèque de Droit International, Tome XXIII.) Paris: Librairie Générale de Droit et de Jurisprudence, 1962. pp. xii, 290.

This is the first monograph in the French language attempting a systematic treatment of unilateral acts in international law. No general study of the subject exists in English; the previous works were in Italian, German and Bulgarian. The study was first presented as a doctoral thesis at the University of Geneva. It presents a definition and classification of unilateral acts and an analysis of their place in the structure of international law. The acts of protest, notification, promise, renunciation and recognition are considered in successive chapters. The author, in his last chapter, discusses the place of unilateral acts in the formation of customary law. His study evidences an impressive familiarity with doctrinal writings in all Western European languages and with the international case law relating to his subject.

The *acte juridique* (for which there is no adequate English equivalent) is defined as a manifestation of contractual or unilateral will, which is imputed to one or several subjects of international law, and to which a norm of this legal order attaches consequences corresponding to the will (p. 22). After extensive consideration the act of notification is considered not to meet this definition. For an *acte juridique* to be unilateral it must meet three requirements: it must emanate from a single subject of international law, be independent of other manifestations of will, and have effects which never constitute an obligation for third parties (p. 33). The author employs these criteria to exclude from the scope of his investigation acts which others would consider to fall logically within the subject.¹ These include: (1) adhesion to multilateral treaties, which he considers solely in contractual terms (pp. 26-27); (2) decisions of international organs, which he views as neither "simple" nor "pure" unilateral acts because they involve conciliation of interests and presuppose the prior consent of addressees bound thereby (pp. 29-30); and (3) various unilateral declarations made in execution of treaty provisions (such as declarations accepting the jurisdiction of the International Court of Justice or extending the territorial application of a treaty pursuant to a colonial application clause), which are qualified as "*actes juridiques dépendants*" (pp. 31-32). The reviewer remains unconvinced of the logic of the distinctions by which the author excludes from his study the second and third classes of acts, and believes that adhesion to multilateral treaties can logically be viewed either as a contractual or a unilateral act.

¹ For an extensive criticism of the author's definition and approach and an attempt to widen considerably the scope of the subject, see Jacques Dehaussy, "Les actes juridiques unilatéraux en droit international public: à propos d'une théorie restrictive," 92 *Journal de Droit International* 41-66 (1965).

Mr. Suy provides a valuable analysis of the unilateral acts which he has chosen to study. These are classified in three groups: acts creating new obligations (promise, recognition), acts confirming rights (protest), and acts by which one may abandon his rights (renunciation) (p. 43). The consideration of unilateral promise is particularly interesting. The author holds that it is binding on the promisor from the moment that the beneficiary has had knowledge of it. The binding character of the promise is considered to be founded on a customary norm which prescribes that international engagements (considered to include both unilateral promise and treaty) must be respected. This norm is based on the superior interest of the security of international relations which is expressed in the principle of good faith (p. 151). In his last chapter, the author presents a suggestive analysis of the element of *opinio juris* and of the rôle of the unilateral acts of recognition and protest in the formation of customary law.

EDWARD YEMIN

Aden and the Federation of South Arabia. By J. Y. Brinton. Washington, D. C.: American Society of International Law, 1964. pp. v, 81. \$2.00.

Federations in the Middle East: A Documentary Survey. By J. Y. Brinton. Cairo: Egyptian Society of International Law (Brochure No. 18), 1964. pp. x, 414. \$1.00.

These two volumes are the product of a study project which has formed one part of a larger program, carried on under the auspices of the American Society of International Law, to examine new developments in federal and quasi-federal arrangements on the contemporary world scene. The author, Judge Brinton of Cairo, is widely known for his eminent service on the former Mixed Courts of Egypt and for his scholarly contributions to the study and understanding of international law in the Middle East. Of the two publications, the first contains an historical and analytical essay and a collection of documents on the British-sponsored effort to bring together the colony of Aden and the various political entities of the Aden Protectorates in a common federation. The second treats in similar fashion the federal arrangements tried out since 1950 in Libya, Ethiopia-Eritrea, Iraq-Jordan, the United Arab Republic (Egypt-Syria), and the United Arab States (U.A.R.-Yemen), with an appended note on federalism in the Congo (Léopoldville).

As the study strikingly demonstrates, the common feature of these widely varying combinations has been their instability. All of the federal associations described in the larger work have succumbed to events; and while the South Arabian Federation still endures, it does not yet include all the principalities of the region and is under heavy internal and external stress. In Libya federalism was found too cumbersome and expensive. In Ethiopia-Eritrea the stronger member absorbed the weaker. The Arab Federation of Iraq and Jordan was a dynastic alliance, hardly born be-

fore becoming a casualty of the Iraq revolution of 1958. The original United Arab Republic broke up after some three years' existence, while the linking of the U.A.R. with the old regime in Yemen was never more than a nominal association in which both sides retained even in theory their own international personalities. Although the various combinations were often elaborately organized on paper, Judge Brinton's account shows how often the arrangements were little more than exercises in drafting.

The lesson to be drawn from these studies is a negative one, though none the less valuable for that. The experience of these Middle Eastern and African states shows once again that a workable federal system is difficult to create and more difficult to maintain; that in their situations federalism offered in general few tangible benefits and numerous practical disadvantages to governments already hard pressed to function efficiently; that it was, in short, ill adapted to the political realities of the times and places. The chief merit of the author's inquiries is to point out how a solution which may appear admirable on paper can fail both in cases where centripetal and centrifugal forces are not so balanced in fact as to require a federal system (as distinguished from other forms of consolidation), and in cases where the circumstances do not provide a solid base for common association. The volumes thus stand as a warning to those who advocate federalism indiscriminately as a simple antidote to the multiplication of states lacking in viability.

RICHARD YOUNG

Le Pouvoir Réglementaire de la Communauté Européenne du Charbon et de l'Acier. By Robert Kovar. Paris: Librairie Générale de Droit et de Jurisprudence, R. Pichon et R. Durand-Auzias, 1964. pp. xiv, 348. Index.

The nature and extent of powers the European Communities enjoy are one of their typical features which clearly distinguishes them from traditional international organizations. An exhaustive and penetrating analysis of these powers and their exercise by the Community institutions may help to shed light on the legal nature of these Communities and make them better understood. Any serious attempt at such an analysis is therefore welcome.

In his book the author attempts to examine the powers of the European Coal and Steel Community (ECSC) from two closely related aspects: from the aspect of the Community legal order and from the aspect of their relation to the powers of the Member States which raises the vital problem of the relation of Community law to national law of the Member States. Undertaking this arduous task the author pleads for a pragmatical and open-minded approach, void of any preconceived legal notions. He rightly refuses to commit himself to any dogmatic classification as to the legal nature of the Communities, so avoiding a mostly sterile discussion. With an equal justification, and for the same reason, he warns against an easy

and fast comparison drawn from a semantic similarity which may exist between the legal notions of Community acts, on one hand, and the traditional ones as developed by national law, on the other. Analyzing the nature of the powers of the ECSC both in the light of the treaty provisions as well as of the case law the Court has so far contributed in this field, he demonstrates the limits to which the Community powers are subject and the conditions under which they may be exercised.

The Community legal order, being a new, developing legal order, raises of course a number of controversial questions which may be solved in different ways. Short of a sufficient practice, various doctrines are advanced. For these reasons the author's views on such points may be respected, even though this reviewer does not necessarily share them. Compared with the traditional relation of international law to national law, the author admits the original nature of the relation of Community law to national law. Yet he concludes that it is not possible in solving this question to disregard completely the traditional solution (p. 235). Consequently the author suggests that the relation of Community law to national law be resolved according to the respective constitutional provisions of the Member States (pp. 256, 258)—a view which is questionable. The Court of Justice in its judgment in the *ENEL* case,¹ rendered after the publication of the book, forcefully refuted the author's view.

A criticism is, however, called for in those instances in which he commits errors or makes omissions which distort or misrepresent the meaning of Community law. Discussing the nature of individual and general acts of the High Authority, as provided by the ECSC Treaty, Art. 33, he fails to explain the true function of this difference (p. 50). The treaty introduced this distinction to differentiate between the right of appeal of the Member States on one hand, and of private parties on the other. The somewhat wavering case law of the Court interpreting the notion of a general or individual act could have been better explained if the origin and function of this difference had been discussed.

In a sweeping statement the author maintains that the request for a preliminary ruling of the Court on the validity of Community acts (ECSC Treaty, Art. 41) is an exception of illegality (Art. 36) (pp. 252-253)—a view for which he offers no support. This view is more than doubtful. A comparison of these two treaty provisions reveals differences which should have been mentioned. First, an exception of illegality may be charged in a litigation pending before the Court of Justice; a request for a preliminary ruling, on the other hand, presupposes litigation before a national court. Secondly, the Court deals with a charge of an exception of illegality in an adversary proceeding; a request for a preliminary ruling of the Court opens an objective procedure in which there are practically no parties in a technical sense. Thirdly, an exception of illegality may be raised by a party to a litigation as of his own right; a preliminary ruling may technically be requested only by the national court before which the validity of a Community act is challenged.

¹ 10 Recueil 1143, 1159 (1964).

Admittedly, Article 41 of the ECSC Treaty is inadequately drafted, as it leaves the question open whether the parties or the national court may request a preliminary ruling of the Court of Justice. The author's interpretation that this right is reserved to private parties is untenable. He tries to substantiate this view by referring to the German and Italian constitutional provisions which provide for a similar procedure in case the constitutionality of a law is challenged in litigation before a national court. His assertion that according to these constitutional provisions the parties themselves, and not the court, may seize the Constitutional Court (p. 251) is clearly incorrect (Constitution of the German Federal Republic, Art. 100, Bundesverfassungsgerichtsgesetz, March 12, 1951, Art. 80; Italian Constitutional Law, March 11, 1953, Art. 23).

Furthermore, had the author merely consulted Article 177 of the EEC Treaty, Article 20 of the EEC Statute, and Article 103 §2 of the Rules of Procedure of the Court of Justice (see the expression "*décision de renvoi*," i.e. of the national court), he would have arrived at the conclusion that also according to Article 41 of the ECSC Treaty only the national court is competent to request a preliminary ruling—a view also shared by the doctrine the author unfortunately ignored.

One also searches in vain in this study, devoted to the analysis of the powers of the ECSC, for any pertinent discussion of the so-called small treaty revision (Art. 95 §§3, 4). This significant power the ECSC may exercise independently of the Member States. The revision, after being favorably ruled upon by the Court, becomes effective on adoption by the European Parliament; a ratification of this revision by the Member States is not required. In one instance the European Coal and Steel Community revised Article 56 by this procedure;² in another, the Court's negative opinion blocked a proposed revision of Article 65.³

Neither are the references to the case law always correct or precise. Thus, for example, discussing the *Tarifcommissie* case, the author maintains that the Dutch tribunal, in accordance with EEC Treaty Article 177, requested the Court to decide whether or not a customs treaty concluded among the Benelux countries prevails over the EEC Treaty (p. 242). In fact the tribunal asked whether or not the prohibition of EEC Treaty Article 12, explicitly addressed to the Member States, was self-executing so that an individual may invoke it before a national tribunal.⁴ Equally incorrect is his statement that the Court, since the *Humblot* case, has *always* asserted its right to rule on the supremacy of Community law over national law (p. 243); the Court did so explicitly only recently in the *ENEL* case mentioned above.

These examples of criticism are taken at random; it would go beyond the framework of this review to offer further points of criticism. The study is unfortunately limited to the European Coal and Steel Community. Whatever reasons may have prompted the author to make such a limitation, it does not justify the almost complete disregard of the provisions of the

² 3 Journal Official 781 (1960).

³ 7 Recueil 505 (1961).

⁴ 9 *ibid.* 3, 7 (1963).

Rome Treaties providing for the powers of the EEC and EURATOM. The excessively long citations in the text not only of the case law of the Court (*e.g.*, pp. 89, 104–105) but also of the doctrine (*e.g.*, pp. 28, 250, 295–296), with few exceptions, do not appear justified nor do they facilitate the presentation. This is further aggravated by the outline of the study which is not always easy to follow. These shortcomings may prevent a reader, not quite familiar with the law of the European Communities, from gaining a clear and correct picture of the subject matter. The author's work, one of the first attempts to analyze comprehensively the powers of the Communities, deserves due respect and recognition. The author valiantly tackled, in an original manner, a difficult problem the complexity of which he could not always master with complete success.

G. BEBR

Indian Foreign Policy and the Border Dispute with China. By W. F. Van Eekelen. The Hague: Martinus Nijhoff, 1964. pp. xiv, 220. Index. Gld. 22.50.

This is a study of the origin and evolution in China-India relations of the *Panchsheel*, the five principles of peaceful coexistence. The author, a graduate of Princeton and the University of Utrecht, has served at the Dutch Embassies in London and New Delhi. He has collected valuable minutiae, such as Indian newspaper editorial comment and press releases pertinent to his subject, and has some valuable insights, appearing mainly in the last twenty pages of the book. The book is seriously marred, however, by a general lack of political and legal subtlety. It strains to prove the obvious and frequently disregards the most important implications of evidence painstakingly presented. For example, an examination of legal aspects of the Sino-Indian border dispute reveals weaknesses in every major Indian argument and yet no cohesive attempt is made to explain why the Government of India offered to submit the case to the International Court of Justice for adjudication while refusing to accept meaningful bilateral negotiations with China. A number of errors of fact and internal inconsistencies make it difficult to distinguish true contributions to the literature of the disputed border, such as the careful confirmation of parts of Alastair Lamb's basic research, from the dross, such as the wholly misunderstood analysis of China's relations with Tibet in 1904–1906 on page 138 (which is inconsistent with the partial analysis on page 103). For background the author appears to rely wholly on the excellent but frankly anti-Chinese Richardson. The bibliography and footnotes do not mention the more balanced works of Schulemann, Rockhill, Pellicot *et al.* In emphasizing Indian problems the author consistently asserts Indian argumentative and sometimes dubious positions to be statements of fact, and ignores or disparages several crucial Chinese overtures. For example, the fiasco of Nehru's meeting in April, 1960, with Chou is described without mentioning the attempt on China's part to make this meeting the high point of a trip that settled the Sino-Burma border and was to

settle the Sino-Nepal border through what the Government of China certainly regarded as key concessions on its part. In this the author probably reflects the insensitivity of Indian leaders, but the result is an analysis of insularity which is itself insular.

ALFRED P. RUBIN

American Support of Free Elections Abroad. By Theodore Paul Wright, Jr. Washington, D. C.: Public Affairs Press, 1964. pp. viii, 184. Index. \$4.50.

United States attempts to guarantee free and fair elections abroad have less often succeeded than failed. That, at least, is what Professor Wright concludes from his study of eight cases of American intervention in Central American elections (in Cuba, Panama, Nicaragua, Mexico, the Dominican Republic, Haiti, Costa Rica, and Honduras) between 1898 and 1933, and in other elections held abroad since 1945. Moreover, he points out that United States attempts to foster free elections and at the same time to promote stability and discourage revolutions in certain strategically important areas have not been at all compatible. In fact, the correlation is negative, because in the areas studied the desired stability, when it has come, has stemmed not from free elections but from the order imposed by U. S. military and naval forces, or from situations where, contrary to American intentions, U. S. policies have paved the way for strong dictatorships. American policy towards Latin America thus appears to Dr. Wright to be naïve, ill-informed, and irrational.

The international lawyer will find in this book cogent facts and illuminating commentary on U. S. policies involving recognition and intervention. The author has identified nine methods that the United States has employed in its attempts to support free elections abroad and thereby to promote democracy: establishing by treaty the right to intervene, making diplomatic representations and protests, refusing to recognize new governments, sending special missions to mediate electoral disputes, observing elections, promoting electoral reform, supervising elections, threatening and using military force, and holding elections by fiat. Mr. Wright observes that the Department of State has "preferred the less coercive methods and proceeded toward more forceful means only if the first steps have proved to be ineffective and further action unavoidable." He notes the exceptions to this observation and then assesses the effectiveness of each of the means and their relations to one another.

He shows that treaties permitting or forbidding intervention have traditionally played a large part in determining whether the United States would involve itself in elections abroad; that diplomatic representations and public pronouncements on foreign electoral policy, "if not joined to threats of stronger action, have been the least effective policy instruments for bringing about free elections"; that non-recognition by the United States has helped obtain free elections only where other special circumstances supported the policy; that the United States has looked upon

written understandings among foreign political antagonists as though they were treaties and used them as a basis for subsequent actions; that an outside Power cannot really hope to guarantee free elections under any circumstances without expecting to influence the results; and that it is all too easy for a state to move from less to more coercive means once it sets about attempting to influence electoral processes abroad.

United States policy in the Dominican Republic could profit from Professor Wright's insights as well as from those of Sumner Welles, from whose *Naboth's Vineyard: the Dominican Republic 1844-1924* Mr. Wright quotes with devastating appropriateness. In fact, Mr. Wright's work will remind policy-makers of historical lessons they seem all too ready to forget in thinking about not only the Dominican Republic but also Viet-Nam. It will also help international lawyers evaluate the political implications of several important legal concepts. Above all, it will illustrate to readers the folly of regarding freely conducted elections as an adequate guarantor of democracy where the preconditions of freedom do not exist.

RICHARD N. SWIFT

Nuklearna Energija i Medjunarodno Pravo. By Milan Šahović. Belgrade: Institute for International Politics and Economy, 1964. pp. xviii, 266.

This book on *Nuclear Energy and International Law* was published by a Yugoslav Institute which appears to be closely connected with the Yugoslav Federal Secretariat for Foreign Affairs. The chief editor of the Institute is Ambassador Leo Mates, formerly Yugoslav Ambassador to the United States. Dr. Milan Šahović has published a number of essays on the subject of atomic energy and is today the leading authority in Yugoslavia on questions concerning nuclear power in connection with international law. However, the book under review undoubtedly reflects not only the author's personal views on the subject matter, but obviously also the official views of the Yugoslav Government.

Dr. Šahović agrees that the dreadful prospects of destruction from nuclear arms required regulations of their use on a supranational level. On the other hand, he wishes that the use of nuclear energy for peaceful purposes be developed through international co-operation, so that practically all countries may use the benefits of scientific development.

He deplores that the international situation has prevented broad disarmament agreements in the field of atomic weapons. He sees that further efforts are needed in order more efficiently to check the spread of atomic weapons, and believes that the principles of international law on peaceful coexistence of all states should enable the United Nations to come to a ban on the use of atomic weapons. He would like to see the EURATOM organization empowered to regulate the co-operation of all states in this respect. Ultimately the production of nuclear energy for military purposes should be prohibited. The signing of the Moscow Agreement on the Partial Prohibition of Nuclear Tests seems to be a proper step in this di-

rection, and it is to be hoped that the International Atomic Energy Agency will be able to establish an international control system.¹

However, the author knows that we are still far away from an ideal solution in the use of atomic weapons. He therefore dedicates considerable space to the discussion concerning regulations of states in the peaceful use of atomic energy. In this respect he criticizes the United States Atomic Energy Act which denies equality of rights to the different states interested in this matter. In his view the activities of the International Atomic Energy Agency and of other organizations in Europe should be more encouraged by the leading atomic countries.

It is evident that Dr. Šahović attempts to define the position of a non-nuclear state with respect to the countries representing the so-called atomic club: the United States, the Soviet Union, the United Kingdom and France. He does not seem to include Red China as a member of the club as yet. Nevertheless, his position is clear: the non-nuclear countries should be permitted to the greatest possible extent to share the benefits of the use of atomic energy, and for that purpose nuclear material and application of nuclear scientific developments should be made available to these countries without undue restrictions. On the other hand, he abhors the use of atomic energy for belligerent purposes and would like to see atomic weapons destroyed and no new atomic weapons manufactured.

The book is very thoroughly written and refers in numerous footnotes to almost the entire bibliography in the field of atomic weapons in connection with international law which has been published since 1945. The book also contains a list of international agreements concluded between Yugoslavia and other countries concerning the use of nuclear energy for peaceful purposes, and a list of multilateral agreements in which Yugoslavia participated. A chronology of nuclear tests is also included, which shows that by the end of 1963 the United States tested nuclear explosions in 259 instances and the Soviet Union in 126 cases.

The book is of high scholarly value for the student of international law as applied to nuclear energy, and specifically for those who like to study the views and opinions in this field of representatives of the so-called "non-aligned" countries.

ZVONKO R. RODE

BRIEFER NOTICES

The Court of the European Communities: New Dimension in International Adjudication. By Werner Feld. (The Hague: Martinus Nijhoff, 1964. pp. viii, 127. Index. Fl. 13.50.) The dramatic venture in supranational government now being enacted by Belgium, France, West Germany, Italy, Luxembourg and The Netherlands understandably arouses strong interest in the world of international law. For these six countries, in forming the European Communities, have structured by treaty and are evolving in everyday practice a completely new kind of governmental apparatus which is directly, uniformly and effectively regulating economic

¹ See Willrich, "Safeguarding Atoms for Peace," 60 A.J.I.L. 34 (1966).

activities in six sovereign states. Though restricted to matters economic and atomic, and limited by certain vetoes still exercisable by Member States, Community organs are generating large quantities of significant law that is "international" in the sense that it affects directly several nations and their citizens and enterprises; except for canons of treaty interpretation, however, practically none of the corpus of the traditional law of nations has contributed to Community law.

The Court of Justice of the European Communities, sitting in Luxembourg, has truly created a "new dimension in international adjudication" during its twelve-year life. It has in large measure fulfilled its assigned function of assuring the rule of law in the Community by affording effective legal recourse to eligible suitors who complain that others have failed to heed Community law. Its suitors—and the defendants it has summoned to its bar—have included the governments of the Member States, the law-making and administrative organs of the Community, corporations and associations engaged in economic undertakings within Community countries, employees of Community institutions, and even creditors of those employees. In terms of European integration, its judgments have been centripetal; though greeted by outrage upon occasion, its judgments have never been defied.

Professor Feld has written a useful introductory text on the Community Court. It describes the Court, its constitution, procedure and jurisprudence with clarity, good sense, and imagination. Though less detailed than Behr's exhaustive *Judicial Control in the European Community*, Feld's book is reasonably comprehensive and analytical, and is more readable. The political significance of the Court and its actual and potential rôle in the political integration of the Community are provocatively explored. A selected bibliography will aid the reader who wishes to study the Court further. The book is marred only by occasional departures from standard legal terminology and excursions into mere speculation.

VICTOR J. STONE

The International Monetary Fund. Legal Bases, Structure, Function. By Hans Aufricht. (New York: Frederick A. Praeger, 1964. pp. ii, 126. Index. \$6.00.) Current discussions of the various proposals for reforming the international monetary system have generated new interest in the International Monetary Fund, the specialized agency of the United Nations responsible for the promotion of exchange stability and the elimination of foreign exchange restrictions. Dr. Aufricht's monograph provides the basic data concerning the organization and functioning of the Fund; it is not an exhaustive treatise on the many difficult problems raised by the Articles of Agreement of the Fund. The information is highly condensed and is limited to non-controversial points. Whenever a question arises about a more complicated issue, the author either refers to official sources where the matter is discussed in more detail or states that the problem "is outside the scope of this paper." (See, e.g., p. 57, note 37.)

Apart from this inherent limitation, the book is extremely helpful, as it puts difficult technical issues in terms which a person not trained in the intricacies of international finance can easily understand. Dr. Aufricht not only explains the text of the agreement establishing the Fund but also summarizes the many documents of the organs of the Fund which interpret or even change that agreement. In several respects the practice of the Fund has gone beyond the limits set by the Bretton Woods Conference which drafted its constitutional instrument, and the Fund has developed new techniques, such as the "stand-by arrangements" and the

"borrowing arrangements," which allow it to cope with the novel situations created by the rapidly expanding world economy. Though there are important limits on what it can do, the Fund is clearly one of the most effective international institutions, and it may be hoped that the new proposals will further enlarge its sphere of activity and will allow it to perform its functions in the future even better than it has performed them in the past.

LOUIS B. SOHN

Commercial Arbitration. By Martin Domke. (Englewood Cliffs, N. J.: Prentice-Hall, 1965. pp. xii, 116. Index. \$2.25.) This is a concise survey of the practice and law of commercial arbitration. It is remarkable for the breadth and the exactness of the information it provides. The platitudes and generalities so often found in the literature on arbitration are lacking. Dr. Domke gives the lawyer and the businessman the important facts they need to know about commercial arbitration, and does so with clarity and brevity. The settings in which arbitration is more useful than in others are indicated. Particularly useful are the chapters on the law of commercial arbitration, consisting of a review of its contractual aspects, enforceability of an arbitration clause and agreements to arbitrate, rôle of the arbitrator, arbitration procedure, and the award. No lawyer should write an arbitration agreement without first having consulted these chapters. Brief consideration is given to foreign trade arbitration; the issues here raised are deserving of fuller treatment in a separate study. It is to be hoped that Dr. Domke may some day undertake its writing.

KENNETH S. CARLSTON

The Popes and World Government. By Emile Guerry, Archbishop of Cambrai. Foreword by Paul Emile Cardinal Léger, Archbishop of Montreal. Translated by Gregory J. Roettger, O.S.B. (Baltimore and Dublin: Helicon, 1964. pp. xviii, 254. Index. \$5.50.) We have lacked a comprehensive work on international law in Catholic thought since John Eppstein's, *The Catholic Tradition of the Law of Nations*.¹ Archbishop Guerry's book does not match Eppstein's in scope or depth but it is a valuable and welcome contribution. It presents in concise and authoritative fashion the teaching on international law of the Popes from Leo III through Pius XII. While one can agree that this portion of Catholic thought is the sound basis for the more recent thought of John XXIII and Paul VI, it is to be regretted that the work was not brought up to date so as to offer a picture of all relevant modern Catholic thought on this subject.

Nevertheless, this book is directed to the right problem: the comparative failure of Catholics to heed the clear teaching of their Church on the moral imperatives underlying international law. Too many Catholics do not, in their thinking about international relations, reflect the concern of modern Popes for strengthening the public international order, defining the fundamental rights and duties of states, combating extreme nationalism and totalitarianism, condemning aggressive war and advancing disarmament efforts.

However, it is important to note that in the context of the emphases mentioned, Archbishop Guerry is firm in his recognition of the continued legitimacy of recourse to force on behalf of the international order and in

¹ John Eppstein, *The Catholic Tradition of the Law of Nations* (Washington, D. C.: Catholic Association for International Peace, 1936); reviewed in 31 A.J.I.L. 369 (1937).

self-defense. As outlined here, Catholic thought remains close to positive international law in its handling of the distinction between aggressive war and community-sanctioned force. The rising tide of pacifism is not supported in this scholarly and thoughtful summary of Catholic thought on war and peace.

WILLIAM V. O'BRIEN

La Protección a los Heridos, Enfermos y Naufragos de las Fuerzas Armadas en Campaña. By Fernando Maria de Lasala Samper. (Zaragoza: Universidad de Zaragoza, 1964. pp. xxxiv, 399. Pts. 150.) As if this were almost a report to another Hague Conference of 1907 preparing laws of war, the author here gives us a scholarly survey of the Red Cross Conventions, beginning with the Convention of 1864 and closing with the Conventions of 1949, those on Amelioration of the Condition of Wounded and Sick both of Armies in the Field and of Members of Naval Forces. Each of these last conventions is analyzed in detail, following which is a lengthy study of the improvements and additions that would be desirable in a future revision of the two conventions. As background material an earlier chapter surveys the history of the treatment of the sick and wounded from ancient times down to the world wars, and a second chapter presents the views of scholars and statesmen from Vitoria down to Portalis. The volume appears in a series published by La Catedra "General Palafox" of the University of Zaragoza.

The reader will doubtless ask, after the experience of recent wars, can we hope for the observance of formal conventions when one or other of the parties at war is already guilty of a violation of the law in resorting to aggression? Is not our sole hope in the limited wars still being fought, that in the humanitarian character of the belligerent there will be some restraint, not because of "laws" of war but because of some deeper and more fundamental moral instinct? The author is indeed aware of the elimination of war as the primary issue; but pending that day he believes that there is still value in emphasizing the obligations of the Geneva Conventions and thereby making easier the transition to the day when war itself will be eliminated.

C. G. FENWICK

The Annals of the Chinese Society of International Law, 1964. No. 1. (Taipei: 1964. pp. 141. N.T.\$40.00; U.S.\$1.00.) This is the first issue of the official publication of the Chinese Society of International Law founded several years ago. The *Annals* are divided into two parts: The first part consists of articles written by Chinese authors both in the Republic of China and abroad. The second part comprises the collection of important documents relating to China. There are six articles (and a foreword by Dr. Tien-fong Cheng, President of the Society) in the first part. Dr. Yuen-li Liang wrote an article on "Codification of the Law of the Sea under the Auspices of the United Nations." Dr. Shushi Hsu, Chinese Ambassador to Canada and former member of the United Nations International Law Commission, published his speech to the annual meeting (May 28, 1963) of the Ottawa Branch of the International Law Association on a Chinese view of the consideration of international law principles under the title "An Attempt to Improve International Law." The other four articles by Yi-ting Chang, Tsen-ming Huang, Chia-yi Liu and Chih-shih Chen deal with the law of war, recognition, intervention and the territorial sea, respectively. The documentary part includes Judge Wellington Koo's separate opinion in the *Northern Cameroons* case; Ambassador Tang Wu's statement delivered on November 21, 1963, be-

fore the Sixth (Legal) Committee of the General Assembly on the agenda item of "Consideration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations"; the Sino-Brazilian Trade Agreement of 1962; and a commercial arbitration case between a United States company and a Chinese company.

The book will be welcomed by lawyers and scholars who are interested in studying the Chinese view and practice of international law. But one will regret that this issue of the *Annals* contains many typographical errors and uses a form of citation which is far from consistent. Moreover, the value of the *Annals* would be increased if in future issues it would include an annual bibliography of works on international law by Chinese authors and also all treaty information (such as conclusion, acceptance, or adherence) concerning the Republic of China.

HUNGDAH CHIU

Mei-kuo yu mei-chou kuo-chia tsu-chih [*The United States and the Organization of American States*]. By Chang Yeh. (Peking: Shih-chieh chih-shih ch'u-pan shê, 1964. pp. 109 (52,000 words).) The first chapter of this volume (pp. 1-24) gives the history of the origin of the Organization of American States with emphasis upon how the United States has used "Pan Americanism" to encroach upon Latin America. The second chapter (pp. 24-45) is a study of the organs and Charter provisions of the O.A.S. It discusses in detail the so-called "fraudulent character" of Charter provisions. For instance, Article 25 provides: "If the inviolability of the integrity of the territory or the sovereignty or political independence of any American State should be affected by an armed attack or by an act of aggression that is not an armed attack . . . the American States . . . shall apply the measures and procedures established in the special treaties on the subject." (Emphasis added.) In the author's view, the inclusion of "an act of aggression that is not an armed attack" in collective measures to be taken is "obviously seeking [to provide] a pretext for the United States to compel Latin American states to follow the United States policy of aggression and war [in any case]" (pp. 29-30). In the third chapter, entitled "The Aggressive Activities of the United States and the O.A.S." (pp. 46-91), the United States policy of collective security, the "Point Four Program," the "Alliance for Progress," etc., are criticized. The fourth chapter (pp. 92-109)—"The Unity of the Latin American People and the Schism of the 'Pan-American System'" —discusses the importance of the Castro revolution in disclosing the hypocritical character of Pan Americanism under the control of the United States. It ends with a study of the two "Havana Declarations" proclaimed in Castro's Cuba in 1960 and 1962, respectively.

The whole book is full of Communist anti-American bias. However, regardless of such bias, students of Communist affairs will find it useful to read this book, as it is the first one published in Communist China discussing the O.A.S. in a detailed and systematic manner.

HUNGDAH CHIU

Law, Politics, and the Security Council. An Inquiry into the Handling of Legal Questions Involved in International Disputes and Situations. By Tae Jin Kahng. (The Hague: Martinus Nijhoff, 1964. pp. xiv, 252. Index. Gld. 27.95.) This book is another attempt to clarify the practice of the United Nations Security Council in the handling of "legal questions." Readers of Jiménez de Aréchaga's study (Carnegie Endowment, U.N. Study No. 5) will recall that the Council, during its first five years

of operation, had developed a body of precedent and a remarkably high degree of consistency and that its "jurisprudence" had already indicated "the emergence of a definite pattern in the handling of disputes and situations." The book under review, which was submitted as a doctoral thesis to Columbia University, appears to observe the pattern of the Council's handling of legal questions. The Council's handling of legal questions to which the book refers is the Council's interpretation, in the course of its functioning, of the Charter as it relates to these three areas: the competence of the Council, voting procedure, and the rights and duties of parties to disputes. The author reviews relevant cases, which constitute the greater part of the book, and adds his observations.

Professor Kahng reiterates the fact that law and politics in the Security Council are not dichotomous but rather functionally complementary. And he finds that the pattern of the Council's handling of legal questions has been a function of political considerations but that there has been "a fairly high degree of objectivity." He points out that the Council has dealt with the questions without reference to the International Court of Justice. He agrees with some writers who believe that the Council would benefit if it would adopt a rapporteur system and institute a committee of jurists to render objective legal opinions. The book is informative and useful as a bibliographical aid on the subject.

SUNGJOOK JUNN

American-Swedish Private International Law. By Håkan Nial. (Dobbs Ferry, N. Y.: Oceana Publications, 1965. pp. 111. Index. \$5.00.) This thirteenth volume in the Bilateral Studies of the Parker School of Foreign and Comparative Law reflects the qualities of style and mastery to be expected from a scholar of the author's rank. This is all that need be said to justify the warmest recommendation of this work. The reviewer may be permitted, therefore, to use this occasion for making a few observations concerning the further utilization and improvement of the series. (1) The coverage of individual studies is becoming disturbingly varied. To be sure, this is inevitable and perhaps an important *raison d'être* for the entire undertaking. But it is now clearly imperative to prepare an introductory and comparative volume. (2) Many of the studies, including the present one, barely touch on American authorities, and thus illustrate the desirability of collaboration between co-authors from both legal orbits. (3) In most of the civil law studies, including the present one, discussion of judicial "holdings" in typical civil-law fashion fails to disclose the facts and issues and often even the court's actual decisions.¹ This makes it impossible to determine whether the practice described deviates from a finding previously noticed,² that in fact courts of all countries, notwithstanding any purported "choice of law," almost always apply their own laws outside the fields of party autonomy and true governmental interests. By a fortunate coincidence there has just been published Eek's work on Swedish conflicts law³ which offers the historical and substantive law

¹ See, e.g., p. 46, note 179, where we are told that, in one of the few (not more than 5) Swedish-American cases discussed, "the testator's intention is respected" and an American will "construed in accordance with American law." From Eek, *The Swedish Conflict of Laws* 157 (1965), we learn, however, that "only the Swedish construction rule was used as *ratio decidendi*." See also pp. 14, 55.

² Ehrenzweig, Fragistas and Yiannopoulos, *American-Greek Private International Law* 57 (1957); *idem*, Ikehara and Jensen, *American-Japanese Private International Law* 41-42 (1964); *idem*, *Conflict of Laws* §§ 101-108 (1962); *idem*, book review, 58 A.J.I.L. 548 (1964).

³ *Op. cit.* note 1 above.

background necessary fully to understand and appreciate the present volume.

ALBERT A. EHRENZWEIG

Das Potsdamer Abkommen und seine Völkerrechtliche Bedeutung. 3rd ed. By Fritz Faust. (Frankfurt/Main and Berlin: Alfred Metzner, 1964. pp. 262. Index. DM. 10.50.) In this volume the author analyzes the international legal meaning of the Four-Power Agreement reached at the Potsdam Conference of 1945. He passes in review the various, often conflicting, interpretations of this most important postwar document on Germany. By examining the opposing views of the major protagonists in the area of Germany, those of the Soviet Union (and its East German satellite), of the Anglo-Saxon Powers, and of the French, the writer provides an interesting legal background for a political conflict which resulted in Germany's economic and political partition, a result which the Potsdam Agreement wished to prevent.

In summing up the (West) German position, the author concludes that the Potsdam Agreement remains for Germany a *res inter alios acta*; in other words, it is not directly binding on the Federal Republic or a united Germany. This thesis appears to be somewhat in conflict with the writer's assertion that Potsdam (which, despite the change of circumstances in the situation of Germany, he still considers a valid international treaty) must remain the legal basis for the Peace Treaty to be concluded between the wartime Allies and Germany. He stresses the obligation to treat Germany as one "economic unit," imposed by the provisions of the Potsdam Protocol on the Four Occupation Powers. The author strongly opposes the Soviet view according to which unification of Germany is a matter for the "two German states" to agree upon.

The book is written in a sober, scholarly and objective manner. It is more than a compendium of theoretical and practical opinions on Germany's post-World War II legal status. The usefulness and also value of this work is demonstrated by the fact that the volume under review is the third extended edition of the book.

FERENC A. VÁLI

Szerokość Morza Terytorialnego i Jego Delimitacja [The Width of the Territorial Seas and Their Delimitation]. By Wojciech Góralczyk. (Warsaw: Państwowe Wydawnictwo Naukowe, 1964. pp. 392. Zł. 54.) Territorial seas continue to be one of the important issues of international law on which policies and ambitions of various Powers conflict to such a degree as to prevent reaching a modicum of agreement which would be generally accepted by the world community. Our author seems to believe that there is a general tendency which will one day permit its achievement. However, it also seems to be abundantly clear that expanding technological possibilities for the exploitation of natural riches on the bottom of the sea tend to limit rather than to expand the chances of arriving at a common point of view on all questions of the width and delimitation of territorial waters. The concept of the continental shelf, of limited significance at the present moment, may find application to various situations not exactly conforming to the situations with which it is associated.

Dr. Góralczyk's book consists of four parts. The first contains a preliminary discussion of various issues involved in determining the policies of individual countries in the matter of territorial waters, including the attitude of the Soviet Union and of the Socialist countries in general. The parts which follow deal with three key problems: (1) the baseline

from which territorial waters extend and are measured, (2) the width of the territorial seas, and (3) the technique of their delimitation.

The book represents an important and successful effort to give a complete account of international practice, trends in scholarly opinion, and of general tendencies in the policies of maritime Powers in this important field of international relations. The emphasis of the book is primarily on state practice, as Dr. Góraleczyk—a confirmed adherent of the positivistic school—believes firmly that “only states establish the rules of international law and their practice, in the first place, deserves our attention.” State practice is conceived very broadly indeed. The book gives an interesting account of the internal legislation of a great number of states, an exhaustive analysis of international agreements and of arbitral and judicial decisions dealing with the problem. It is an important contribution not only to the Polish literature of international law, but also for the jurists of other countries.

KAZIMIERZ GRZYBOWSKI

Mezhdunarodnopraven rezhim na Dunava. Sbornik [Le régime international du Danube. Recueil]. Edited by E. Kamenov and P. Radoinov. Résumés in Russian and French. (Sofia: Éditions de l'Académie Bulgare des Sciences, 1964. pp. 259.) This symposium, published by the Legal Institute of the Bulgarian Academy of Sciences under the general editorship of E. Kamenov and P. Radoinov, contains six studies devoted to the international legal status of the Danube and related problems. As indicated by the authors, the work is considered as the first effort on the part of Bulgarian legal and economic writers to fill the gap in Bulgarian literature on the international regime of this river.

In his study, E. Kamenov presents a survey of all the acts dealing with the status of the Danube as well as a thorough analysis of the Belgrade Conference of 1948 and the documents adopted by it. A. Angelov's topic is concerned with the international agencies administering navigation on the Danube. Both authors make special efforts to justify the exclusion from the Belgrade Conference of non-neighboring countries, especially France, Great Britain, and the United States, as well as the establishment of a single Danube Commission to administer navigation on the Danube in the place of the then existing International and European Commissions. U. S. Senator Vandenberg's appeal for the “internationalization” of this river is sharply criticized (p. 24) and the theory of the Western European nations concerning “acquired rights” in accordance with the existing Danube conventions is also flatly denied. The “socialist method” for regulating Danube navigation is fully endorsed: the administration and authority over the river belong to the neighboring countries (sovereign rights of [riparian] nations) to the exclusion of all others, even though navigation thereon is free and open to all. The Soviet influence on the Belgrade Conference was also apparent in the system adopted for the rotation of the presiding chairmen at the Conference, namely, in alphabetical order of the names of the participating states in accordance with the Cyrillic alphabet (p. 31).

The remaining four studies discuss the international regime of ship navigation on the Danube (by P. Radoinov), the economic use of this river (by Vl. Kutikov), the pollution of its waters (by P. Stainov), and the fishery of the river (by S. Penkov).

This symposium furnishes an abundance of information for the Bulgarian reader; but the interpretation and analysis of problems involving the international legal status of the Danube are strictly along the political and legal line of the present Government of Bulgaria.

IVAN SIPKOV

BOOKS RECEIVED *

- Académie de Droit International de La Haye. *Annuaire de l'A.A.A.* Vol. 34, 1964. Papers of the 15th Congress, 1963, and 16th Congress, 1964. The Hague: Martinus Nijhoff, 1965. pp. viii, 226. Gld. 27.50.
- . *Recueil des Cours*, 1964. Tome II (Vol. 112 of the Collection). Leyden: A. W. Sijthoff, 1964. pp. xii, 550. Index. Fl. 45.
- Alker, Hayward R., Jr., and Bruce M. Russett. *World Politics in the General Assembly*. New Haven and London: Yale University Press, 1965. pp. xxvi, 326. Index. \$7.50; 56 s.
- Association of American Law Schools. *The Law of U. S.-U.S.S.R. Trade*. (Papers prepared for Conference of Soviet and American Legal Scholars, June, 1965.) Washington, D. C.: Association of American Law Schools, 1965. pp. 103.
- Bär, Rolf. *Kartellrecht und Internationales Privatrecht*. Die Kollisionsrechtliche Behandlung Wirtschaftsrechtlicher Eingriffe, dargestellt am Beispiel der Gesetze gegen Wettbewerbsbeschränkungen. (Abhandlungen zum Schweizerischen Recht, Vol. 369.) Bern: Verlag Stämpfli & Cie., 1965. pp. xvi, 440. Fr./DM. 45.
- Barros, James. *The Corfu Incident of 1923. Mussolini and the League of Nations*. Princeton: Princeton University Press, 1965. pp. xxii, 339. Index. \$7.50; 60 s.
- Cambridge Essays in International Law. *Essays in Honour of Lord McNair*. London: Stevens & Sons; Dobbs Ferry, N. Y.: Oceana Publications, 1965. pp. x, 186. Index.
- Cavers, David F. *The Choice of Law Process*. (The Thomas M. Cooley Lectures.) Ann Arbor, Michigan: University of Michigan Press, 1965. pp. xiv, 336. Index. \$8.50.
- Chamas, Samy. *L'État et les Systèmes Bancaires Contemporains*. (Bibliothèque de Droit Commercial, Vol. 13.) Paris: Librairie Sirey, 1965. pp. 362. Index. Fr. 25.
- Clemens, Walter C., Jr. (ed.) *Toward a Strategy of Peace*. (Center for International Studies, Massachusetts Institute of Technology.) Chicago: Rand McNally & Co., 1965. pp. xviii, 264.
- Collège d'Europe. *Semaine de Bruges 1965: Droit Communautaire et Droit National [Community Law and National Law]*. (Cahiers de Bruges, N.S. 14.) Bruges: De Tempel, 1965. pp. 412. Fr. B. 450; \$9.00.
- Colloque International de Nice, 27-29 Mai 1965. *L'Adaptation de l'O.N.U. au Monde d'Aujourd'hui*. Paris: Éditions A. Pédone, 1965. pp. 230.
- de Vries, Henry P., and José Rodríguez-Novás. *The Law of the Americas. An Introduction to the Legal Systems of the American Republics*. Dobbs Ferry, N. Y.: Oceana Publications, 1965. pp. xii, 339. Index. \$15.00.
- Dinstein, Yoram. *The Defence of "Obedience to Superior Orders" in International Law*. Leyden: A. W. Sythoff, 1965. pp. xvi, 278. Index. Fl. 28.
- European Communities Court of Justice. *Recueil de la Jurisprudence de la Cour*, 1965. Vol. XI, Nos. 6-8. Luxembourg: Services des Publications des Communautés Européennes, 1965. pp. 109-771. Fr. B. 400; DM. 32; Fr. 39; Lit. 5,000; Fl. 29, per volume.
- Fernández-Shaw, Félix. *La Integración de Centroamérica*. Madrid: Ediciones Cultura Hispanica, 1965. pp. 1086. Pts. 450.
- Forgac, Albert A. *New Diplomacy and the United Nations*. New York: Pageant Press, 1965. pp. xxvi, 173. \$5.00.
- Hocheplied, Jean-Pierre de. *La Protection Diplomatique des Sociétés et des Actionnaires*. Paris: Éditions A. Pédone, 1965. pp. ii, 274.
- Institut de Droit Comparé de l'Université de Paris. *Aspects du Droit de l'Énergie Atomique*. Tome I: *Responsabilité—Assurance—Transport*. Paris: Éditions du Centre National de la Recherche Scientifique, 1965. pp. xii, 350. Fr. 45.
- International Atomic Energy Agency. *Agreements Registered with the International Atomic Energy Agency up to 31 December, 1964*. (Legal Series No. 3.) New York: National Agency for International Publications, Inc. (distributors); Vienna: Inter-

* Mention here neither assures nor precludes later review.

- national Atomic Energy Agency, 1965. pp. viii, 43. \$1.30; S.21; Fr. 4; DM. 3.20; 6 s.
- International Law Association. Committee on State Succession to Treaties and Other Governmental Obligations. *The Effect of Independence on Treaties. A Handbook*. London: Stevens & Sons; South Hackensack, N.J.: Fred B. Rothman & Co., 1965. pp. xvi, 391. \$17.50.
- Jessurun D'Oliveira, H. U. *Internationale Verkeersongelukken. Het Slagveld van een Grondslagenstrijd in het IPR*. (Studiekring "Prof. Mr. J. Offerhaus," reeks Internationaal Privaatrecht, No. 3.) Amsterdam: Scheltema & Holkema N.V., 1965. pp. iv, 44. Fl. 3.75.
- Johnson, David H. N. *Rights in Air Space*. Manchester, England: Manchester University Press; Dobbs Ferry, N. Y.: Oceana Publications, 1965. pp. viii, 129. Index. \$4.50; 21 s.
- Johnston, Douglas M. *The International Law of Fisheries. A Framework for Policy-Oriented Inquiries*. New Haven and London: Yale University Press, 1965. pp. xxiv, 554. Index. \$12.50; 90 s.
- Knote, Jürgen. *Internationale Rohstoffabkommen aus der Nachkriegszeit*. Bonn: Ludwig Röhrscheid Verlag, 1965. pp. 199. DM. 19.
- Lambrinidis, John S. *The Structure, Function, and Law of a Free Trade Area. The European Free Trade Association*. (Library of World Affairs, No. 65.) New York and Washington: Frederick A. Praeger, 1965. pp. xxii, 303. Index. \$12.50.
- Lissitzyn, Oliver J. *International Law Today and Tomorrow*. Dobbs Ferry, N. Y.: Oceana Publications, 1965. pp. x, 133. Index. \$4.00.
- Lombard, Richard S. *American-Venezuelan Private International Law*. (Parker School of Foreign and Comparative Law, Bilateral Studies, No. 14.) Dobbs Ferry, N. Y.: Oceana Publications, 1965. pp. ii, 125. Index. \$5.50.
- Matte, Nicolas Mateesco. *Deux Frontières Invisibles: De la Mer Territoriale à l'Air "Territorial"*. Paris: Éditions A. Pédone, 1965. pp. 294.
- Müller-Rappard, Ekkehart. *L'Ordre Supérieur Militaire et la Responsabilité Pénale du Subordonné*. Paris: Éditions A. Pédone, 1965. pp. xviii, 281.
- Orfield, Lester B., and Edward D. Re. *International Law. Cases and Materials*. Revised edition. Indianapolis, Kansas City and New York: Bobbs-Merrill Co., 1965. pp. xlv, 1102. Index.
- Reuter, Paul. *Organisations Européennes*. ("Thémis" Manuels Juridiques, Économiques et Politiques.) Paris: Presses Universitaires de France, 1965. pp. viii, 451. Index. Fr. 20.
- Sandifer, Durward V., and L. Ronald Scheman. *The Foundations of Freedom. The Interrelationship between Democracy and Human Rights*. New York, Washington and London: Frederick A. Praeger, 1966. pp. xvi, 139. \$5.00.
- Sauer, Ernst Friedrich. *Staatsphilosophie*. Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag, 1965. pp. viii, 343. Index. DM. 37.80.
- Scharpf, Fritz Wilhelm. *Grenzen der Richterlichen Verantwortung. Die Political-Question-Doktrin in der Rechtsprechung des Amerikanischen Supreme Court*. (Freiburger Rechts- und Staatswissenschaftliche Abhandlungen, Vol. 22.) Karlsruhe: Verlag C. F. Müller, 1965. Bibliography. Table of Cases. pp. xvi, 462. DM. 38.
- Schmidt, Klaus-Peter. *Die Wirtschaftlich-Politische Ordnung des Internationalen Luftlinienverkehrs als Völkerrechtliches Problem*. Munich: Dissertations-Druckerei Charlotte Schön, 1965. pp. xviii, 115.
- Sen, B. *A Diplomat's Handbook of International Law and Practice*. The Hague: Martinus Nijhoff, 1965. pp. xxxiv, 522. Index. Gld. 58.50.
- Seydou, Madani SY. *Recherches sur l'Exercice du Pouvoir Politique en Afrique Noire (Côte d'Ivoire, Guinée, Mali)*. Collection du Centre de Recherches, d'Études et de Documentation sur les Institutions et la Législation Africaines, No. VII.) Paris: Éditions A. Pédone, 1965. pp. iv, 230.
- Shulman, Marshall D. *Beyond the Cold War*. New Haven and London: Yale University Press, 1966. pp. viii, 111. \$3.75, cloth; \$1.25, 8s. 6d., paper.

- Stašnov, Petko. *La Coexistence Pacifique entre Etats à Régime Politique Différent et le Traité de Moscou du 5 Août 1963*. (In Bulgarian with a summary in French.) Reprint from *Annuaire de l'Université de Sofia, Faculté de Droit*, Vol. 55, 1964. Sofia: 1964. pp. iv, 87-108.
- Stenton, Doris M. *After Runnymede. Magna Carta in the Middle Ages*. (Magna Carta Essays Series, No. 7.) Charlottesville, Va.: University Press of Virginia, 1965. pp. vi, 54. \$75.
- Stephanova, Slava. *Classification Juridique des Espaces Maritimes. Aperçu Historique. Principes de Base du Régime Actuellement en Vigueur*. (In Bulgarian with a summary in French.) Reprint from *Annuaire de l'Université de Sofia, Faculté de Droit*, Vol. 55, 1964. Sofia: 1964. pp. iv, 113-204.
- Stoessinger, John G., with assistance of Robert G. McKelvey. *The United Nations and the Superpowers. United States-Soviet Interaction at the United Nations*. New York: Random House, 1965. pp. xviii, 206. Index. \$1.95, text ed.
- Stumpf, Samuel Enoch. *Morality and the Law*. Nashville: Vanderbilt University Press, 1966. pp. xiv, 247. Index. \$5.00.
- Tammes, A. J. P. *Internationaal Publiekrecht*. Haarlem: De Erven F. Bohn N.V., 1966. pp. xvi, 257. Index. Fl. 40.
- Turkish Yearbook of International Relations, 1963*. Vol. IV. Ankara: University of Ankara, Institute of International Relations, 1965. pp. vii, 350. TL. 27.25.
- United States Senate Committee on Commerce. *Air Laws and Treaties of the World*. 3 vols. (Committee Print, 89th Cong., 1st Sess., July 1, 1965.) Washington, D. C.: U. S. Government Printing Office, 1965. Vol. I: pp. x, 1408. \$4.00; Vol. II: pp. vi, 1409-3084. \$4.50; Vol. III: pp. x, 3085-4484. Index. \$4.00.
- Van Oudenhove, Guy. *The Political Parties in the European Parliament. The First Ten Years (September 1952-September 1962)*. (European Aspects. A Collection of Studies Relating to European Integration Published under the Auspices of the Council of Europe. Series C: Studies on Politics, No. 18.) Leyden: A. W. Sijthoff, 1965. pp. xvi, 268. Fl. 29.50.
- Veiter, Theodor. *Die Italiener in der Österreichisch-Ungarischen Monarchie. Eine Volkspolitische und Nationalitätenrechtliche Studie*. (Schriftenreihe des Instituts für Österreichkunde.) Vienna: Verlag für Geschichte und Politik, 1965. pp. 112. S.65.
- Verzijl, J. H. W. *The Jurisprudence of the World Court. A Case by Case Commentary*. Leiden: A. W. Sijthoff, 1965. pp. xiv, 600. Fl. 64.50.
- Von Simson, Werner. *Die Souveränität im Rechtlichen Verständnis der Gegenwart*. Berlin: Duncker & Humblot, 1966. pp. 275. DM. 48.60.

OFFICIAL DOCUMENTS *

SECOND SPECIAL INTER-AMERICAN CONFERENCE

Rio de Janeiro, Brazil, November 17-30, 1965

RESOLUTIONS¹

I

THE ACT OF RIO DE JANEIRO AMENDMENTS OF THE CHARTER OF BOGOTÁ

WHEREAS:

The inter-American system is the most expressive manifestation of the will of the American states in that which relates to firm guarantees of peace and security in the hemisphere, to the rule of the principles of law, both internally and in their foreign relations, and to the economic and social development of the people of the hemisphere;

The experience gained since the Charter of the Organization of American States² came into effect indicates the need for strengthening the structure and more effectively coordinating the activities of the organs of the system, to attain fully the objectives set forth in the preceding paragraph, and

The inter-American system should be empowered, in accordance with the purposes and principles of the Charter of the OAS, to resolve more effectively the various problems of the hemisphere,

The Second Special Inter-American Conference

REAFFIRMS:

The principles and standards in effect that are embodied in Part One of the Charter of the Organization of American States;

DECLARES:

1. That it is essential to forge a new dynamism for the inter-American system and to avoid duplication of efforts and conflicts of jurisdiction

* Obtained and prepared by R. R. Baxter of the Board of Editors.

¹ Final Act of the Conference, Doc. 150 (English) Rev., Nov. 30, 1965, O.A.S. Official Records OEA/Ser.E/XIII.1. The Act of Rio de Janeiro and the Economic and Social Act of Rio de Janeiro are also reprinted in 53 Dept. of State Bulletin 985 (1965). Only the resolutions of particular legal interest are reproduced here.

Statements and declarations were made by a number of the American Republics with respect to the following resolutions: Act of Rio de Janeiro (Chile, Dominican Republic, Ecuador, and Peru); Annual Meetings of Ministers of Foreign Affairs (Chile, Dominican Republic, Ecuador, and Haiti); Strengthening the Means for Peaceful Settlement (Chile, Dominican Republic, and Peru); Asylum for Cuban Political Refugees (Haiti); and Informal Procedure on the Recognition of *De Facto* Governments (Ecuador and Haiti). The statements and declarations, which appear at pp. 58-66 of the Final Act of the Conference, are not reproduced here. ² 46 A.J.I.L. Supp. 43 (1952).

among its organs, in order to facilitate cooperation between the American states and obtain a more rational utilization of the resources of the Organization;

2. That it is essential to modify the working structure of the Organization of American States as defined in the Charter; and

RESOLVES:

1. To convoke, in accordance with Articles 36 and 111 of the OAS Charter, the Third Special Inter-American Conference, to be held in the city of Buenos Aires. The Council of the Organization in agreement with the host country, shall set a day in July 1966 for the opening of the conference.

2. To entrust to a Special Committee, composed of representatives of each of the member states, the preparation of a preliminary draft proposal on amendments to the Charter of the Organization. The Council of the Organization of American States shall convoke the aforesaid Committee to meet in Panama and shall receive its conclusions. The Council shall refer these to the governments together with its observations, if any, at least 60 days before the Inter-American Conference to be convoked in accordance with paragraph 1 is held.

3. The preliminary draft of these amendments shall include additional standards for inter-American cooperation in the economic, social, and cultural fields.

4. The Special Committee shall use the following guidelines for the amendment of the Charter of the Organization:

- a. An inter-American conference, as the highest body of the Organization of American States, shall be convened annually at a different location and on a fixed date, for the purposes set forth in Article 33 of the Charter and to approve the program and budget of the Organization, to determine the quotas of the member states, and to coordinate the activities of the organs and agencies of the inter-American system.
- b. The Meeting of Consultation of Ministers of Foreign Affairs shall be retained in the form established in Article 39 of the Charter.
- c. There shall be three Councils, directly responsible to the Inter-American Conference, as follows:

- 1) The present Council of the Organization, which shall be permanent in nature and, in addition to the pertinent powers that may be assigned to it in the Charter of the Organization and inter-American treaties and agreements such as those relative to the maintenance of peace and the peaceful settlement of disputes, shall be the executive body for the decisions the Inter-American Conference or the Meeting of Consultation does not entrust to the Inter-American Economic and Social Council, to the Inter-American Educational, Scientific and Cultural Council, or to other organs;

- 2) The Inter-American Economic and Social Council, which shall meet at least once a year and shall have a permanent executive committee with a structure similar to those of CIAP; CIAP shall act as the executive committee of the IA-ECOSOC so long as the Alliance for Progress is in force; and
 - 3) The Inter-American Educational, Scientific, and Cultural Council, which shall meet when convoked by the Inter-American Conference and shall have as its duties, in addition to promoting education, science, and culture, those assigned to the present Inter-American Cultural Council in Articles 73 and 74 of the OAS Charter, with the exception of the last part of subparagraph (h) of Article 74, where reference is made to the Council of the Organization. The Inter-American Educational, Scientific and Cultural Council shall have a permanent committee, and its activities in the fields of education and training should be closely coordinated, whenever pertinent, with those of the IA-ECOSOC.
- d. The Pan American Union shall continue to function as the central and permanent organ of the Organization of American States and the General Secretariat of the Organization, adapting its functions to the needs of the inter-American system.
 - e. The Secretary General and the Assistant Secretary General of the Organization shall hold office for five years.
 - f. The present Inter-American Juridical Committee of Rio de Janeiro shall be maintained as an advisory organ with the structure and functions deemed desirable by the Special Committee, and the situation of the Inter-American Council of Jurists shall be studied.
 - g. A study shall be made of the advisability of locating the permanent headquarters of all the Councils in one place or having them geographically decentralized, as well as a study of the feasibility of proceeding similarly in the case of the other OAS organs and agencies. In both cases all reasons and circumstances for and against one or the other of these solutions shall be considered.
 - h. The provisions of the Act of Washington, signed at the First Special Inter-American Conference on December 18, 1964,³ regulating the admission of new members shall be included; and

DECIDES:

That this resolution shall be known as "The Act of Rio de Janeiro."

II

ECONOMIC AND SOCIAL ACT OF RIO DE JANEIRO

PREAMBLE

WHEREAS:

Freedom, security, and the improvement of democratic institutions are the best means of satisfying man's aspirations for obtaining employment

³ 59 A.J.I.L. 719 (1965).

and social justice, land and housing, education and health, and no system can guarantee true progress unless it affirms the dignity of the individual;

Freedom, security and the improvement of democratic institutions in the hemisphere require the elimination of the serious obstacles to achievement by the American peoples of a rising level of well-being;

The Act of Bogotá, the Charter of Punta del Este, and the Charter of Alta Gracia set forth economic and social aspirations and goals that are important expressions of the interest in finding a satisfactory hemisphere answer to the demands of the new American realities, and that should be noted in the course of evolving hemispheric cooperation;

Also, the studies by IA-ECOSOC, CIAP, IDB, and other regional agencies, whose activities are carried out within the framework of the objectives of the documents mentioned in the preceding paragraph, have made it possible to identify specific problems that the countries of Latin America face in their economic and social development, and propose ways of overcoming those problems, which should be taken into consideration;

The need is recognized, in accordance with the principles of inter-American cooperation and mutual assistance, to extend the duration of the Alliance for Progress for as long as may be needed to ensure sustained and adequate growth, social progress consonant with the goals of the Act of Bogotá and the Charter of Punta del Este, and hence the basic ideas that inspired these documents should be incorporated into the permanent structure of the system;

For the extended duration of the Alliance it should be accompanied by renewed efforts to mobilize national resources to the maximum and to ensure an adequate flow of mutual and external financial and technical assistance, from both public and private sources of capital;

Modernization of rural life and the more equitable distribution and better use of land are essential to national progress, to fulfilling the aspirations of the rural population and the ever-increasing need for food in the hemisphere, and to promoting national development through market expansion;

Economic and social development planning and domestic price stability compatible with such development are national objectives requiring the understanding, the support, and the participation of the various sectors of the national community;

International trade is a determining factor of economic and social development of the countries of the hemisphere and should evolve in the direction of providing developing countries, especially, with a system of fair prices, increasing earnings, and free access to world markets;

External and mutual technical and financial assistance granted on flexible and suitable terms is also a determining factor of economic and social development;

Based on the democratic principles and institutions of the inter-American system, each member country will freely foster its development in accordance with its own methods and procedures;

In order to give impetus to development of the hemisphere, it is essential

to accelerate economic integration, looking to the creation of a Latin American common market, taking into account the differing degrees of development of the Latin American countries and the process already initiated in this field by the Latin American Free Trade Association and the General Treaty on Central American Economic Integration;

The hope shared by the member states for a hemisphere made up solely of free and democratic nations is intimately linked to the success of the Alliance for Progress; and

The effectiveness of the inter-American system depends upon respect and active support by its member countries for the principles of the system and, reciprocally, upon the support given by the inter-American system to national policies based on these principles,

The Second Special Inter-American Conference

DECLARES:

That it is essential to incorporate into the economic and social field of the inter-American system, as juridically binding, principles of mutual security, solidarity, cooperation, and assistance; however the member states may nevertheless adopt pertinent measures immediately to implement the principles set forth in this Act; and

RESOLVES:

1. To reaffirm the principles and objectives stated in the Declaration to the Peoples of America and in the Charter of Punta del Este, approved by the Inter-American Economic and Social Council on August 17, 1961, as the fundamental policy of the Organization of American States and of the governments of the member states with regard to the economic and social development of the hemisphere; and

2. To instruct the Special Committee charged with drawing up the preliminary draft amendments to the Charter of the Organization of American States to prepare, with the advice of the Inter-American Committee on Alliance for Progress and other regional bodies, the additional standards in the economic and social field required to be incorporated into the said Charter, in accordance with the guidelines set forth below.

CHAPTER I—*Political Security and Economic and Social Development*

1. The principles of solidarity that inspire the activities of inter-American cooperation in the political field and in that of mutual security must, of necessity, be applicable also to the economic and social field, inasmuch as the American Republics have resolved to unite in a common effort to enable their peoples to attain the greater social justice and more rapid and balanced economic progress essential to the security of the hemisphere.

2. Freedom, security, and democratic institutions are the best means of satisfying individual aspirations for progress through employment,

social justice, improvement in education and health, better land distribution, adequate housing, and protection of the family and children. No system can guarantee true progress unless it affirms the dignity of the individual.

3. To achieve the objectives of the Alliance for Progress, the obligation to cooperate in the solution of economic and social problems is essential, inasmuch as these problems can disturb relations among peoples, limit the opportunities to affirm the dignity of the individual, limit the full exercise of democracy, and endanger the peace and security of the nations.

CHAPTER II—*The National Social and Economic Effort*

4. The economic and social progress of the countries depends fundamentally on mobilizing their national, human, and material resources.

5. The improvement of health, education, housing, and the system of land tenure, as well as the protection of the family and children, and the right to work, should be the fundamental objectives of social development, and to achieve these objectives it is essential, among other things, to generate national resources and establish an adequate domestic institutional structure.

6. The growing urban concentration in the hemisphere makes it increasingly important to focus attention and effort on providing the services and the means essential to an urban life of dignity, healthful and productive; at the same time, national policies may be pursued in order to achieve an appropriate geographic distribution of the population.

7. An effort should be made to achieve a more equitable distribution of national income through measures such as, among others, an appropriate fiscal policy.

8. Increased agricultural productivity and yields, as well as agricultural diversification through the application of modern techniques, credit expansion, systems for the marketing and processing of agricultural products, and reform of inefficient and unjust land-tenure systems, are basic elements for sustained development in the hemisphere.

9. The requirements for accelerated economic development and the need to create new employment opportunities for the growing population of Latin America make industrialization, under conditions of increasing efficiency and competition, imperative, particularly with respect to capital and intermediate goods, as well as the use of idle capacity and the absorption of unemployed and underemployed manpower through housing and public works programs.

10. The dynamic and constructive action of free trade unions and other organizations dedicated to furthering the welfare of their members contributes importantly to the economic and social development of the countries and to the achievement of the objectives of the Alliance for Progress.

11. Economic development can be furthered in important ways, through the stimulation of increased private initiative and investment, along with parallel action in the public sector, and through the additional economic activity which accompanies such investments. The member states recog-

nize the increasing benefits to the process of development that can be achieved in this manner.

12. Stability in the domestic price level is a fundamental element in the achievement of social justice and sustained development, and, since inflation has an especially detrimental effect on the low-income sectors and on the capacity to earn the foreign exchange necessary for the importation of essential goods, one of the objectives of development policy should be that of reconciling price stability with economic growth and social justice.

CHAPTER III—*Mutual and External Economic
and Social Assistance*

13. The member states accept the obligation, within the framework of their constitutional processes and to the extent their resources permit, to help one another and to provide assistance, in the order of need to the less-developed countries of the system, with a view to achieving, on a national and regional level, the social and economic objectives set forth in this Act, for the purpose of putting the countries of the hemisphere in a situation of development as soon as possible.

14. The member states undertake to avoid adopting policies, actions, or measures that might jeopardize the economic and social development of another member state.

15. The member states recognize the necessity of cooperating individually and collectively in multinational projects to accelerate the process of Latin American economic integration, particularly those projects originating in the organizations which have that purpose.

16. The member states agree to seek the solution of urgent problems that arise when the economic development or stability of any member state is seriously affected by economic or trade measures adopted by other countries, by severe and continuing deficits in their balance of payments resulting from sharp drops in income from foreign sources, or by emergency situations, whatever their origin, that cause a shortage of essential goods and services.

17. Within the framework of mutual assistance, the benefits of scientific and technological progress should be spread among the member states, promoting, in accordance with prevailing treaties and national laws, the dissemination and utilization of scientific and technical knowledge and facilitating access to patents that reflect modern technology and promote the expansion of industrial exports.

18. The member states agree that mutual assistance should be extended in sufficient volume and under flexible repayment terms and conditions and manner of utilization, including financing of local costs when necessary, and also to make every effort, individually and collectively, to increase financial and technical cooperation on similar terms from countries or regions outside the inter-American system, as well as that from international financing agencies.

19. Program loans for general development purposes are an important means of facilitating the execution of development plans and monetary

stabilization programs, as well as of creating or strengthening national financial institutions, and should therefore be extended without prejudice to the financing of specific projects, provided that the granting of such credits does not create or aggravate balance-of-payments difficulties of another member state.

20. Development plans and monetary stabilization programs require the adoption of suitable formulas to solve the problems arising from excessive accumulation of short-term obligations, detrimental to the economic stability of a member state of the system.

21. The member states agree that external aid should include extending financial resources so that the developing countries of the inter-American system will be able to market their industrial products under competitive credit conditions.

CHAPTER IV—*Foreign Trade*

22. The close interdependence of international trade and economic and social developments compels the member states to join forces in order to ensure the undertaking of both collective and individual action aimed at:

- a. Eliminating excessive tariffs, internal taxes, subsidies, and charges and other restrictions of similar effect that hinder exports from countries of the inter-American system, except when such measures are applied in order to diversify the economic structure or accelerate the development of the less developed nations or to intensify the process of economic integration of Latin America;
- b. Eliminating trade preferences and other discriminatory practices that hinder the access of the hemisphere's products to world markets;
- c. Concluding and strengthening international agreements on basic products between producers and consumers that are equitable and are applied in orderly form, with respect to marketing as well as production control, in order to achieve fair prices and larger receipts from their exportations; and complementing such agreements by financial procedures, supported by international institutions, for the purpose of diversifying production and exports and of correcting tendencies toward overproduction;
- d. Having importing member countries reduce and, if possible, abolish, within the shortest possible time, all restrictions and discriminations on consumption and importation of primary products, except when these restrictions are imposed temporarily to diversify their economic structure, to protect it, or to accelerate the economic development of the developing countries of the inter-American system.

23. The member states should exert properly directed and joint efforts toward:

- a. Lessening, by means of suitable systems of international compensatory financing, the fluctuations in earnings from abroad suf-

ferred by countries that still depend to a great extent on the export of primary products, with a view to maintaining the continuity of their economic and social development programs;

- b. Doing away with preferential agreements and other measures that limit world consumption of Latin American basic products, manufactures, and semimanufactures and their access to international markets;
- c. Diversifying and expanding the export of manufactures and semi-manufactures originating in the developing countries, as a means of accelerating the economic development of these countries and of raising their standards of living. In this respect, individual or joint measures shall be adopted to:
 - (i) create favorable conditions for access to international markets;
 - (ii) improving the quality and marketing of the products of the developing countries, in order to assure them an increasing participation in the trade in manufactures and semimanufactures and to meet the needs of their development.
- d. Promoting improvement and coordination of transportation and communications in the developing countries as an essential means of achieving their progress, in the national sphere as well as in the integration process.

24. Orderly and appropriate marketing procedures for surplus products should be maintained, in order to avoid disturbing the traditional markets of member countries and to encourage the increased sale of their products on other markets.

25. The developed member countries that sign international trade agreements do not insist on reciprocity for concessions granted by them to less developed countries in the matter of lowering or abolishing tariffs and other barriers to foreign trade.

26. The drafting of plans for the production and export of basic products, with due attention to their effect on world markets, makes it necessary to support and improve the effectiveness of international price stabilization programs and machinery. Further, efforts shall be made to avoid the uneconomical production of products that can be obtained under better terms in the less developed countries of the hemisphere.

CHAPTER V—*Economic Integration*

27. The American states recognize that the economic integration of the developing countries of the hemisphere should be one of the basic objectives of the inter-American system and, for that reason, will orient their efforts and take the measures that are necessary to accelerate the process of integration.

28. With the object of strengthening and accelerating integration in all its aspects, special priority must be given to the preparation and execution of multinational projects, and to the financing thereof, and the already existing economic integration agencies should coordinate their activities

with a view to the earliest possible establishment of the Latin American common market. Likewise, the economic and financial institutions of the region should continue to give their fullest support to the organizations for regional integration.

29. Within the framework of mutual assistance, the participation of the comparatively less developed countries in Latin American programs of multinational economic cooperation should be encouraged, and the smooth balanced development of Latin American integration promoted, with special importance attached to the needs of those countries and particularly to their infrastructure programs and programs for the promotion of new lines of production.

30. National development plans should take into account the market expansion resulting from regional integration, in accordance with their own goals and objectives, in order to achieve adequate levels of employment, stimulate investment, increase technological capacity, and improve the conditions of cost, competition, and productivity.

III

ANNUAL MEETINGS OF MINISTERS OF FOREIGN AFFAIRS

WHEREAS:

The Act of Rio de Janeiro provides that a Special Inter-American Conference is to be convoked, in accordance with Article 111 of the Charter, to consider the amendments thereto needed to strengthen the inter-American system and give it vitality;

Until those amendments are approved and enter into force, it is imperative that the necessary measures be taken to handle periodically and frequently the matters that relate to inter-American life;

It is the common desire of the member states to strengthen and give greater cohesion to the regional Organization to which they belong;

The American states have linked the maintenance of peace, the collective security of the hemisphere, the defense of representative democracy and economic, social, and cultural development, to the institutions of the inter-American system; and

It is likewise advisable to provide coordination among the organs and bodies of the inter-American system, and this necessity becomes increasingly urgent with the emergence of new forms of economic, social, and cultural integration and cooperation of common interest to the Continent,

The Second Special Inter-American Conference

RESOLVES:

1. To hold annual meetings of Ministers of Foreign Affairs of the member states of the Organization of American States, to consider common problems and activities of the inter-American system. The Council of the Organization shall convoke the Meeting in accordance with the provisions of the Charter that, according to circumstances, may be pertinent.

2. The site of the annual meeting of Ministers of Foreign Affairs shall rotate among the member states of the Organization of American States. If for any reason it cannot be held at the site selected, the meeting shall be held at the headquarters of the Organization of American States.

3. The Secretary General shall present to each meeting a report on the activities of the Organization.

IV

COORDINATION OF THE ACTIVITIES OF INTERNATIONAL AND INTER-AMERICAN ORGANIZATIONS

WHEREAS:

It is necessary to promote the strengthening of inter-American organizations so that, along with those of the United Nations and other international agencies, they will be able to contribute effectively and increasingly to economic, social, and cultural progress, and to inter-American cooperation;

Coordination is an effective means that can contribute notably to the strengthening of the inter-American system in the fields entrusted to the inter-American organizations because it prevents duplication of efforts, facilitates complementation in order to achieve better results and increases the degree of constructive action in the member states; and

In accordance with the provisions of Article 53 of the Charter of the Organization of American States, it is the duty of the Council of the Organization to take appropriate measures with regard to the proper functioning of inter-American organizations,

The Second Special Inter-American Conference

RESOLVES:

1. To instruct the Council of the Organization of American States:
 - a. To study the broad aspects of the methods necessary for the effective coordination of inter-American organizations, so that they will complement and strengthen one another in the performance of their services;
 - b. To study the bases for a plan of coordination for the entire system which, with a view to avoiding the unnecessary proliferation of new agencies or new services, will ensure that the new functions and activities aimed at promoting economic, social, and cultural development and inter-American cooperation are entrusted to the organs of the system that have the greatest experience in the various fields;
 - c. To study a plan which establishes the general bases for the eventual signing, at the highest possible level and without prejudice to existing agreements, of general agreements coordinating the action of the Organization of American States and inter-American bodies

- with that of the United Nations and other international entities and organizations, with a view to increasing their cooperation and the volume of their effective cooperation, avoiding duplication in their activities, and in general ensuring that they will make a greater contribution, in a complementary and joint manner, to the economic, social, and cultural development of the American countries;
- d. To carry out all negotiations with inter-American and international entities and organizations to ensure fulfillment of the objectives of the present resolution;
 - e. To present a general report on the topics mentioned in paragraph 1 to the special Committee on amendments to the Charter of the Organization.
2. To suggest to the governments of the member states that they consider the advisability of establishing or improving suitable methods for achieving, on the national level, the increased coordination and cooperation called for in the present resolution.

X

CONVOCACTION OF A SPECIALIZED CONFERENCE

The Second Special Inter-American Conference

RESOLVES:

1. To convoke a specialized conference, which will meet at the time and place to be fixed by the Council of the Organization, in order:
 - a. To study matters related to the use of international rivers and lakes for agricultural and industrial purposes, and to sign an international instrument or instruments containing general standards on the subject;
 - b. To study matters related to the commercial use of international rivers and lakes, formulate the recommendations that may be called for, and possibly to sign an international instrument or instruments containing general standards on the subject.
2. The instruments referred to in the preceding paragraphs should not affect bilateral or regional agreements concluded among the member states of the Organization.

XIII

STRENGTHENING THE MEANS FOR PEACEFUL SETTLEMENT

The Second Special Inter-American Conference

RESOLVES:

To request the Special Committee established by the Act of Rio de Janeiro, in drawing up the preliminary draft amendments to the Charter, to strengthen the capacity of the Organization to give the member states

effective aid in the peaceful settlement of their disputes, assigning the necessary powers to the Council of the Organization of American States.

XVIII

INTER-AMERICAN PEACE COMMITTEE

The Second Special Inter-American Conference,

CONSIDERING:

The report of the Inter-American Peace Committee concerning the amendment of its statutes (Document No. 14) and that submitted pursuant to paragraph 3 of Resolution IV of the Fifth Meeting of Consultation of Ministers of Foreign Affairs (Document No. 39); and

The draft resolution presented by the Delegation of the Government of Haiti, entitled "Competence of the Inter-American Peace Committee" (Document No. 73), and the study prepared by the Inter-American Juridical Committee of Rio de Janeiro dated October 28, 1959 (Document No. 6), and the minutes of the meetings of Committee III,

RESOLVES:

1. To submit these documents to the Council of the Organization of American States so that, after consultation with the member states, it shall determine whether the present Statutes of the Inter-American Peace Committee shall be amended or not and, if so, to amend them in accordance with the observations of the member states.

2. To set April 1, 1966, as the closing date for the consultations referred to in the previous paragraph.

3. To terminate the powers that Resolution IV of the Fifth Meeting of Consultation of Ministers of Foreign Affairs provisionally vested in the Inter-American Peace Committee.

4. To instruct the Council of the Organization that if—as a result of the consultations provided for in paragraph 1 hereof—the Statutes are to be amended, none of the powers that have been terminated by virtue of paragraph 3 of this resolution shall be included.

XXI

ASYLUM FOR CUBAN POLITICAL REFUGEES

WHEREAS:

Pursuant to the American Declaration of the Rights and Duties of Man, "Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements",⁴

The institution of asylum is recognized in the Americas not only by the practice of states but also in successive regional instruments, such as

⁴ Adopted at the Ninth International Conference of American States, Bogotá, Colombia, May 2, 1948, Art. XXVII. 43 A.J.I.L. Supp. 133, 137 (1949).

the Convention on Asylum (Havana, 1928),⁵ the Convention on Political Asylum (Montevideo, 1933),⁶ the Montevideo Treaty on Political Asylum and Refuge (1939),⁷ the Convention on Diplomatic Asylum (Caracas, 1954),⁸ and the Convention on Territorial Asylum (Caracas, 1954);⁹

The situation of the Cuban refugees, as a result of the exodus brought about by the conditions prevailing in their country, has created complex problems which require prompt and effective measures, particularly by the American states, in order to provide asylum to those refugees and guarantee their rights and basic freedoms, at least on a par with that provided for under the Convention on the Status of Refugees (Geneva, 1951);¹⁰ and

One of the most urgent problems is that concerning the need for those refugees to be provided with a travel document,

The Second Special Inter-American Conference

RESOLVES:

1. To urge the member states of the Organization of American States that have not yet ratified the Convention on Territorial Asylum signed at Caracas in 1954 to do so, and apply its provisions to the refugees from Cuba according to the facilities and material possibilities of each of them.

2. To recommend to the states that they study the possibility of issuing a travel document to refugees who must take final leave of the country where they obtained asylum, using as a sample the specifications included in Article 28 of the Convention on the Status of Refugees, signed at Geneva in 1951, and the annex thereto.

3. To charge the Inter-American Juridical Committee of Rio de Janeiro with the preparation of a draft convention on refugees, after consulting the Inter-American Commission on Human Rights.

XXII

EXPANDED FUNCTIONS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

WHEREAS:

Protection of the rights of man should be a principal guide in the development of inter-American law;

The Inter-American Commission on Human Rights was created by the Fifth Meeting of Consultation of Ministers of Foreign Affairs to "promote respect for human rights" and "to develop an awareness of human rights among the peoples of America";¹¹

⁵ Signed Feb. 20, 1928. 132 L.N. Treaty Series 323; 22 A.J.I.L. Supp. 158 (1928).

⁶ Signed Dec. 26, 1933. 28 A.J.I.L. Supp. 70 (1934).

⁷ Signed Aug. 4, 1939. 37 A.J.I.L. Supp. 99 (1943).

⁸ Signed March 28, 1954. Pan American Union Treaty Series No. 18.

⁹ Signed March 28, 1954. *Ibid.*, No. 19.

¹⁰ Signed at Geneva, July 28, 1951. 189 U.N. Treaty Series 150.

¹¹ Final Act, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, Aug. 12-18, 1959. Pan American Union Doc. 89 (English), Rev. 2, Oct. 12, 1959, p. 10.

The Commission has performed valuable service in carrying out its mandate;

The Eighth Meeting of Consultation of Ministers of Foreign Affairs (Punta del Este, 1962) recognized that "there is a pressing need for accelerating development in the hemisphere of the collective defense of human rights" and recommended the broadening and strengthening of the Commission's attributes and faculties (Resolution IX);¹²

The member states of the Organization agreed that the Inter-American Commission on Human Rights should be strengthened by broadening its responsibilities in an effort to promote greater respect for human rights in the hemisphere; and

Without prejudice to the continuing exercise by the Inter-American Commission on Human Rights of its responsibilities in furtherance of all the rights and duties included in the American Declaration, it would be desirable to have an annual review, at the ministerial level, of progress in the protection of human rights,

The Second Special Inter-American Conference

RESOLVES:

1. To request the Inter-American Commission on Human Rights to conduct a continuing survey of the observance of fundamental human rights in each of the member states of the Organization.

2. To request the Commission to give particular attention in this survey to observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man.

3. To authorize the Commission to examine communications submitted to it and any other available information, so that it may address to the government of any American state a request for information deemed pertinent by the Commission, and so that it may make recommendations, when it deems this appropriate, with the objective of bringing about more effective observance of fundamental human rights.

4. To request the Commission to submit a report annually to the Inter-American Conference or Meeting of Consultation of Ministers of Foreign Affairs. This report should include a statement of progress achieved in realization of the goals set forth in the American Declaration, a statement of areas in which further steps are needed to give effect to the human rights set forth in the American Declaration, and such observations as the Commission may deem appropriate on matters covered in the communications submitted to it and in other information available to the Commission.

5. In exercising the functions set forth in paragraphs 3 and 4 of this resolution, the Commission shall first ascertain whether the domestic legal procedures and remedies of a member state have been duly pursued and exhausted.

¹² 56 A.J.I.L. 613 (1962).

6. That the Chairman of the Commission may go to the Commission's headquarters and remain there for such time as may be necessary for the performance of his function.

7. That the secretariat services of the Commission shall be provided by a specialized functional unit, which shall be part of the General Secretariat of the Organization and shall be organized so as to have the resources required for performing the tasks entrusted to it by the Commission.

8. That the statutes of the Inter-American Commission on Human Rights shall be amended in accordance with the provisions of this resolution.

XXVI

INFORMAL PROCEDURE ON THE RECOGNITION OF DE FACTO GOVERNMENTS

WHEREAS:

The various instruments of the inter-American system have established and reiterated the principle that, in order that there may be real harmony and solidarity among the American states, it is essential that the effective practice of representative democracy be exercised in each one of them;

Consequently, the overthrow of a government and its replacement by a de facto government could be dangerous to the peace and solidarity of the hemisphere, and is therefore the subject of concern on the part of all the American states;

Through Resolution XXXVI, the Ninth International Conference of American States charged the Inter-American Council of Jurists with the preparation of a draft statute on the recognition of de facto governments, a task which it has not yet been possible to carry out; and

Until such time as said statute has been drafted, it is desirable that an informal procedure on the recognition of de facto governments be established,

The Second Special Inter-American Conference

RESOLVES:

1. To recommend to the member states that, immediately after the overthrow of a government and its replacement by a de facto government, they begin an exchange of views on the situation, giving due consideration to whether or not the overthrow of the government took place with the complicity and aid of one or more foreign governments, or of their respective officers or agents.

2. To recommend that the governments [of] member states, in the exchange of views provided for in the preceding article, consider the following circumstances:

- a. Whether the de facto government proposes to take the necessary measures for the holding of elections within a reasonable period, giving its people the opportunity freely to participate in the consequent electoral process; and

- b. Whether the de facto government agrees to fulfill the international obligations assumed previously by its country, to respect the human rights expressed in the American Declaration of the Rights and Duties of Man, and to comply with the commitments assumed by the signatories of the Declaration of the Peoples of the Americas and the general principles of the Charter of Punta del Este.
3. To recommend that, once opinions have been exchanged, each government decide whether it will maintain diplomatic relations with the de facto government.

[*Translation*]

THE HAGUE CONFERENCE ON PRIVATE
INTERNATIONAL LAW

Seventh Session, The Hague, October 9-31, 1951

STATUTE OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW¹
(REVISED TEXT)

The Governments of the following countries:

The Federal Republic of Germany, Austria, Belgium, Denmark, Spain, Finland, France, Italy, Japan, Luxembourg, Norway, the Netherlands, Portugal, the United Kingdom of Great Britain and Northern Ireland, Sweden, and Switzerland;

Considering the permanent character of The Hague Conference on Private International Law;

Desiring to accentuate this character;

Having, for such purpose, deemed it desirable to provide the Conference with a Statute;

Have agreed as follows:

ARTICLE 1

The purpose of The Hague Conference shall be to work for the progressive unification of the rules of private international law.

ARTICLE 2

The states that have already participated in one or more sessions of the Conference and accept this Statute shall be Members of The Hague Conference on Private International Law.

Any other states the participation of which is of juridical interest to the work of the Conference may become Members. The admission of new Members shall be decided by the Governments of the participant states, on the proposal of one or more of them, by a majority vote, within six months from the day on which the Governments have been informed of such proposal.

¹ T.I.A.S., No. 5710. In force with respect to the United States October 15, 1964.

The admission shall become definitive by reason of the acceptance of this Statute by the state concerned.

ARTICLE 3

The functioning of the Conference shall be the responsibility of the Netherland State Commission, established by Royal Decree of February 20, 1897, for the purpose of promoting the codification of private international law.

That Commission shall be responsible for the functioning of the Conference through a Permanent Bureau, the activities of which it shall direct.

It shall examine all proposals intended to be placed on the agenda of the Conference. It may determine the action to be taken on such proposals.

The State Commission shall fix, after consultation with the Members of the Conference, the date and the agenda of the sessions.

It shall ask the Government of the Netherlands to convene the Members.

The regular sessions of the Conference shall be held, in principle, every four years.

When necessary, the State Commission may, with the approval of the Members, ask the Government of the Netherlands to call a special session of the Conference.

ARTICLE 4

The Permanent Bureau shall have its headquarters at The Hague. It shall be composed of a Secretary General and two Secretaries, of different nationalities, who shall be appointed by the Government of the Netherlands upon presentation by the State Commission.

The Secretary General and the Secretaries must have the proper legal knowledge and practical experience.

The number of Secretaries may be increased after consultation with the Members of the Conference.

ARTICLE 5

Under the direction of the State Commission, the Permanent Bureau shall be responsible for:

- (a) Preparing for and organizing the sessions of The Hague Conference and the meetings of the special committees;
- (b) The work of the Secretariat of the above-mentioned sessions and meetings;
- (c) All the tasks included in the work of a secretariat.

ARTICLE 6

In order to facilitate communication between the Members of the Conference and the Permanent Bureau, the Government of each Member must designate a national agency.

The Permanent Bureau may correspond with all the national agencies so designated and the competent international organizations.

ARTICLE 7

The Conference, and, in the period between sessions, the State Commission, may set up special committees for the purpose of preparing draft conventions or studying any questions of private international law that come within the purpose of the Conference.

ARTICLE 8

The operating and maintenance expenses of the Permanent Bureau and the special committees shall be apportioned among the Members of the Conference, with the exception of compensation for the travel and living expenses of the representatives on the special committees, which compensation shall be paid by the Governments represented.

ARTICLE 9

The budget of the Permanent Bureau and the special committees shall be submitted every year to the Members' diplomatic representatives at The Hague for approval.

These representatives shall also determine the apportionment among the Members of the expenses payable by them under that budget.

The diplomatic representatives shall meet, for such purposes, under the chairmanship of the Minister of Foreign Affairs of the Netherlands.

ARTICLE 10

The expenses resulting from the regular sessions of the Conference shall be borne by the Government of the Netherlands.

In the event of a special session, the expenses shall be apportioned among the Members of the Conference who are represented at the session.

In any case, compensation for the travel and living expenses of the Delegates shall be paid by their respective Governments.

ARTICLE 11

The practices of the Conference shall continue to be observed in all matters not in conflict with this Statute or the Regulations.

ARTICLE 12

Amendments may be made in this Statute if they are approved by two-thirds of the Members.

ARTICLE 13

The provisions of this Statute shall be supplemented by Regulations for the purpose of ensuring the execution thereof. The Regulations shall be prepared by the Permanent Bureau and submitted to the Governments of the Members for approval.

ARTICLE 14

This Statute shall be submitted for acceptance to the Governments of the states that have participated in one or more sessions of the Conference. It shall enter into force as soon as it is accepted by a majority of the states represented at the Seventh Session.

The statement of acceptance shall be deposited with the Netherlands Government, which shall communicate the deposit thereof to the Governments mentioned in the first paragraph of this article.

In the event of the admission of a new state, the same shall apply with respect to the statement of acceptance by that state.

ARTICLE 15

Each Member may denounce this Statute after a period of five years from the date of its entry into force under the terms of Article 14, first paragraph.

Such denunciation must be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the expiration of the fiscal year of the Conference and shall become effective on the expiration of the aforesaid year, but only with respect to the Member that has given the notice thereof.

*Tenth Session, The Hague, October 7-28, 1964*CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL
DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS¹

Adopted October 23, 1964; not yet entered into force

The states signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

ARTICLE 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

¹ Final Act of the Hague Conference on Private International Law, Oct. 28, 1964; also reprinted in 4 Int. Legal Materials 341 (1965). A Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions and a Convention on the Choice of Court were also drawn up at the Conference but are not reproduced here. The two conventions appear in 4 Int. Legal Materials 338 and 348 (1965). The report of the United States Delegation is reprinted in 52 Dept. of State Bulletin 265 (1965).

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I—JUDICIAL DOCUMENTS

ARTICLE 2

Each contracting state shall designate a Central Authority which will undertake to receive requests for service coming from other contracting states and to proceed in conformity with the provisions of Articles 3 to 6.

Each state shall organise the Central Authority in conformity with its own law.

ARTICLE 3

The authority or judicial officer competent under the law of the state in which the documents originate shall forward to the Central Authority of the state addressed a request conforming to the model annexed to the present Convention,² without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

ARTICLE 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

ARTICLE 5

The Central Authority of the state addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either:

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the state addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the state addressed.

That part of the request, in the form attached to the present Convention,² which contains a summary of the document to be served, shall be served with the document.

² Omitted here.

ARTICLE 6

The Central Authority of the state addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.²

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

ARTICLE 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the state in which the documents originate.

The corresponding blanks shall be completed either in the language of the state addressed or in French or in English.

ARTICLE 8

Each contracting state shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any state may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the state in which the documents originate.

ARTICLE 9

Each contracting state shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting state which are designated by the latter for this purpose.

Each contracting state may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

ARTICLE 10

Provided the state of destination does not object, the present Convention shall not interfere with

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the state of origin to effect service of judicial documents directly

² Omitted here.

through the judicial officers, officials or other competent persons of the state of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the state of destination.

ARTICLE 11

The present Convention shall not prevent two or more contracting states from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

ARTICLE 12

The service of judicial documents coming from a contracting state shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the state addressed.

The applicant shall pay or reimburse the costs occasioned by

(a) the employment of a judicial officer or of a person competent under the law of the state of destination.

(b) the use of a particular method of service.

ARTICLE 13

Where a request for service complies with the terms of the present Convention, the state addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

ARTICLE 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

ARTICLE 15

Where a writ of summons or an equivalent document has had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that

(a) the document was served by a method prescribed by the internal law of the state addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting state shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the state addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

ARTICLE 16

When a writ of summons or an equivalent document has had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

(b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting state may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II—EXTRAJUDICIAL DOCUMENTS

ARTICLE 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting state may be transmitted for the purpose of service in

another contracting state by the methods and under the provisions of the present Convention.

CHAPTER III—GENERAL CLAUSES

ARTICLE 18

Each contracting state may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal states shall be free to designate more than one Central Authority.

ARTICLE 19

To the extent that the internal law of a contracting state permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

ARTICLE 20

The present Convention shall not prevent an agreement between any two or more contracting states to dispense with

- (a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,
- (b) the language requirements of the third paragraph of Article 5 and Article 7,
- (c) the provisions of the fourth paragraph of Article 5,
- (d) the provisions of the second paragraph of Article 12.

ARTICLE 21

Each contracting state shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following

- (a) the designation of authorities, pursuant to Articles 2 and 18,
- (b) the designation of the authority competent to complete the certificate pursuant to Article 6,
- (c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each contracting state shall similarly inform the Ministry, where appropriate, of

- (a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,
- (b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,
- (c) all modifications of the above designations, oppositions and declarations.

ARTICLE 22

Where parties to the present Convention are also parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

ARTICLE 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

ARTICLE 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the parties have otherwise agreed.

ARTICLE 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting states are, or shall become, parties.

ARTICLE 26

The present Convention shall be open for signature by the states represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

ARTICLE 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory state which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

ARTICLE 28

Any state not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a state in the absence of any objection from a state, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding state on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

ARTICLE 29

Any state may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the state concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

ARTICLE 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for states which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the state which has notified it. The Convention shall remain in force for the other contracting states.

ARTICLE 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the states referred to in Article 26, and to the states which have acceded in accordance with Article 28, of the following

- (a) the signatures and ratifications referred to in Article 26;
- (b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;
- (c) the accessions referred to in Article 28 and the dates on which they take effect;

(d) the extensions referred to in Article 29 and the dates on which they take effect;

(e) the designations, oppositions and declarations referred to in Article 21;

(f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorized thereto, have signed the present Convention.

Done at The Hague, on the 28th day of October, 1964, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the states represented at the Tenth Session of the Hague Conference on Private International Law.

INTERNATIONAL LEGAL MATERIALS

The following documents are reproduced in Volume V, No. 1 (January, 1966) and No. 2 (March, 1966) of *International Legal Materials: Current Documents*:¹

VOLUME V, NUMBER 1 (JANUARY, 1966)

LEGISLATION AND REGULATIONS	PAGE
New Zealand: Territorial Sea and Fishing Zone Act	1
United States: Voluntary Guidelines for Controlling U. S. Investment Abroad and 1966 Balance of Payments Program	9
REPORTS	
International Bank for Reconstruction and Development: Report on Financing Export Shortfalls of Developing Countries	81
Report on Studies of Multilateral Investment Guarantees	92
TREATIES AND AGREEMENTS	
Argentina: Settlement with Tennessee Argentina, S.A. (annulment of oil production contracts)	103
International Labour Organisation and Organization of African Unity: Agreement on Cooperation	107
Japan and Korea: Agreement on Settlement of Problems in Regard to Property and Claims and Economic Cooperation (reparations)	111
Agreement on Status of Koreans in Japan	118
Agreement on Cultural Assets	121

¹ The annual subscription for six numbers of *International Legal Materials* is \$24.00; there is a concessionary rate of \$18.00 for members of the American Society of International Law. Inquiries and orders should be directed to *International Legal Materials*, American Society of International Law, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

PAGE

United States: Notice of Denunciation of Warsaw Convention (liability for air transport injury)	122
--	-----

OTHER DOCUMENTS

International Committee of the Red Cross: Reply of Democratic Republic of Viet-Nam to Committee's Letter on Applying Geneva Conventions in Viet-Nam	124
Latin American Free Trade Association: Final Act and Resolutions of Meeting of Foreign Ministers (proposed changes in structure of L.A.F.T.A.)	125
Organization of African Unity: Declaration on Subversion	138
Organization of American States: Resolution to Convoke Meeting to Amend Charter, and Guidelines for Amendments	140
Resolution Establishing Guidelines for Charter Amendments on Economic and Social Matters	144
Resolution to Hold Annual Meetings of Foreign Ministers	153
Resolution on Recognition of <i>De Facto</i> Governments	155
Organization of the Petroleum Exporting Countries: Statute of Economic Commission	157
United Nations: General Assembly and Security Council Resolutions on Rhodesia	161
General Assembly Resolution on Non-proliferation of Nuclear Weapons	169
General Assembly Resolution on Suspension of Nuclear Weapons Tests	172
General Assembly Declaration on De-nuclearization of Africa	174
United States: President's Statement on Negotiations for Revised Panama Canal Treaty	176
Letter of Senate Foreign Relations Committee Members to Presi- dent on Shipping Restrictions and U. S. Treaty Obligations, and Department of State Memoranda	178

VOLUME V, NUMBER (MARCH, 1966)

JUDICIAL AND SIMILAR PROCEEDINGS

International Coffee Organization: Report of the Advisory Panel on the Legality of a System for the Selective Adjustment of Quotas .	195
United States: Supreme Court Supplemental Decree in <i>U.S. v.</i> <i>California</i> (inland waters; territorial waters)	205

LEGISLATION AND REGULATIONS

Bolivia: Foreign Investment Law:	208
Law on Tin Royalties	218
Ceylon: Petroleum (Foreign Claims) Compensation Act	224
Rhodesia: Proclamation of Independence	230

	PAGE
United Kingdom: Southern Rhodesia Act 1965	232
United States: Department of Commerce Reporting System for Controlling U.S. Investment Abroad	235
S.E.C. Proposed Rules on Securities of Foreign Companies	251

TREATIES AND AGREEMENTS

Asian Development Bank: Charter	262
United States Treasury Department Report	292
Australia and New Zealand: Free Trade Agreement	305
European Communities: Arrangements on Voting in Council of Ministers; Relations between Council and Commission	316
India and Pakistan: Tashkent Declaration	320
Ireland and United Kingdom: Agreement Establishing a Free Trade Area	321
Japan and United States: Amendment of Cotton Textile Arrange- ment	339
Mongolia and U.S.S.R.: Friendship Treaty	341
Netherlands and United Kingdom: Agreement on Delimitation of Continental Shelf	344
Agreement on Exploitation of Single Geological Structures on Continental Shelf	348
United Nations: Convention on Elimination of Racial Discrimina- tion	350

OTHER DOCUMENTS

United Nations: General Assembly Resolution on <i>Apartheid</i> in South Africa	369
General Assembly Declaration on Intervention	374
United States: List of Countries Where Investment Guaranties Are Available	377

American Association of Law Libraries

**INDEX TO FOREIGN LEGAL PERIODICALS
AND COLLECTIONS OF ESSAYS**

**An Index to the Legal Periodical Literature of the
World Outside the Common Law Sphere**

indexes by subject, author and geographical name
articles and book reviews in more than 300 of the world's
most outstanding legal periodicals and collections of
essays

3 quarterly issues and Annual Cumulative Volume
each year and 3-year Cumulations

published since 1960 under the direction of the
Committee on Foreign Law Indexing of the American
Association of Law Libraries

Price: Cumulation I (1960-1962): \$45.00

Cumulation II (1963-1965): \$60.00

Annual subscription: \$30.00

Order from:

WILLIAM D. MURPHY

2900 Prudential Plaza, Chicago, Illinois 60601

Just Published . . .

a collection of articles by fourteen noted legal scholars



**ESSAYS ON
INTERNATIONAL LAW
from the
COLUMBIA
LAW REVIEW**

With a Foreword by Philip C. Jessup

■ *Selected from the Columbia Law Review, these essays reflect the broad thinking of outstanding twentieth-century scholars of international law. The volume presents a greatly diversified sampling of ideas from the following influential legal thinkers:*

Gerhard Bebr	Hans Kelsen	Hans J. Morgenthau
Frederick Sherwood Dunn	H. Lauterpacht	Frederick Pollock
Wolfgang Friedmann	Oliver J. Lissitzyn	James B. Scott
William S. Holdsworth	John Bassett Moore	John R. Stevenson
Philip C. Jessup		Julius Stone

With biographical notes

\$8.50 (cloth) \$3.95 (paper)

COLUMBIA LAW REVIEW
435 WEST 116 ST. • N.Y., N.Y. 10027

The Procedural Aspects of International Law Series

Just published—Volume V

THE PROTECTION OF FOREIGN INVESTMENT SIX PROCEDURAL STUDIES

Richard B. Lillich

In most instances today, Americans sustain extensive losses if their property abroad is confiscated. Protective and remedial measures are inadequate under international law and under the national system of protection developed to date by the United States.

This is the first systematic attempt to appraise promising existing protective measures and to assess their strengths and weaknesses in relation to the comprehensive program needed to protect private foreign investment.

Professor Lillich's fully documented findings and carefully considered recommendations for action deserve the closest attention in the courts and in Congress, by government officials, international lawyers, and private businessmen.

The Contents: Protection in Municipal Courts; Sovereign Immunity; Act of State.

Protection by the Government: The Hickenlooper Amendment; The Investment Guaranty Program.

Protection for the Future: Pre-adjudication of International Claims; A New Look at Old Problems.

Appendixes, bibliography, index. \$7.50

Volume IV—

THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS

Gillian White

"The only source book now existing on the subject."—Fordham Law Review

\$8.95

Volume III—

THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER

Richard A. Falk

"Reading Mr. Falk's book is certain to be a very rewarding experience. It should not be delayed."—Harvard Law Review

\$6.50

Volume II—

INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION

Richard B. Lillich and Gordon A. Christenson

"To any lawyer engaged in representing such claimants the present book will be indispensable."—American Journal of Comparative Law

\$6.60

Volume I—

INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS

Richard B. Lillich

"The best available short text on the procedural aspects of American national claims commissions."—American Bar Association Journal

\$5.00

Syracuse University Press Syracuse, New York 13210

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 60

July, 1966

NO. 3

CONTENTS

	PAGE
INTERNATIONAL LAW: THE OLD AND THE NEW. <i>Charles G. Fenwick</i>	475
ARBITRATION AND THE EXHAUSTION OF LOCAL REMEDIES. <i>Stephen M. Schwebel</i> and <i>J. Gillis Wetter</i>	484
INSPECTION EXPERIENCE UNDER THE ANTARCTIC TREATY AND THE INTERNATIONAL ATOMIC ENERGY AGENCY. <i>James Simsarian</i>	502
EDITORIAL COMMENT:	
<i>Jus Dispositivum</i> and <i>Jus Cogens</i> in International Law: in the Light of a Recent Decision of the German Supreme Constitutional Court. <i>Stefan A. Riesenfeld</i>	511
Philip Marshall Brown. <i>Eleanor H. Finch</i>	515
NOTES AND COMMENTS:	
<i>Institut de Droit International</i> : The Warsaw Session, 1965. <i>Herbert W. Briggs</i>	517
United Nations Program of Assistance and Exchange in the Field of Inter- national Law	526
Educational and Cultural Agreements and Ententes: France, Canada and Quebec. <i>Gerald F. FitzGerald</i>	529
Regulation of International Trade. Summary Report, Board of Review and Development. <i>Stanley D. Metzger</i>	537
Annual Meeting of the American Society of International Law. <i>Eleanor H.</i> <i>Finch</i>	546
Regional Meetings of the Society. <i>Eleanor H. Finch</i> and <i>C. B. Bourne</i>	551
The Carnegie-Harvard Seminar on International Law for Legal Officers. <i>E. R. B.</i>	554
International Course on European Integration, University of Amsterdam. <i>E. H. F.</i>	555
International Association of Young Lawyers. <i>E. H. F.</i>	556
The Chinese Society of International Law. <i>Hungdah Chiu</i>	557
<i>Erratum</i>	558
U. S. CONTEMPORARY PRACTICE RELATING TO INTERNATIONAL LAW	559
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW. <i>John E.</i> <i>Stevenson</i>	586
BOOK REVIEWS AND NOTES. <i>Leo Gross</i> :	
Fenwick, <i>International Law</i> , 602; Christy and Scott, <i>The Common Wealth in</i> <i>Ocean Fisheries</i> , 605; Adam, <i>Les Organismes Internationaux Spécialisés</i> , 606; Proehl, <i>Foreign Enterprise in Nigeria</i> , 608; Regala, <i>World Peace Through</i> <i>Diplomacy and Law</i> , 609; Eichelberger, <i>UN: The First Twenty Years</i> , 611; Barnet and Falk (eds.), <i>Security in Disarmament</i> , 612; <i>Yearbook of the</i> <i>European Convention on Human Rights</i> , 1963, 613; Gorove, <i>Law and Politics</i> <i>of the Danube</i> , 616.	
Briefer Notices; Parry, 617; <i>British International Law Cases</i> , 618; <i>British</i> <i>Year Book of International Law</i> , 1963, 618; Agrawala, 619; Skubiszewski, 620; <i>Index to Multilateral Treaties</i> , 620; Gotlieb, 621; Weil, 622; Gomez Robledo, 622; Garcia Arias, 623; Vásárhelyi, 623; Wurfel, 624; Aufrecht, 625.	
Books Received	625
OFFICIAL DOCUMENTS	
AGREEMENTS RELATING TO THE SITUATION IN VIET-NAM:	
Agreement between the Commander-in-Chief of the French Union Forces in Indo-China and the Commander-in-Chief of the People's Army of Viet-Nam on the Cessation of Hostilities in Viet-Nam. <i>Geneva, July 20, 1954</i>	629
Final Declaration of Geneva Conference on the Problem of Restoring Peace in Indo-China. <i>Geneva, July 21, 1954</i>	643
United States Declaration on Indochina. <i>Geneva, July 21, 1954</i>	645
Southeast Asia Collective Defense Treaty and Protocol. <i>Manila, Sept. 8, 1954</i>	646
UNITED NATIONS:	
Convention on the Elimination of All Forms of Racial Discrimination. <i>New</i> <i>York, December 21, 1965</i>	650
Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. <i>December</i> <i>21, 1965</i>	662
Resolution on Technical Assistance to Promote the Teaching, Study, Dissemina- tion and Wider Appreciation of International Law. <i>December 20, 1965</i> ..	664
INTERNATIONAL LEGAL MATERIALS. Contents, Vol. V, No. 3 (May), 1966	668



BOARD OF EDITORS

Editor-in-Chief

WILLIAM W. BISHOP, JR., University of Michigan Law School

RICHARD R. BAXTER
Harvard Law School

HARDY C. DILLARD
University of Virginia Law School

RICHARD A. FALK
Princeton University

ALWYN V. FREEMAN
Detroit, Michigan

LEO GROSS
Fletcher School of Law and Diplomacy

JOHN N. HAZARD
Columbia University

JAMES NEVINS HYDE
New York, N. Y.

OLIVER J. LISSITZYN
Columbia University

BRUNSON MACCHESNEY
Northwestern University Law School

MYRES S. MCDUGAL
Yale Law School

H. C. L. MERILLAT
Washington, D. C.

STANLEY D. METZGER
Georgetown University Law Center

STEFAN A. RIESENFELD
University of California Law School

OSCAR SCHACHTER
New York, N. Y.

LOUIS B. SOHN
Harvard Law School

ERIC STEIN
University of Michigan Law School

JOHN R. STEVENSON
New York, N. Y.

RICHARD YOUNG
Van Hornesville, N. Y.

Honorary Editors

HERBERT W. BRIGGS
Cornell University

CHARLES G. FENWICK
Washington, D. C.

HANS Kelsen
University of California

JOSEF L. KUNZ
University of Toledo

PITMAN B. POTTER
American University

JOHN B. WHITTON
Princeton University

ROBERT R. WILSON
Duke University

QUINCY WRIGHT
University of Virginia

Secretary of the Board of Editors

ELEANOR H. FINCH

The object of The American Society of International Law is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. For this purpose it co-operates with similar societies in this and other countries.

Membership in the Society is open to all persons of good moral character interested in the objectives of the Society. Membership dues are: Regular, \$15.00 for residents of the United States, \$10.00 for non-residents; professional, \$25.00; intermediate, \$10.00; student, \$5.00. Application forms and further information may be obtained from the Membership Secretary of the Society at the address given below.

The JOURNAL is published quarterly and is supplied to all members of The American Society of International Law without extra charge. The annual subscription to non-members of the Society is \$15.00 and includes subscription to the *Proceedings* of the Society. Available single numbers of the current volume of the JOURNAL will be supplied at \$3.50 per copy; other available back numbers at \$4.50 per copy.

The views expressed in the articles, editorial comments, book reviews and notes, and other contributions which appear in the JOURNAL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

Subscriptions, orders for back numbers, correspondence with reference to the JOURNAL, manuscripts, and books for review should be sent to the Secretary of the Board of Editors, 2223 Massachusetts Avenue, N.W., Washington, D. C. 20008.

INTERNATIONAL LAW: THE OLD AND THE NEW

BY CHARLES G. FENWICK

Of the Board of Editors

The Hague Conference of 1907 is over and the delegates return to their respective countries. Aspirations for the pacific settlement of international disputes have been voiced and a list of possible arbitrators has been drawn up described by the formal name of the Permanent Court of Arbitration. Well and good! No obligation was accepted to have recourse to the Court, but at least the Conference went so far as to declare its acceptance of "the principle of compulsory arbitration" and its applicability to international agreements. At the same time the Conference declared that the divergencies of opinion in respect to compulsory arbitration "have not exceeded the bounds of judicial controversy," and that the delegates, in the course of their long collaboration, had succeeded "in evolving a very lofty conception of the common welfare of humanity."

What "lofty conception" could it have been? Hypocrisy, no! Just an expression of the limited outlook of the governments of 1907, and the limited area of international law at the beginning of the century. Dr. Scott, my professor, just back from the Conference, held out to us the hope that a first step had been taken towards the establishment of a permanent Judicial Arbitration Court, possessed, as it was said, of a sense of judicial responsibility. A draft convention had been proposed which would bring the Court into effect when an agreement could be reached upon a method of selecting the judges. The matter did not seem to be urgent, however, except indeed to Dr. Scott.

But the failure of the Hague Conference to provide more adequate procedures for the pacific settlement of international disputes is pardonable in relation to its more grievous failure to make provision for some system of co-operative defense to replace the balance of power in Europe. Here were the delegates of the nations, assembled in conference, and no constructive idea was so much as suggested. That the balance of power was inherently unstable, and would almost inevitably break down in time, seemed to trouble no one. The hard fact was that war was accepted as part of the normal condition of things. Nationalism had reached the point where war was not only a procedure of self-defense, it was to a degree a test of the virility of a nation, and the ability to make war gave it a right to speak with a measure of authority in determining the policies of the nations.

The result was that out of thirteen conventions adopted at the Hague Conference eleven related to the conduct of the next war. Could practical statesmen actually have believed that the rules so meticulously laid down would be observed in the stress of the major conflict that was to be antici-

pated? They knew the weapons already in use and could have imagined those that might be invented. Could they not have foreseen that possible new weapons would render rules prescribed for old weapons no longer practicable? At this distance of time the word "naïve" seems best to describe their attitude. So conflicting were the views of the leading maritime Powers at the London Naval Conference a year later that the Declaration adopted there remained unratified. What would not have been contraband ten years before might now be.

Few will contest today the statement that of all major wars the war of 1914 had least justification. There were no moral issues at stake, there was no real threat to the security of Austria-Hungary, merely the issue whether a stronger state might punish a weaker state for an act for which the weaker state could not reasonably be held responsible. What an act of folly, to risk a major war for so little! How unstable a balance of power that could have been upset for so little! Why was a third Hague Conference not called to meet the situation? The answer is that no provision had been made in 1907 for a meeting to prevent war; the only thought was how the war was to be fought. The exchanges of telegrams from members of the Triple Alliance to members of the Dual Alliance read at this date as a confused crossing of purposes. No one really wanted war, but all were prepared for it; and it just came. Britain did not seem to be seriously aware that she might become involved. The Triple Entente was a looser bond than the Triple Alliance. The United States, far off across the wide Atlantic, could see no national interest of its own that might have led it to make an offer of mediation or conciliation. Europe was politically a world of its own.

With war itself in 1914 came the test whether the conditions of war had now changed so much as to justify new instruments and new methods. Was the submarine a justifiable instrument of warfare when it could not meet the traditional conditions under which merchant ships of the enemy might be destroyed? Was it justifiable to "ration" neutral countries lest their excess of production of food and supplies might find its way to a neighboring enemy? Was it permissible to use guns of such long range that it was impossible to direct the fire against military installations and not hit churches and monuments?

In like manner the traditional rules of neutrality were put to their severest test, and their inconsistencies and irrationalities were soon manifest: a country could make loans and sell munitions in vast quantities to one of the belligerents and still remain neutral; it could allow itself to become economically involved in the war and yet remain politically apart from the conflict. If, in view of changed conditions, it made a concession to one side, it was immediately accused by the other of lack of neutrality. At long last, as controversy followed controversy, President Wilson came to declare that "the business of neutrality is over," and that no nation must henceforth be permitted to declare war and set in motion forces so destructive to the normal commerce of peaceful nations. Something must be done to put an end to war itself, since by its very nature it put the neutral state in a

position where it must either abandon its neutral rights or fight to maintain them.

The proposal by President Wilson in the Treaty of Versailles of a collective responsibility for the maintenance of peace was a far-reaching one, and it may be said to have marked a line, however inconclusively, between the old international law and the new. There was not, indeed, much hope that without the stabilizing influence of the United States the League of Nations could succeed in making the guarantees of Article 10 of the Covenant effective. But for all that, the principle had been proclaimed that the members of the League were henceforth responsible for the protection of the territorial integrity and political independence of the other members of the League, and that any war or threat of war, whether immediately affecting a particular member of the League or not, was a matter of concern to the whole League, which should take any action considered effectual to safeguard the peace. The proposal was, in point of law, a constructive one of the first order, but in such sharp contrast to the law of 1914 that a majority of the American people were unable to recognize it in the presence of the political confusion of postwar Europe. More serious than that, the proposal to guarantee the independence and territorial integrity of the members of the League did not seem to take into account the fact that many of the territorial arrangements of the Treaty were clearly not so far final as to justify guaranteeing their permanence.

But if the United States would not join the League of Nations, what could it do for peace? Something had to be done to distract the advocates of the League from their idealistic objective and at the same time forestall what appeared to be a new race in armaments. The Washington Conference met in 1922 and agreed upon an over-all ratio of 5-5-3-1.7-1.7 for the United States, Great Britain, France, Japan and Italy. But the ratio was confined to capital ships only, leaving other smaller craft, cruisers, destroyers and submarines, untouched. The agreement was sensational, but little attention was paid to the fact that there was no provision for collective security, the cornerstone of any effective system of peace. International law remained as it was: each state was responsible for its own security, except insofar as a member of the League of Nations might rely upon the provisions of the Covenant. It was almost unpatriotic, at the moment, to suggest that the fundamental weakness of international law, the right of each state to take the law into its own hands, had been overlooked for something that appeared tangible and practicable. The illusion was of short duration.

The additional substitute offered for the refusal of the United States to accept the obligations of the Covenant, known as the Kellogg-Briand Pact, reads at this date as a combination of dramatic idealism and political naïveté. Recourse to war was solemnly condemned and renounced as an instrument of national policy; and a pledge was given that the settlement of all disputes of whatever nature should never be sought except by pacific means. But as if the abstract character of the declaration might have gone too far, an exchange of identic notes made exception of the right of self-defense as interpreted by each state for itself, the only issue on which a

nation might be expected to go to war. As in the case of the Washington Conference, the illusion that something constructive had been done for peace was short-lived.

The breakdown of international law came with the defiance by Japan of its pledge made at the time of the Disarmament Conference to respect the Open Door in China, and with the open and unashamed seizure of Manchuria in clear violation of the Covenant, the Nine-Power Treaty, and the Kellogg Pact. But who was to take action to defend the agreements? The League of Nations could do no more than appoint a commission to study the crisis; the United States limited itself to a note to the aggressor that it would not recognize any situation brought about contrary to the obligations of the Kellogg Pact, a reprimand so ineffective as to encourage, or at least not discourage, other aggressors to take the law into their own hands. The rape of Ethiopia followed, with nothing more than economic sanctions by the League against the aggressor, stopping short of the sanction against shipments of oil which might have brought the dictator to a stop. The repudiation of the Treaty of Versailles by the Nazi leader followed. The worst could now be expected, if Chamberlain had been able to read the signs of the times.

As the war clouds gathered, the United States might have thrown its weight against the aggressors and warned them of its determination not to see principles of international law defied with impunity. But we seemed to have no national interest of our own in the maintenance of international law and order. Instead we took the course of modifying the application of the international law of neutrality, so as to prevent any possibility that conditions might arise again such as had brought the United States into the war in 1917. Legislation was adopted prohibiting the making of loans to belligerents or the sale of munitions, both legal under the law of 1914. The result was to give the green light to Hitler and enable him to plan his policies of aggression in the knowledge that Great Britain would not be ready for a war and could not obtain munitions from the United States if war came.

As in 1914, only in a far more drastic form, the violations of international law literally stunned the American people. Neutrality offered no protection against the aggressor. Now at last it was clear that the United States did have a vital national interest of its own in the maintenance of international law and order. The triumph of ruthless aggression in Europe might well mean a danger to the security of the United States, even across the barrier of the Atlantic Ocean. An inter-American conference met at Havana in 1940 and adopted the principle of collective security for the Western Hemisphere—an attack upon one is an attack upon all. Shortly after, the President of the United States, abandoning its technical position of neutrality, met with the British Prime Minister on the high seas and adopted the Atlantic Charter, a definite pledge of co-operation for a better international law “after the final destruction of Nazi tyranny.” Neutrality was now at an end, even before Pearl Harbor brought the United States into the war.

The Declaration of United Nations of January 1, 1942, succeeding to the

Atlantic Charter, marked the first step towards a new international law. For the time it was an alliance of the 26 states at war with the Axis Powers; but it laid the foundation of the collective security system drafted at Dumbarton Oaks and finally adopted at San Francisco on June 26, 1945. The terms of the Charter were clear and definite, clarifying the obligations of Article 10 of the Covenant of the League of Nations and creating procedures for enforcement. A concession had to be made in giving a veto to the five permanent members constituting, with six elected members, the Security Council, although the veto did not extend to procedural matters. Regional security groups were recognized, and provision was made that in the event of an armed attack they might retain their "inherent right of individual or collective self-defense" until such time as the Security Council should take the means necessary to maintain the peace. A second foundation stone was laid in the provisions for the peaceful settlement of international disputes, which are all comprehensive, although reference to the International Court of Justice is qualified by the consent of the parties, manifested in advance for a limited group of cases by states signing the Optional Clause.

Some twenty or more years have gone by since the principles of a new international law were adopted, since the Charter was signed and the substance of the law was extended into the fields of economic, social and cultural relations. What has been the experience of those years? How far have the ideals of the Charter been put into practice, been made a living reality, been reduced from the abstract to the concrete? Unhappily, on the crucial issue of collective security the new law has simply proved ineffective. The first principle of all law, national as well as international, is the collective responsibility of the whole community for the protection of its individual members. When that goes, the cornerstone of the edifice is shaken. Doubtless the veto power of the permanent members of the Security Council has on occasion prevented decisions that might have resulted in more decisive action to prevent aggression. But far more serious has been an element not taken into account in the formulation of the Charter, the discovery of nuclear energy and the invention of the atomic bomb. Here, within a year of the adoption of the Charter, was a weapon of such a formidable character as to change the underlying assumptions of collective security. For it put the individual state in the position of facing complete annihilation if called upon to take action against a Power in possession of the atomic bomb. The result was that a new balance of power arose, described popularly as a "balance of terror," in which the national security of the United States, itself possessing the bomb, was dependent upon its ability to survive an initial devastating attack and be able to strike back and inflict equal devastation upon the aggressor.

The years succeeding 1946 were thus years of tense competition in the development of nuclear weapons and in the means by which they might be made effective against a potential enemy. The strongest deterrent against the use of the bomb, apart from the inherent immorality of a weapon that could not by its very nature be brought within the traditional laws of war,

was the fact that neither side could anticipate victory; both would lose more than they could gain. Limitation of nuclear weapons was attempted; but the Soviet Union was unwilling to permit local inspection of the observance of an agreement. The Test Ban Treaty of 1963 was restricted to new inventions and improvements and did not extend to the limitation of existing stocks of atomic warheads or methods of long-range bombardment. Thus, while the principle of collective security still holds, the application of the principle is for the time ineffective, as are the pledges of pacific settlement listed in the Charter. A number of states soon made it clear that they could not recognize the obligations of the Charter when the conditions under which they had signed the treaty had been so completely changed. The term "neutrality" came into use, not in the sense of neutral states in relation to belligerents under the old law, but in the sense of an unwillingness to take sides in issues bearing upon the "cold war" between the two leading atomic Powers.

However, in spite of the ineffectiveness of the procedures established in the Charter for the enforcement of the principle of collective security, there is no question that both the Security Council and the General Assembly exercise a strong moral influence upon the maintenance of law and order in the international community. The existence of a general forum where problems can be discussed and resolutions adopted makes it possible to meet critical situations before they reach the point of a dangerous crisis. The General Assembly thus acts as a sort of permanent mediatory body before which grievances can be brought and tensions kept under control. In this process the declarations and resolutions of the General Assembly are slowly acquiring an authority beyond the legal obligation of the document. It is a question, however, whether, in view of the large number of former colonial dependencies admitted to membership of the United Nations, the principle of equal voting should be continued in the General Assembly. Does the "sovereign equality" proclaimed by the Charter extend beyond the fundamental area of national self-government and include also the equal right of a state, whatever its size and resources, to determine the financial obligations of the Members. That would be in a sense a denial of the principle itself, and it would defeat rather than promote co-operation. In administrative problems the solution is often to be found in the composition of committees of the Assembly.

Substantial progress has been made in meeting legal problems arising in the normal intercourse of states. Here the International Law Commission established by the General Assembly has been an effective agency for the progressive development of the law, both in its studies of specific problems and in the draft projects it has prepared for conferences, such as that on the Law of the Sea at Geneva in 1958 and those on Diplomatic Intercourse and Immunities of 1961, and on Consular Relations of 1963.

Of significance of recent years has been the tendency to develop rules of international law governing problems of private international law, including the conflict of laws, judicial assistance, and uniformity of legislation. The importance of obtaining a more definite regulation of these topics has ob-

vously grown with the very great increase of commercial relations between states and the attendant increase in communication and travel. A new law of outer space is in process of development, which falls within a special category of its own.

The law of 1906 was the law of the Western World; so also the law of 1945 in respect to principles and rules not included in the Charter of the United Nations. Did the admission of half a hundred new Asian and African states into the United Nations imply their acceptance of the existing law of the Western World? Doubtless some modification of traditional rules was to be expected, especially where the traditional rule affected adversely the new state by reason of its former colonial status, as in respect to principles of succession and the legal status of natural resources. Perhaps it may even be said to be a matter of surprise that so much respect has been shown for the traditions of Western Europe, apart from occasional psychopathic reactions that relate rather to matters of policy than of general international law.

But the story of the new international law is as yet but half told. Equally important—more important it may prove to be—has been the extension of international law into the new areas of economic and social co-operation. Contrast the law of 1906 with that of 1966 and we are in a sense worlds apart. On the eve of the first World War the struggle of the manufacturing countries for foreign markets went on without restraint, accompanied by a corresponding struggle for supplies of the raw materials of industry that were essential to manufacture. In both cases the control of a colony gave to the colonial Power a practical monopoly of both supplies and markets. To protect its commercial interests a state had to have a powerful army and a powerful navy, and these in turn made necessary more economic resources, so that political and economic imperialism proceeded hand in hand. The Constitution of the International Labor Organization, incorporated in the Treaty of Versailles, recognized the need of establishing standards of social justice as a basis of peace, and the long list of draft conventions submitted to the members covered all of the important problems of labor policy. But these were practically lost in the political conflicts that followed the close of the war. The rivalry between the leading Powers appeared to increase rather than diminish, and the financial depression that followed led to an even closer national control of policies of trade and commerce, which in turn increased the political tension.

It was only with the adoption of the Atlantic Charter and the wider Declaration of United Nations that it came to be realized that the hope of a new political order was dependent upon removing the economic causes of war and setting up an ideal of social reconstruction. The barriers to the trade and raw materials of the world must be removed; labor standards must be improved, and social security assured to the people of all countries. The pledges of the Declaration took definite shape in the Charter of the United Nations. The Economic and Social Council is the central co-ordinating body of a group of "specialized agencies" which, although associated with the United Nations, have a separate institutional character which en-

ables them to develop their own law and functions without being dependent upon the political elements of the Security Council and the General Assembly. In addition there are innumerable non-governmental organizations devoted to practically every aspect of human interest cutting across state lines.

A new world has now been opened up in which the old international law of rights and duties is being supplemented by an international law of co-operation, which is slowly building up a body of international common interests which may, in the course of the years, accomplish what the more strictly political elements of the rule of law have thus far been unable to accomplish. Nationalism is for the moment dominant, but dominant, perhaps, because statehood has taken on a larger meaning with the newly emancipated colonial dependencies, and, in two outstanding cases, from the recourse to political power to further ideological conceptions of economic welfare. But it is the faith and hope of the Western World that the wide range of economic and social activities of the new governmental and non-governmental organizations cannot fail in time to strengthen the bonds of international unity and the realization that the rule of law conceived in a larger sense of justice, is the hope of progress.

Supplementing the economic and social program of the United Nations, and equally far-reaching in its ultimate effects, is the declaration in the preamble of the Charter "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." The objective is repeated in Article I of the Charter, which enumerates among the Purposes of the United Nations "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." This was followed by the Universal Declaration of Human Rights enumerating in detail the rights contemplated in the Charter.

Here, for the first time in the history of international law, was an act of the whole community of states, looking behind the formal organization of their governments to the individual human beings who constitute the legal body of the state. It creates, in a sense, a bond of unity cutting across state lines and restricting the sovereignty of the state in a vital area of its domestic life. The individual has thus been accepted as a subject as well as an object of international law, and it is to be expected that, as emphasis upon his human needs increases, the existing over-emphasis upon nationalism may lose something of its present appeal. In a separate field, the Educational, Scientific and Cultural Organization (UNESCO) is seeking to break down the intellectual and moral barriers between states and to promote the "moral disarmament" of the nations, which is declared to be an essential condition of peaceful relations. The task is a vast one, but already enough progress has been made to justify belief in its ultimate success.

International law, the old and the new. Looking only at the principles

of international law that have come into being, at the widening range of its precepts, at the proclamation of high ideals of co-operation and at the concrete agencies actually functioning, great advances in the law have been made; so great, indeed, that even the idealists of sixty years ago would scarcely believe in the reality of what has taken place. Unhappily the prospect of a world of law and order remains dim, not so much because of the conflict of ideologies between the leading states, which time might moderate by degrees, but because of the invention of the new instruments of destruction, which, in the chance hands of a fanatic, might start a succession of crises beyond the control of the governments that realize their deadly character. The need of controlling so dangerous an instrument of destruction is clear, if only action can be taken in time. The danger is too great to postpone the issue.

ARBITRATION AND THE EXHAUSTION OF LOCAL REMEDIES ¹

By STEPHEN M. SCHWEBEL
Of the New York Bar

and

J. GILLIS WETTER
Of the Stockholm Bar

Where a state and an alien agree in a contract to arbitrate disputes relating to the contract, in terms which indicate that arbitration is to be the exclusive remedy, need the alien exhaust any other remedy before an international claim may be presented relating to a dispute which falls within the scope of the arbitration clause?

New light has been shed on this unresolved question by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which has been submitted to governments by the Executive Directors of the International Bank for Reconstruction and Development.² Article 26 of the Convention provides:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.³

The Report of the Executive Directors on the Convention states with regard to "Arbitration as exclusive remedy" that:

32. It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26. In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies.⁴

¹ The authors wish to express their appreciation for a research grant of the Svenska Handelsbanken's Social Science Research Fund.

² Convention on the Settlement of Investment Disputes between States and Nationals of Other States Submitted to Governments by the Executive Directors of the International Bank for Reconstruction and Development and Accompanying Report of the Executive Directors, March 18, 1965; 4 Int. Legal Materials 532, 524 (1965). The Convention will come into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval.

³ Convention, *loc. cit.* 536.

⁴ Report of the Executive Directors, *loc. cit.* 528-529.

An earlier draft of the Convention and its commentary came to the same conclusion in somewhat differing terms. Section 16 of the Preliminary Draft provided:

Consent to have recourse to arbitration pursuant to this Convention shall, unless otherwise stated, be deemed consent to have recourse to such proceedings in lieu of any other remedy.⁵

The commentary to the Preliminary Draft indicates that a requirement of the exhaustion of local remedies which the state may impose must be a term of its agreement to arbitrate, or otherwise be stipulated (a reservation to the Convention presumably would be effective). The requirement will not be deemed to operate by reason of municipal law. As the commentary concludes:

... if a State were to include an unqualified arbitration clause in an agreement with a foreign investor, it would seem to run counter to normal rules of interpretation to read into that clause a requirement of the prior exhaustion of local remedies.⁶

While the focus of the Convention is not upon state responsibility, it would seem that the presumption which the Convention embodies—that consent of the parties to arbitration shall be deemed consent to such arbitration to the exclusion of any other remedy—should, if well founded, apply equally to the sphere of state responsibility.

This article will consider whether or not the presumption of Article 26 of the Convention is well founded. It will be submitted that, essentially, it is, in terms both of principle and precedent.

Article 26 is believed to constitute the first conventional expression of what appears to be the trend of customary international law: that, where a state and an alien agree in a contract to arbitrate disputes relating to that contract, in terms indicating that arbitration is the exclusive remedy, then that remedy only must be exhausted before an international claim may be maintained. This trend is a plausible one, whose principle would appear, *prima facie*, to be sound. However, both the principle and the practice have their refinements—refinements which indicate that the exclusion of other remedies is and ought not to be absolute. In particular, the alien may be obligated to exhaust certain local remedies which pertain to the enforcement of the arbitration agreement or the arbitral award itself. Arguably these remedies may not be only those of the contracting state.

After illustration of a typical arbitration clause of a contract between a state and an alien, there will be considered, first, the related practice, notably the cases in which the question at issue has been argued before the Permanent Court of International Justice and the International Court of Justice. Then the considerations of principle which the cases canvass will

⁵ International Bank for Reconstruction and Development, Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 15, 1963, p. 33.

⁶ *Ibid.* 34.

be discussed. Finally, the relationship of the question under discussion to that posed by an agreement between states to arbitrate will be noted.

A Characteristic Arbitration Clause

The number of contracts between states (and state agencies) and aliens which provide for arbitration of disputes arising thereunder is large. The arbitral clauses vary considerably in their provisions, but apparently are constant in their comprehensive description of the scope of the obligation to arbitrate; typically, they provide that "any dispute" or "any and every dispute" relating to the contract which is not otherwise settled shall be settled by arbitration in accordance with the specifications of the agreement. A recent example is the Joint Structure Agreement between the National Iranian Oil Company, an Iranian governmental agency, and Bataafse Petroleum Maatschappij N.V. Article 38 of the Agreement provides for the optional conciliation of differences, prescribing that, if the dispute is not settled by conciliation, "the sole method of determining it shall be arbitration in accordance with Article 39." Article 39 in part provides that:

1. Any dispute arising from the execution or interpretation of the provisions of this Agreement shall be settled by an Arbitration Board consisting of three arbitrators. . . .⁷

The article then proceeds, in thirteen detailed paragraphs, to specify the mode of appointment and operation of the tribunal, and to demonstrate amply the intention of the parties that arbitration shall be the comprehensive and exclusive remedy, which is not to be permitted to fail for any of a variety of reasons (such as the incapacity of an arbitrator or the termination of the Agreement). While some arbitration provisions are more complex still—for example, that of the Iranian Consortium Agreement of 1954—⁸ and most others are simpler, it appears to conclude that normally their terms indicate that arbitration is to be the exclusive remedy.

The Practice

Before considering those cases in which the question under analysis has been the focus of international controversy, it is worth recalling that a large number of arbitrations between states and aliens have taken place pursuant to the arbitration clauses of contracts between them. The authors have reviewed thirty-eight of these awards (many of them unpublished), which, it is believed, include a high proportion of all the instances in which arbitrations between states and aliens have taken place.⁹ In all of the cases

⁷ The Agreement, dated Jan. 16, 1965, is reprinted in Platt's Oilgram News Service, Spec. Supp., May 4, 1965, Vol. 43, No. 85-Y, p. 10.

⁸ The Agreement is reprinted in Platt's Oilgram News Service, Spec. Supp., Oct. 5, 1954, Vol. 32, No. 192-A, p. 1; and in 2 Hurewitz, *Diplomacy in the Near and Middle East* 348-383 (1956).

⁹ The cases examined do not include the significant number of unpublished awards of the Court of Arbitration of the International Chamber of Commerce. See Böckstiegel,

examined, except as noted below,¹⁰ the state and the alien concerned treated the arbitral remedy as exclusive. The state concerned did not contend that other remedies were available and should be pursued, before or after arbitration. Such a contention quite understandably was not made, not only because of the exclusive import of the contractual obligation to arbitrate but also because of the fact that arbitration actually was undertaken. Nevertheless, it may reasonably be said to follow from this pattern of state-alien arbitration that it is the view of the states concerned that arbitration as prescribed by the contract is the exclusive remedy and the only one to be exhausted. While the states parties to these arbitrations did not, as far as is known, explicitly address themselves to the question of whether the exclusive character of the arbitral remedy means that, upon resort to that remedy, the international legal rule of exhaustion of local remedies is satisfied, the fact that they did engage in arbitration without raising the possibility of resort to other remedies suggests that they would have acknowledged this conclusion had there been occasion to do so.

Correspondingly, those instances in which arbitration, though demanded, has been refused and the contracting state has contended that local remedies have not been exhausted, indicate that states do not uniformly treat arbitration as an exclusive remedy which alone must be invoked to satisfy the rule of exhaustion of local remedies. There are only a few such instances; by far they are lesser, and the less persuasive element in the pattern of state practice. Moreover, the state of which the alien is a national has characteristically contested any claim of the contracting state that local remedies had not been exhausted.¹¹ These cases will now be set forth and discussed.

The Losinger & Co. Case

The *Losinger* case is the first of four cases before the Permanent Court of International Justice and the International Court of Justice in which the precise issue under analysis was joined by the parties and left unresolved by the Court, since, in each case, a settlement supervened. Nevertheless, the character of the arguments and the consequence of the cases is such as to merit their exposition. As will appear, much of the heart of the matter was laid bare by the advocacy of Switzerland and Yugoslavia in the *Losinger* case.

Losinger & Co. was the assignee of a railway construction contract entered into in 1929 by an American company with a then autonomous district of

"Arbitration of Disputes between States and Private Enterprises in the International Chamber of Commerce," 59 A.J.I.L. 579-586 (1935).

¹⁰ To the four cases discussed below, there should be added the award in *Société Européenne d'Études et d'Entreprises v. the Government of Yugoslavia* (1956), [1957] I.L.R. 761, which was attacked by Yugoslavia.

¹¹ Apart from the cases analyzed below, there are instances of a state refusing arbitration which have not been the source of subsequent international proceedings, for lack of international jurisdiction or otherwise. *E.g.*, Iraq is known to have declined to arbitrate a certain dispute with the Iraq Petroleum Company, and Lebanon reportedly failed to name an arbitrator in another case to which the Iraq Petroleum Company was party.

Yugoslavia (for which the state of Yugoslavia was substituted when Losinger replaced the American firm in 1931). Article XVI of the contract contained the following arbitration clause:

Any differences of opinion or disputes which may arise between the contracting Parties in connection with the carrying out or interpretation of the clauses and conditions of this contract shall be settled by compulsory arbitration, if a friendly settlement cannot be reached by the contracting Parties.

Within thirty days of a demand made by either of the contracting Parties, each Party shall appoint an arbitrator for the joint settlement of the disputes. If these two arbitrators fail to agree, or if one of the Parties fails to appoint an arbitrator within the time specified, the case shall be referred either to the President of the Swiss Federal Court or to a neutral person who shall be appointed by the latter and who shall in the capacity of umpire give his decision alone upon the dispute. The award of the arbitrators or of the umpire shall be rendered in Yugoslavia. There shall be no appeal from this decision.¹²

In 1934, the Yugoslav Government declared the contract canceled. A dispute arose as a result of the cancellation, which led Losinger & Co. to institute arbitral proceedings pursuant to Article XVI. Yugoslavia failed to appoint an arbitrator within the time specified, and, in accordance with Article XVI, the case was referred to the President of the Swiss Federal Court for decision. In the course of the proceedings, the Yugoslav Government claimed that the umpire lacked jurisdiction by reason, *inter alia*, of the fact that a Yugoslav law of July 19, 1934, which came into effect shortly before the company requested arbitration, provided that any dispute with the state could only be brought before the ordinary courts of the state. The umpire, in an interlocutory judgment, ruled that he was not competent to adjudicate upon this plea since it related to the validity of the arbitration clause¹³ and, while retaining the case, "left the Parties to submit this question to the competent authority."¹⁴

At the request of Losinger & Co., the Swiss Government then intervened, and asked the Permanent Court to give judgment to the effect that the Yugoslav Government could not claim release from the terms of a clause of its contract with Losinger & Co. by adducing a law concerning the conduct of state litigation which was of more recent date than the contract. Yugoslavia responded that "... the application of the Swiss Government cannot be entertained because the rule which requires the previous exhaustion of the remedies available under Yugoslav municipal law was not observed by the firm of Losinger & Co."¹⁵

The Swiss Memorial contended that the Court's jurisdiction could not be denied on the ground of failure to exhaust local remedies. The rule of exhaustion of local remedies did not apply in situations where no remedies existed or the results which could be obtained through their pursuit were illusory. Moreover, the arbitration clause of the contract demonstrated that "it was the will of all the contracting parties to withdraw their dis-

¹² P.C.I.J., Series C, No. 78, pp. 7-8.

¹³ *Ibid.* 116.

¹⁴ *Ibid.* 117 (authors' translation).

¹⁵ *Ibid.* 214.

putes from any of the Yugoslav courts, for recourse to the courts was entirely excluded, and the arbitrators or the umpire were empowered to give a definitive decision. . . ."¹⁶ Switzerland further argued that the Court's decision in the *Chorzów Factory (Indemnity)* case¹⁷ showed that no state could plead that its local remedies had not been exhausted when it itself, because of its failure to observe its contractual obligations, prevented the other contracting party from seeking the vindication of its rights before the truly competent jurisdiction.¹⁸

For its part, Yugoslavia argued that the Swiss Government's assertion that the object of the arbitration clause was to withdraw possible disputes entirely from the Yugoslav courts was

absolutely without foundation. No civilized State, in which there is a regular administration of justice, with independent courts, could accept it. . . . The object of the arbitration clause was to submit possible disputes to arbitration. It contains no provision which excludes the jurisdiction of the Yugoslav courts. And the arbitration clause, in the same way as any other contract, is subject to the laws which determine its conditions of validity, define its mechanism, and govern its operation.¹⁹

The Yugoslav Government contended that it was "beyond question" that the relations between Losinger & Co. and the Yugoslav Government were governed by the laws of Yugoslavia. Thus "everything connected with the arbitration clause" was governed by Yugoslav law. An arbitral award could be annulled by a Yugoslav court, and Losinger & Co. could have asked the Yugoslav courts

. . . to adjudicate upon the soundness of the plea to the jurisdiction that had been raised by the Yugoslav State in the proceedings before the umpire. It is not, therefore, correct to say that Yugoslav law provides no remedies for this situation. Nor is it possible to anticipate what would be the decision of the Yugoslav courts, seeing that these courts have not hitherto had any opportunity of deciding as to the period of time covered by the provisions of Article 24 of the Yugoslav law of July 19th, 1934. The fact that this law prohibits the conclusion of arbitration agreements on behalf of the State, in the future, does not prejudice the question whether it is retrospective in character. The law itself contains no provision stating that it operates retrospectively. In regard to that point, the character of the law remains to be determined by the courts; so that if ordinary Yugoslav courts had ruled that the plea to the jurisdiction submitted by the State was not well-founded, the Yugoslav Government would have abandoned that argument. In any case, Losinger & Co. S.A. were able, and were obliged, to exhaust these municipal judicial remedies before applying through their Government to the Permanent Court.²⁰

¹⁶ *Ibid.* 40.

¹⁷ P.C.I.J., Series A, No. 9.

¹⁸ The Swiss Memorial quoted the *Chorzów* holding that ". . . one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him." *Ibid.* 31.

¹⁹ P.C.I.J., Series C, No. 78, p. 132.

²⁰ *Ibid.* 133-134.

Switzerland responded that the arbitration clause itself excluded the possibility of any recourse against an award rendered pursuant to it, citing the provision that: "There shall be no appeal from this decision."²¹ It argued that Yugoslavia as well as Losinger & Co. had thus agreed to accept the definitive character of the award and to renounce the submission of any question to any Yugoslav tribunal.

In the oral argument, Yugoslavia maintained and elaborated its contention that "arbitration in private law does not constitute a kind of judicial autarchy,"²² and accordingly was subject to the intervention of the regular courts. It could not be claimed that the arbitration clause barred access to the Yugoslav courts, for the reason that it was these courts and not the arbitral tribunal which could resolve any difficulties which might impede the functioning of the arbitral tribunal.²³ Switzerland contended that it was "absolutely inconceivable" that Yugoslavia could hold Losinger & Co. responsible for not having applied to Yugoslav courts to vindicate the validity of an arbitration clause which Yugoslavia challenged and the company upheld; if there were to have been an action in the Yugoslav courts to set aside the arbitration clause, it was up to Yugoslavia to have brought it.²⁴

The *Losinger* case will be commented upon in conjunction with the three remaining cases.

The Anglo-Iranian Oil Company Case

In the *Anglo-Iranian Oil Company* case,²⁵ the Iranian Government claimed to have annulled the concession of the company through enactment of the Iranian Oil Nationalization Act of May 1, 1951.²⁶ Article 22 of the Convention concluded between the Government and the company on April 29, 1933, provided for arbitration of "any differences between the parties of any nature whatever," in the following terms:

(A) Any differences between the parties of any nature whatever and in particular any differences arising out of the interpretation of this Agreement and of the rights and obligations therein contained as well as any differences of opinion which may arise relative to questions for the settlement of which, by the terms of this Agreement, the agreement of both parties is necessary, shall be settled by arbitration.

The article proceeded to specify the manner of constituting the tribunal, even in an instance where a party defaulted in the process. It further provided:

(E) The procedure of arbitration shall be that followed, at the time of arbitration, by the Permanent Court of International Justice. The place and time of arbitration shall be fixed by the umpire or by the sole arbitrator provided for in clause (D), as the case may be.

(F) The award shall be based on the juridical principles contained

²¹ *Ibid.* 160.

²² *Ibid.* 193 (authors' translation).

²³ *Ibid.* 346.

²⁴ *Ibid.* 311-312.

²⁵ I.C.J. Pleadings, *Anglo-Iranian Oil Co. Case* (United Kingdom v. Iran).

²⁶ *Ibid.* 279-280.

in Article 38 of the Statute of the Permanent Court of International Justice. There shall be no appeal against the award.²⁷

Article 26 of the Convention provided in part:

Before the date of the 31st December 1933, this Concession can only come to an end in the case that *the Company* should surrender the Concession (Art. 25) or in the case that the Arbitration Court should declare the Concession annulled as a consequence of default of *the Company* in the performance of the present Agreement.

The following cases only shall be regarded as default in that sense:

- (a) if any sum awarded to Persia by the Arbitration Court has not been paid within one month of the date of the award;
- (b) if the voluntary or compulsory liquidation of *the Company* be decided upon.

In any other cases of breach of the present Agreement by one party or the other, the Arbitration Court shall establish the responsibilities and determine their consequences.²⁸

The United Kingdom contended before the International Court of Justice that the termination of the concession was internationally unlawful on multiple grounds and that, if it otherwise were lawful to nationalize the enterprise, the amount of compensation due must be decided by the Arbitration Tribunal provided for in the concession.²⁹ The United Kingdom further claimed that a measure of confiscation or nationalization of a concession which is contrary to international law engages directly the international responsibility of a state "if it is the result of legislation or other action admitting of no recourse against the measure to local courts or the tribunals provided for in the concession agreement." It submitted that, in addition, the international responsibility of the state is directly engaged on the further ground of denial of justice if the right to cancel the concession is not established "to the satisfaction of the appropriate judicial tribunal (in particular to the satisfaction of the judicial tribunal provided for in the concession, if one is so specified)."³⁰

Noting that there were no local remedies to exhaust in any event, since the law of Iran afforded no remedies against a law passed by the Iranian legislature, the British Memorial continued:

Moreover, the legal remedies for a breach of the Convention of 1933 are the remedies provided for in Article 22 of the convention, namely, recourse to the Arbitration Court provided for in that Article. That legal remedy the Government of Iran has repudiated expressly and repeatedly—a repudiation which in itself constitutes the international delinquency of denial of justice. Further, Iran has not only excluded arbitration as a remedy for the Company to use if the Company disputes, as it does, the legality of the expropriation. The expropriation

²⁷ *Ibid.* 268. The original French text is reproduced at pp. 256–257.

²⁸ *Ibid.* 269. Art. 21 of the Convention also provided in part:

"This Concession shall not be annulled by *the Government* and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities."

²⁹ *Ibid.* 81–82.

³⁰ *Ibid.* 122.

has itself been justified in part by allegations of default or misconduct on the part of the Company, yet Iran has not called upon the Arbitration Court provided for in the Convention to examine these allegations, although this Arbitration Court certainly had exclusive jurisdiction to pronounce upon allegations of default. Instead Iran has made herself the judge in her own cause on this issue also.³¹

The United Kingdom in conclusion asked the Court to declare that Iran was under a duty to submit to arbitration within the terms of the Convention, and, alternatively, to declare, *inter alia*, that, by denying to the company "the exclusive legal remedy provided," Iran had committed "a denial of justice contrary to international law."³²

In its Preliminary Observations, the Government of Iran replied that the concession, which, it alleged, was invalid, in any event automatically "disappeared . . . in all its articles" by virtue of the nationalization, with the consequence that Articles 21 and 22 were a "dead letter."³³ It contested the alleged denial of justice, contending that a denial of justice could not arise without the "prior exhaustion of local remedies" and did not arise because of the refusal to arbitrate pursuant to Article 22.³⁴ Iran alternatively contended that, were Article 22 considered to remain in force, it would, because of its exclusive reliance on arbitration, oust any jurisdiction of the International Court of Justice.³⁵

The United Kingdom responded that "the implication that in the present case the Anglo-Iranian Oil Company should have had recourse to the Iranian municipal courts . . . is quite obviously untenable . . . the Convention of 1933 provided for arbitration and . . . on any view, therefore, the Company was not obliged or even permitted to have recourse to the Iranian municipal courts. . . ."³⁶ As to the alternative Iranian contention, the United Kingdom submitted that:

It is hardly credible that, after its total rejection of arbitration, and its repudiation of the articles of the Concession Convention which provide for it, the Iranian Government should now suggest that those articles constitute a bar to the jurisdiction of the Court. . . . It is a novel answer to an accusation of denial of justice to say that the jurisdiction of the International Court to hear the accusation at the suit of a government is ousted by the exclusive jurisdiction of that very tribunal to which access to the national has been wrongfully and unjustly denied.³⁷

In oral argument, Professor Rolin, as agent for Iran, submitted that Article 22 established the competence of the arbitrators to pass upon the interpretation or application of the Convention but that it was not relevant in the type of case which was at bar. Moreover, Professor Rolin contended, Article 22 had had the same fate as the concession contract as a whole: it

³¹ *Ibid.* 122-123 (footnotes omitted).

³² *Ibid.* 18-19.

³³ *Ibid.* 288 (authors' translation).

³⁴ *Ibid.* 291 (authors' translation).

³⁵ *Ibid.* 304-305.

³⁶ Observations and Submissions presented by the Government of the United Kingdom of Great Britain and Northern Ireland to the Preliminary Objection lodged by the Imperial Government of Iran, *ibid.* 365.

³⁷ *Ibid.* 367.

was annulled by the nationalization law. In these circumstances, arbitration "was not that procedure which one could consider to be the normal recourse which must be open and which was open to the Company."³⁸ Rather, recourse must be had to the Iranian courts, which were entitled to pass upon the question of any compensation due to the company.³⁹ The agent of the United Kingdom, Sir Eric Beckett, while denying that the Iranian courts were competent to deal with that question, contended that Professor Rolin had further failed to deal with the British contention that, even if the concession had ceased to operate in its principal provisions, nevertheless the tribunal specified in Article 22 of the Convention ought to assess the compensation.⁴⁰ The remaining discussion in the course of oral argument with respect to the exhaustion of local remedies did not relate to the effect of the arbitral remedy, nor, of course, did the Court's judgment holding that it lacked jurisdiction in the case advert to this question.

Électricité de Beyrouth Company Case

In the *Électricité de Beyrouth Company* case differences arose between the Government of Lebanon and the French concessionaire. The company requested arbitration pursuant to a clause of its contract⁴¹ which provided that

disputes which arise between the concessionaire and the Government concerning the execution or interpretation of the clauses of this contract shall be brought before the competent administrative jurisdiction, unless the concessionaire makes use of the right which it nevertheless reserves to submit the dispute to an arbitral tribunal composed of three arbitrators, one named by the Government, the other by the concessionaire, and the third by the two arbitrators or, failing their agreement, by the vice president of the Conseil d'État of the French Republic.⁴²

The Lebanese Government took no action under the arbitration clause, but sequestered the concessionary enterprises. The company renewed its request for arbitration, but the government did not reply.

France thereupon instituted proceedings before the International Court of Justice. It noted that, in a treaty of January 24, 1948, between France and Lebanon, Lebanon had given certain relevant undertakings concerning concessions of French companies operating in Lebanon and had agreed to submit any disputes arising under the treaty to the International Court.

³⁸ *Ibid.* 501 (authors' translation).

³⁹ The Court quoted this limited Iranian reliance on the rule of exhaustion of local remedies in these terms: "That the claim concerning the amount of the compensation due to the Anglo-Iranian Oil Company is also inadmissible, because that Company has not yet exhausted the local remedies provided by Iranian Law." (Anglo-Iranian Oil Co. case [jurisdiction], Judgment of July 22, 1952, [1952] I.C.J. Rep. 93, 99.)

⁴⁰ *Ibid.* 555-556, 642.

⁴¹ The company was the holder of five concessions in Lebanon, whose *Cahiers des Charges* (General Conditions) provided for arbitration in the terms quoted.

⁴² I.C.J. Pleadings, "Électricité de Beyrouth" Company Case (France v. Lebanon), p. 57 (authors' translation).

"The refusal of the Lebanese Government to accept arbitration, as it is bound to do under the General Conditions, constitutes a further violation of the obligations it had assumed" under the treaty, "and this violation constitutes a culminating point of all the measures which it has taken in contravention of the Instruments of Concession . . . The Company is now denied recourse to the tribunal to which it is entitled under its contract." France claimed that the breach of the concessionary contract and "the denial of justice involved in the Lebanese Government's refusal to accept arbitration provided for" by the contract are, "by reason of the treaty obligations cited . . . violations of international law for which the Government of the Lebanese Republic must bear responsibility."⁴³ Even absent the treaty, it amounted to an internationally illegal act:

In refusing arbitration, the Lebanese Government violated . . . the contract and consequently the treaty . . . ; the denial of justice thus committed, was, moreover, of itself, an internationally illegal act, even in the absence of such a treaty.⁴⁴

The only indication of the position taken by Lebanon is a reference in the French Memorial to the fact that, in the course of diplomatic correspondence, the Lebanese Government had maintained that arbitration could not take place since there was no justiciable dispute, and this for the reason that the granting authority could by virtue of its sovereign powers unilaterally alter concessionary provisions.⁴⁵

After the submission of the French Application and Memorial, and before the Lebanese Government had replied, the dispute was settled by agreement between the two governments, and the case was removed from the Court's list.⁴⁶

Case Concerning the Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient

The facts in the *Compagnie du Port* case resemble those in the *Électricité de Beyrouth Company* case. The *Compagnie du Port* and the *Société Radio-Orient* were parties to concession contracts with the Lebanese Government, the concession of the former containing the following provision for arbitration:

any disputes that may arise between the *Compagnie du Port de Beyrouth* and the Administration concerning the execution or interpretation of the clause of the Company's concessionary instruments shall be submitted to the competent administrative jurisdictions, unless the concessionary Company exercises the right which it reserves to itself, nevertheless, to submit the dispute to an arbitration commission composed of three arbitrators, one appointed by the Government, another by the concessionaire and the third by the former two or failing

⁴³ *Ibid.* 14.

⁴⁴ *Ibid.* 58 (authors' translation).

⁴⁵ *Ibid.* 48.

⁴⁶ "Électricité de Beyrouth" Company Case, Order of July 29, 1954, [1954] I.C.J. Rep. 107-108.

agreement between them, by the Vice-President of the *Conseil d'État* of the French Republic.⁴⁷

The Franco-Lebanese Treaty of January 24, 1948, covered these concessions. In 1956, the Lebanese Government adopted a law providing that companies which had enjoyed certain tax exemptions should, as from January 1, 1952, be subject to income and other taxes. The *Compagnie du Port* and the *Société Radio-Orient* were among such companies. After unproductive negotiations, the *Compagnie du Port* requested arbitration. The Lebanese Government gave no positive reply, leading the French Government to institute proceedings before the International Court of Justice.

France claimed that the infringements of the concessionary contracts of the two companies, and, so far as the *Compagnie du Port* was concerned, the failure of the Lebanese Government to accept arbitration were, by reason of the treaty of 1948, violations of international law for which the Lebanese Government was responsible.⁴⁸ It further argued that Lebanon, by refusing to settle its differences with the *Compagnie du Port* by arbitration as prescribed by the concession contract, was "guilty of a denial of justice, thus engaging its international responsibility."⁴⁹

Lebanon responded that the French application should be rejected on the ground that there had been a failure to exhaust local remedies.⁵⁰ Lebanon contended that, under Lebanese law, recourse existed in an instance in which one contracting party refused to go to arbitration. The *Compagnie du Port*, it maintained, accordingly should have taken the case to the Lebanese courts in accordance with the Lebanese Code of Civil Procedure. But the company had neither sought a remedy against the refusal to arbitrate nor had it exhausted the remedies open to it for contesting the taxes. Lebanon concluded that: "One could not conceive of a case in which the rule of exhaustion of local remedies was more completely and more deliberately ignored" than the present.⁵¹

France rejected the Lebanese contentions on two main grounds. First, it contended that the rule of exhaustion of local remedies could have no application to a claim by France that Lebanon was in breach of treaty obligations it owed to France.⁵² Second, it maintained that arbitration was an incontestable right of the *Compagnie du Port*, and a vital element of the contract. The result of the company's opting for arbitration, it argued, citing the Swiss argument in the *Losinger* case, was "to withdraw the dispute definitively from any Lebanese jurisdiction. In according the Company this right, the Lebanese Government had renounced in advance requiring the Company to apply to its courts. . . . As soon as the Company . . . requested arbitration of any dispute whatsoever, it had fulfilled the conditions necessary to prevent application of the rule of exhaustion of local remedies." Thus, ". . . once the Company had chosen arbitration, at no

⁴⁷ I.C.J. Pleadings, Case Concerning the *Compagnie du Port, des Quais et des Entrepôts de Beyrouth* and the *Société Radio-Orient* (France v. Lebanon), p. 7.

⁴⁸ *Ibid.* 9.

⁵⁰ *Ibid.* 67.

⁵² *Ibid.* 89.

⁴⁹ *Ibid.* 39 (authors' translation).

⁵¹ *Ibid.* 70 (authors' translation).

point nor on any pretext could the dispute be submitted to the ordinary courts.”⁵³ The question was not whether Lebanese law allowed the state to be compelled to arbitrate against its will, although, in any event, the law did not. Rather, the point was that recourse to arbitration withdrew the dispute from Lebanese jurisdiction; and it would be an impairment of the company’s contractual rights to allow the Lebanese courts to pass upon issues which the company had declined to submit to them because of Lebanon’s failure to abide by the arbitration clause.⁵⁴

The case was settled by the two governments before the stage of oral argument.⁵⁵

COMMENTARY

The foregoing cases are of great interest in a number of respects. Three of the leading Western trading and capital-exporting states, whose contributions to the growth of customary and conventional law are notable, took the position that arbitration was the exclusive remedy, pursuance of which within the terms of the arbitration clause satisfied the rule of exhaustion of local remedies. Three states which, in current international parlance, at any rate, tend in matters economic and legal to align themselves with the non-aligned, took the position that the rule of exhaustion of local remedies was not discharged by the concessionaire’s request for arbitration.

The *Losinger* case is of particular interest in its exposition of a key problem: whether the exhaustion of the arbitral remedy itself entails recourse to the courts of the contracting state. Switzerland maintained that the arbitration clause was designed to exclude entirely recourse to Yugoslav courts. Switzerland so claimed despite the fact that the arbitration clause provided that: “The award of the arbitrators or of the umpire shall be rendered in Yugoslavia”—a provision which it might be argued subjects procedural aspects of the arbitration to Yugoslav law. The alleged intention of the parties to withdraw their disputes wholly from the cognizance of Yugoslav courts found support in the provisions for selection of the umpire and for the definitive character of the award,⁵⁶ but was weakened by the provision that the arbitration should take place in Yugoslavia.

⁵³ *Ibid.* 91–92 (authors’ translation).

⁵⁴ *Ibid.* 93.

⁵⁵ Case Concerning the *Compagnie du Port, des Quais et des Entrepôts de Beyrouth* and the *Société Radio-Orient* (France v. Lebanon), Order of Aug. 31, 1960, [1960] I.C.J. Rep. 5.

⁵⁶ In the case of *The Société Commerciale de Belgique*, P.C.I.J., Series A/B, No. 78, Belgium sought the Court’s declaration that all the provisions of two arbitral awards rendered in proceedings between the *Société Commerciale* and Greece were binding upon the Greek Government without reservation. The awards were rendered pursuant to an arbitration clause which provided for arbitration of “all disputes of every kind,” for ultimate appointment of an umpire by “the President of the International Court of Arbitration at The Hague,” and for the final character of the award. (At p. 166.) The Court held that, “since the arbitral awards . . . are, according to the arbitration clause under which they were made, ‘final and without appeal’, and since the Court has received no mandate from the Parties in regard to them, it can neither confirm nor annul them either wholly or in part.” (At p. 174.) In speaking of “the definitive and obligatory character of the arbitral awards,” it further held that:

“If the awards are definitive and obligatory, it is certain that the Greek Government is bound to execute them and to do so as they stand. . . .” (At p. 176.)

Yugoslavia argued strongly that, since the contract was governed by Yugoslav law, exhaustion of the arbitral remedy required pursuit of those Yugoslav remedies which pertained to enforcement of an agreement to arbitrate. While, in the circumstances, this argument had a disingenuous ring, it nevertheless has considerable theoretical cogency. It is of equal interest that Yugoslavia did not argue either that cancellation of the contract of itself rendered the arbitral remedy nugatory,⁵⁷ or that Losinger & Co. was bound to exhaust those local remedies which did not pertain to invocation of the arbitral process itself.

The Swiss argument that, since it was Yugoslavia which claimed that the arbitration clause was invalid, the burden of bringing an action in the Yugoslav courts to establish this contention rested on Yugoslavia, was a singular attempt to shift the burden of exhausting local remedies from the alien to the contracting state. Losinger & Co. sought to rely on the validity of the agreement to arbitrate and, if any action in the Yugoslav courts to establish the validity of the arbitral agreement was maintainable, the burden of bringing it clearly was Losinger's.

The *Anglo-Iranian Oil Company* case in some respects presents fewer difficulties. Here the comprehensiveness of the obligation to arbitrate and the clear divorce of the arbitral remedy from Iranian municipal law, substantive and procedural, would have made much less persuasive any claim that recourse must be had to Iranian procedures to enforce the obligation to arbitrate. In fact, Iran made no such claim, while the United Kingdom maintained that "the Company was not obliged or even permitted to have recourse to the Iranian municipal courts . . ." ⁵⁸ Iran rather took the position that annulment of the concession entailed abrogation of any obligation to arbitrate under the concession. This contention at any rate had the virtue of simplicity. Such legal merit as it might have had was dependent on the answer given to what Professors Sohn and Baxter describe as "the larger question of the extent to which a State may, without engaging its responsibility, alter the law applicable to contracts or concessions." ⁵⁹ In the authors' view, on the facts of the *Anglo-Iranian Oil Company* case (where "the law applicable" to the contract would not seem to have been Iranian law), the obligation to arbitrate disputes arising under the concession remained valid. If so, it is submitted that, in view both of the comprehensive character of the obligation to arbitrate and the explicit subjec-

⁵⁷ Yugoslavia did maintain before the umpire that "the cancellation of the contract resulted in cancellation of the arbitration clause and thus did away with the right to have recourse to arbitration"; this submission was rejected by the umpire. Interlocutory Award of the Umpire, The Losinger & Co. Case, P.C.I.J. Series C, No. 78, pp. 109-111. Yugoslavia did not, however, rely on this argument before the Permanent Court of International Justice.

⁵⁸ See the quotation at note 36 above. The Comment on the Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, referred to above at note 6, is to the effect that a mutual intent to exclude remedies other than arbitration would oblige a municipal court to dismiss a claim brought before it.

⁵⁹ Sohn and Baxter, Convention on the International Responsibility of States for Injuries to Aliens, Draft No. 12 with Explanatory Notes, 1961, p. 165.

tion of the arbitral process to international law, procedural and substantive,⁶⁰ exhaustion of the arbitral remedy, without any reference to Iranian procedures, would have been sufficient to satisfy the rule of exhaustion of local remedies.

Iran did not contend that the British claim as a whole could not be maintained because of the failure of the Anglo-Iranian Oil Company to exhaust local remedies. The case was plainly one in which there were no local remedies to exhaust; Iran, far from suggesting that there were local remedies against nationalization, confined itself to the claim that the company should have had recourse to Iranian courts only on the question of any compensation due to the company in respect of its claims and the counterclaims of the government. For its part, the United Kingdom, while contending that the Convention as a whole could not be legally annulled, maintained that in any event "the exclusive legal remedy" provided for in Article 22 of the Convention remained in force and that Iran "committed a denial of justice contrary to international law" in denying the company that remedy, which, in any event, was the only legal procedure for determining the compensation due to the company.⁶¹

The *Électricité de Beyrouth Company* case is of interest insofar as France maintained that, even apart from treaty obligations, the refusal of the Lebanese Government to arbitrate its dispute with the company constituted a "denial of justice . . . an internationally illegal act." By bringing an international claim against Lebanon for what it alleged to be an act in violation of international law, France by necessary implication took the position that the rule of exhaustion of local remedies had been satisfied, presumably by the company's demand for arbitration. Lebanon apparently took a position resembling that of Iran in the *Anglo-Iranian Oil Company* case, namely, that, by virtue of its sovereign powers, it could rid itself of any obligation to arbitrate.⁶² That contention once more raised "the larger question of the extent to which a State may, without engaging its responsibility, alter the law applicable to contracts or concessions,"⁶³ in an instance where the law applicable might be claimed to have been Lebanese. The international references which characterize the arbitration clause of the Anglo-Iranian Convention of 1933 were not to be found in the concession of the *Électricité de Beyrouth Company*. The sole proviso which tended to withdraw the contract from Lebanese jurisdiction was that for the appointment of the umpire by the vice president of the French Conseil d'Etat (that is, appointment by an official of the country of which the concessionaire was a national).

The *Compagnie du Port* case recalls the *Losinger* case. France alleged a denial of justice because of Lebanon's refusal to arbitrate; Lebanon claimed a failure to exhaust local remedies pertaining both to enforcement of the arbitral process and to the validity of the taxes imposed. Like

⁶⁰ See Art. 22 of the Convention, Secs. (E) and (F), quoted at p. 490.

⁶¹ See pp. 491-492 above.

⁶² See p. 494 at note 44 above.

⁶³ Sohn and Baxter, *op. cit.*

Switzerland, France maintained that the arbitration agreement withdrew the dispute definitively from the jurisdiction of the contracting state. Like Yugoslavia, Lebanon maintained that the alien contractor should have litigated the state's refusal to arbitrate in the state's municipal courts. It so claimed in a case where, as in the *Électricité de Beyrouth Company* case, the obligation to arbitrate was not clearly subjected to a law other than that of the contracting state.

CONCLUSIONS

What conclusions are suggested by the Bank's analysis and the considerations which state practice brings to light?

As the Report of the Executive Directors states:

It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy.⁶⁴

However, as the argumentation in the *Losinger* and *Compagnie du Port* cases suggests, the decisive factor may be not simply the intention of the parties to have recourse to arbitration only; it may and probably should be whether the arbitration proceedings are or are not subject to the law of the contracting state. While proceedings pursuant to an arbitration clause such as the characteristic clause summarized above⁶⁵ would not seem to be subject to the contracting state's municipal law, the arbitration clauses of certain agreements between states and aliens stipulate that any arbitration shall be governed by the arbitration law of the contracting state,⁶⁶ and in other agreements the same intention may be implied. In such a case, the reasonable rule would seem to be that the alien must exhaust those remedies which pertain to the enforcement of the obligation to arbitrate or, where an award has been rendered, to enforcement or interpretation of the award itself. Other remedies unrelated to the arbitral process, however, need not be exhausted.

Conversely, where the arbitral process is not governed by the municipal law of the contracting state, then no municipal remedies of the contracting state need be exhausted;⁶⁷ arbitration within the four corners of the agreement to arbitrate is the sole remedy which the alien must exhaust.

⁶⁴ Note 4 above.

⁶⁵ At p. 486.

⁶⁶ For example, a contract of Oct. 23, 1964, between the Government of the Bahama Islands and Home Lines, Inc., a Panamanian corporation, provides for arbitration of disputes, the sole arbitrator, who shall hold or have held high judicial office in the United Kingdom or Canada, being named by the parties or ultimately by the Supreme Court of the Bahama Islands. Art. 26 (2) provides that:

"Either party may demand that a dispute or claim as set forth in the preceding paragraph be made the subject of arbitration in accordance with the provisions of the Arbitration Act of the Bahama Islands or any statutory modification or reenactment thereof for the time being in force." (Unpublished.)

⁶⁷ Professors Sohn and Baxter contend, however, that:

"If a procedure exists under the law of the responsible State whereby the alien may through action before the courts either compel resort to the arbitral machinery provided

It is further submitted that, while arbitral proceedings between the contracting state and the alien are in progress, an international claim based on violation of the rights of the alien is not maintainable by the state of which the alien is a national, on the ground that the arbitral remedy has not been exhausted, it being the equivalent of local remedies for this purpose.⁶⁸

In referring to the "well-established rule of customary international law" that local remedies must be exhausted before international proceedings may be instituted, the International Court of Justice noted that "it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system. . . ."⁶⁹ The rule thus has no application to the question of whether an alien is required to exhaust the remedies of a forum other than that of the contracting state before the state of which he is a national may maintain an international claim on his behalf. However, as noted above, the law governing the procedure of an arbitration may well be that of another jurisdiction, for example, Switzerland.⁷⁰ The law of that

under the agreement, or secure judicial enforcement of the decision of the arbitral tribunal against a State not complying with the award, or seek review of the propriety of the decision of the arbitral tribunal, there can be little doubt that the alien must exhaust his judicial as well as arbitral remedy. The obligation of seeking judicial redress may thus exist even though the contract or concession states that the special form of arbitration provided is the exclusive remedy as to all disputes arising under the agreement. If, however, the procedure stipulated in the contract or concession does not under the law of the responsible State lend itself to judicial enforcement or review, it may constitute the sole available remedy, especially if the contract or concession itself has the status of a law of the respondent State as well as that of an agreement to which that State is a party." (*Op. cit.* 164-165.)

It is submitted that Professors Sohn and Baxter, in this passage, fail to distinguish between arbitral remedies governed by municipal law and those governed by a law other than the municipal law of the contracting state. As noted above, it is believed that the latter type of arbitral process does not require the exhaustion of any remedies of the contracting state. See in support of this conclusion, Bourquin, "Arbitration and Economic Development Agreements," 15 *The Business Lawyer* 860-872, at 870-871 (1960). See also Hyde, "Economic Development Agreements," 105 *Hague Academy Recueil des Cours* 271-374, at 352 (1962); Young, "Remedies of Private Claimants Against Foreign States," *Proceedings of the 1961 Institute on Private Investments Abroad* (1961), pp. 45-100, at 57; and American Branch of the International Law Association, *Report of the Committee on Nationalization of Property, Proceedings and Committee Reports 1957-1958*, pp. 61-85, at 75, note 25.

⁶⁸ Professors Sohn and Baxter describe arbitration, including that under a contract such as the Iranian Consortium Agreement, as a "local remedy" (*loc. cit.*), a description which appears accurate when applied to an arbitration whose procedure is governed by the law of the contracting state. It may be questioned whether an arbitration in which the umpire is foreign and internationally appointed, which takes place abroad, and applies another law, substantively or procedurally, or both, is a "local remedy."

⁶⁹ *Interhandel Case*, Judgment of March 21, 1959, [1959] *I.C.J. Rep.* 6, 27. See also Bagge, "Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders," 34 *Brit. Yr. Bk. of Int. Law* 169 (1958).

⁷⁰ *Cf. Sapphire International Petroleum Limited v. National Iranian Oil Company* (1963). The whole of the award in this arbitration is unpublished, but extracts from

forum will typically contain remedies pertaining to the arbitral process. A question which possibly may merit consideration is whether, in such a case, the alien should be required to exhaust those remedies before an international claim may be maintained on his behalf.⁷¹

It may finally be noted that the case in which two states agree to arbitrate is distinct from the subject of this article. The rule applicable to such treaties seems to be that, where states agree in a claims convention that the rule of exhaustion of local remedies shall not bar any claim, their agreement is effective to waive the rule. In the absence of a clear provision in the treaty, such waiver may sometimes be inferred. However, where there is not a claims convention but rather a general agreement to arbitrate disputes which may arise in the future, such an agreement is not normally viewed as waiving the rule.⁷²

it—unrelated to the issue discussed here—have been quoted, *inter alia*, by Lalive, "Contracts between a State or a State Agency and a Foreign Company," 13 Int. and Comp. Law Q. 987-1021, at 1011-1021 (1964). The umpire in the Sapphire case held that the arbitration proceedings were governed by the procedural law of the Canton of Vaud and were "subject to the judicial sovereignty of Vaud" (authors' translation). For a critique of the umpire's holding, see Suratgar, "The Sapphire Arbitration Award, The Procedural Aspects: A Report and a Critique," 3 Columbia Journal of Transnational Law 153, 184-185, 198-203 (1965).

⁷¹ A negative answer to that question is suggested by the award in *Saudi Arabia v. Arabian American Oil Company (Aramco)* (1958), 27 I.L.R. 117, 155-156, where the tribunal held that the law of Geneva, the tribunal's seat, could not be applied as the procedural law of the arbitration, on the ground of the jurisdictional immunity of states. See to the same effect Bourquin, *loc. cit.* at 870-871. In contrast with the Sapphire case, the tribunal in the Aramco case held that the law governing the procedure of the arbitration was international law. Whether the law of another state, or international law, is held to govern the procedure of the arbitration, the result is the same for the question under analysis: in neither case need any local remedies, pertaining to arbitration or otherwise, be exhausted if the contracting state fails to arbitrate in accordance with its contractual obligation.

⁷² Cf. Law, *The Local Remedies Rule in International Law* 93-98 (Geneva and Paris, 1961), and the sources there cited. See also Garcia Amador, "International Responsibility, Third Report by F. V. Garcia Amador, Special Rapporteur," 1958 I.L.C. Yearbook (II) 59-60, 72.

INSPECTION EXPERIENCE UNDER THE ANTARCTIC TREATY AND THE INTERNATIONAL ATOMIC ENERGY AGENCY

BY JAMES SIMSARIAN

*Officer in Charge, International Scientific Organizations,
Department of State*

Two international programs have developed recently permitting inspections, one by national teams and the other by international teams. Although the two programs concern arms control, they are, however, both limited in scope and applicability. The Antarctic Treaty of 1959¹ authorizes national teams to inspect any area in Antarctica to verify compliance with prohibitions in the treaty against military uses. Under the Statute of the International Atomic Energy Agency (IAEA),² arrangements have been adopted which authorize Agency teams to inspect the peaceful uses of nuclear materials and facilities to ensure that they are not being used to further any military purpose.

Parties to the Antarctic Treaty have agreed to use Antarctica for peaceful purposes only; any measures of a military nature are prohibited, including the testing of any type of weapon. Under its Statute, the IAEA, as it assists in the development and practical application of atomic energy for peaceful purposes, seeks to ensure that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose.

IAEA teams are established and make their inspections under the direction of an Inspector General, who is supervised by the Director General of the IAEA, the chief administrative officer of the Agency. The teams are of course required to comply with regulations adopted by the Board of Governors and the General Conference of the Agency. In contrast to this arrangement, there is no similar post of Inspector General or Director General under the Antarctic Treaty; there is no international Secretariat under this treaty. Each signatory³ may proceed as it considers appropriate in

¹ T.I.A.S., No. 4780; 54 A.J.I.L. 477 (1960).

² T.I.A.S., No. 3873, as amended, No. 5284.

³ The term "signatory" is used in this note to refer to each of the original 12 parties to the Antarctic Treaty, which are the only countries thus far entitled to exercise the right of inspection in Antarctica. This right is limited to the original 12 signatories and other contracting parties conducting substantial scientific research activity in Antarctica, such as the establishment of a scientific station or the despatch of a scientific expedition. Other contracting parties have not thus far conducted the substantial activity required to qualify. The 12 signatories are Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, U.S.S.R., United Kingdom and United States. Three other countries which have acceded to the treaty are Czechoslovakia, Denmark and Poland.

the establishment of its national inspection team and in despatching its team to inspect the activities of other countries in Antarctica.

Many bilateral agreements authorize countries assisting other countries in the peaceful uses of atomic energy to despatch national inspection teams to the countries being assisted to conduct periodic inspections to assure that nuclear materials and equipment provided are in fact being used for peaceful purposes only. These "safeguards" arrangements are necessary because the operation of many types of nuclear reactors results in the production, as a by-product, of plutonium which is capable of use either in atomic weapons or as fuel in certain types of reactors.⁴

Safeguard provisions have been included in United States bilateral agreements with some 40 countries, beginning with the first agreement signed with Turkey in June, 1955.⁵ The United States has implemented these safeguard provisions by conducting more than 500 inspections in 27 countries in Europe, Latin America, and the Middle and Far East.

The European Atomic Energy Community, or EURATOM, the nuclear community composed of the six Common Market countries, has its own multilateral safeguards arrangements, which have been developed along the lines of the safeguards provided for in the Statute of the IAEA. Under a co-operation agreement between the United States and EURATOM,⁶ the latter guarantees that no material, equipment or device furnished under the agreement will be used for military purposes and that no material will be transferred from the control of EURATOM except by agreement of the United States. The United States and EURATOM consult and exchange visits on a regular basis to ensure the effectiveness of EURATOM's safeguards system.

Inspection teams despatched by a signatory of the Antarctic Treaty have complete freedom of access at any time to any and all areas of Antarctica. Inspection teams may be despatched by a signatory upon compliance with only one prior condition: the communication of the names of those on inspection teams to all of the other signatories to the Antarctic Treaty.

In the case of the IAEA, the application of its safeguards system is limited to only Agency projects or to other arrangements where the Agency is requested by the parties concerned to apply safeguards.

The IAEA Statute came into force in 1957. Its Board of Governors adopted the Agency's safeguards system in 1961 to implement the safeguards provisions of the Statute. The safeguards system was initially applicable only to nuclear reactors with less than 100 thermal megawatts

⁴ On safeguards generally, see address by Dr. Glenn T. Seaborg, Chairman, U. S. Atomic Energy Commission, entitled "The International Atom," 51 Dept. of State Bulletin 779 (1964); remarks by Dr. Seaborg at the Economic Club of Detroit, May 10, 1965, U. S. Atomic Energy Commission Press Release S-10-65; John A. Hall, "Atoms for Peace or War," 43 Foreign Affairs 602 (1965); John G. Palfrey, "Atoms for Peace and the Effort to Halt the Spread of Nuclear Materials," 53 Dept. of State Bulletin 393 (1965); and Mason Willrich, "Safeguarding Atoms for Peace," 60 A.J.I.L. 34 (1966).

⁵ T.I.A.S., No. 3320, as amended, No. 4748.

⁶ T.I.A.S., Nos. 4091, 4173, 4650, 5103, 5104 and 5444.

output and to fissionable material used and produced in such reactors.⁷ In 1964 this system was extended to include reactors with 100 or more thermal megawatts.⁸ In 1965, the system was revised to clarify its provisions.⁹

Reporting arrangements are utilized under both the Antarctic Treaty and the IAEA Statute to assist in obtaining compliance with the provisions of these two agreements. Each contracting party under the Antarctic Treaty is required to provide advance information to other contracting parties on activities to be undertaken in Antarctica, together with an account of personnel and equipment intended to be sent to Antarctica.

A state with nuclear facilities subject to IAEA safeguards must maintain appropriate records with respect to these facilities as well as related nuclear material outside such facilities. These records are subject to inspection. In addition the state must submit reports to the Agency on the production, processing and use of this nuclear material in or outside the nuclear facilities.

Thus far, the IAEA has applied its safeguards to projects it is assisting in five countries: Argentina, the Democratic Republic of the Congo, Finland, Norway and Pakistan. Safeguards will also be applied to reactors in Mexico and Yugoslavia being assisted by the Agency as soon as the construction of these reactors is completed and fuel is delivered to them.

In addition, the IAEA safeguards system has been extended to bilateral arrangements by the agreement of the parties concerned. The first trilateral agreement was signed on behalf of the Agency, Japan and the United States in September, 1963, and came into force in November of the same year. Under the agreement the agency applied its safeguards system to the equipment, devices and nuclear materials which had been subject to United States safeguards in Japan. Thirteen reactors and related nuclear materials were involved. The first safeguards inspection in Japan was carried out by the Agency in May, 1964.

In June, 1964, the IAEA Board of Governors approved four additional trilateral agreements for the transfer to the Agency of the administration of safeguards under bilateral agreements between the United States and Austria, Greece, Norway and the Philippines. These agreements provide for an "umbrella"-type safeguards arrangement, under which the items to be safeguarded are not specified in the agreements themselves, but will cover all facilities, equipment or materials transferred by the United States to the four countries under the bilateral agreements, as well as all special fissionable material produced by their use, whether such material remains in the country in which it was produced or is transferred to the United States or elsewhere.

⁷ IAEA Doc. GC(V)/154, Annual Report of the Board of Governors to the General Conference, July 1, 1960-June 30, 1961, p. 3.

⁸ IAEA Doc. GC(VIII)/270, Annual Report of the Board of Governors to the General Conference, July 1, 1963-June 30, 1964, p. 29.

⁹ For the text of the IAEA Revised Safeguards System as approved by the Board of Governors on Sept. 28, 1965, see IAEA Doc. GC(IX)/294. There are 96 states members of the Agency.

Since then, the Board of Governors has approved eight further transfer agreements relating to bilateral agreements between the United States and other countries.¹⁰ In addition, in September, 1965, the Board approved the application of IAEA safeguards to a reactor and fissionable material obtained by Uruguay from the United States under an Agency project agreement.

The United States is moving as rapidly as it can to transfer to the IAEA the administration of safeguards to materials and equipment transferred abroad under bilateral agreements.

The United Kingdom and Canada have a policy similar to that of the United States. Although they also have been relying on bilateral safeguards arrangements, they prefer international safeguards as does the United States. In June, 1965, the IAEA Board of Governors approved agreements to transfer bilateral arrangements between the United Kingdom and Denmark and Japan to the IAEA. In September, 1965, the Board of Governors approved an agreement to transfer bilateral safeguards arrangements between Canada and Japan to the IAEA.

Two power reactors and two research reactors in the United States were subjected to the IAEA safeguards system in 1962 by voluntary action of the United States. The Agency inspected these four reactors in 1962 and again in 1963. In August, 1964, an agreement entered into force between the Agency and the United States providing for the continued application of safeguards to three of these reactors for a period of five years: the Brookhaven Graphite Research Reactor and the Brookhaven Medical Research Reactor on Long Island, New York, and the Piqua Power Reactor at Piqua, Ohio. These three facilities are 20, 3 and 45.5 thermal megawatt, respectively. In addition, this agreement covered the 600 thermal megawatt Yankee Nuclear Power Reactor in Rowe, Massachusetts, the first facility to which the Agency's new safeguards provisions for large reactor facilities became applicable. This is the only agreement under which the Agency is thus far safeguarding nuclear activities in a member state at the state's own request.¹¹

When the United States announced in March, 1964, that it would invite the IAEA to apply safeguards to the Yankee reactor, one of the largest in operation in this country, the United States gave two reasons for this action:

First, it will assist the IAEA further in developing and demonstrating the effectiveness of its inspection techniques for large reactor facilities. Second, we intend it as an example to other nuclear Powers. We hope that other States will join us in this step and invite the application of IAEA safeguards on some of their large civil reactors; indeed, we urge them, and in particular we urge the Soviet Union, to do so.¹²

¹⁰ Argentina, China, Iran, Israel, Portugal, South Africa, Thailand and Viet-Nam.

¹¹ T.I.A.S., No. 5621; IAEA Doc. GC(IX)/299, Annual Report of the Board of Governors to the General Conference, July 1, 1964-June 30, 1965, p. 41.

¹² Statement by the Acting U. S. Representative (Adrian Fisher) to the Eighteen Nation Disarmament Committee, Geneva, March 5, 1964, Documents on Disarmament, 1964 (U. S. Arms Control and Disarmament Agency), p. 79.

President Johnson had earlier pointed out in a message to the Eighteen Nation Disarmament Committee on January 21, 1964, that nations must seek to stop the spread of nuclear weapons to nations not now controlling them, and in this connection he urged agreement¹³ “. . . that all transfers of nuclear materials for peaceful purposes take place under effective international safeguards. . . .” At the same time he called upon the major nuclear Powers to “accept in an increasing number of their peaceful nuclear activities the same inspection they recommend for other States.”

The United Kingdom announced in June, 1965, that it is prepared to place the two identical 538 thermal megawatt gas-cooled natural uranium reactors of the Bradwell Nuclear Power Station under Agency safeguards. This action will provide Agency inspectors with additional valuable experience.

By September 30, 1965, the Agency had negotiated and the Board had approved 25 safeguards agreements with 21 member states¹⁴ relating to 40 research and power reactors in operation in these states; the aggregate thermal capacity of these reactors exceeds 1400 megawatts.

There is a total of about 300 research reactors and 55 power reactors in the world. Of the above 21 member states, only two have nuclear power reactors in operation under Agency safeguards: Japan and the United States.¹⁵

The IAEA Board of Governors has authorized the use of 14 Agency officials as safeguards inspectors, including an Inspector General who has a rank equal to a Deputy Director General and directs a Department of Safeguards and Inspection.

In the period July 1, 1964, to June 30, 1965, Agency inspectors carried out 15 inspections of 11 reactors in three member states. In addition, in order to complete the arrangements for bringing into force or for implementing safeguards agreements, Agency officials carried out pre-operational visits to 23 facilities in 13 member states with which safeguards agreements had been concluded or were under negotiation.

The number of routine inspections which may be made annually of a reactor and nuclear material under the Agency safeguards system depends upon the reactor and nuclear material involved and the maximum potential annual production of special fissionable material. The actual frequency of inspection of a reactor takes into account (a) whether the state possesses irradiated-fuel reprocessing facilities, (b) the nature of the reactor and (c) the nature and amount of the nuclear material produced or used in the reactor. Routine inspections may range up to 12 annually, depending upon

¹³ *Ibid.*, p. 7.

¹⁴ Argentina, Austria, China, Democratic Republic of the Congo, Denmark, Finland, Greece, Iran, Israel, Japan, Mexico, Norway, Pakistan, Philippines, Portugal, South Africa, Thailand, United States, Uruguay, Viet-Nam and Yugoslavia.

¹⁵ The eight other states in the I.A.E.A. with nuclear power reactors in operation are Belgium, Canada, France, Federal Republic of Germany, Italy, Sweden, the United Kingdom and the U.S.S.R. Five other member states have nuclear power reactors under construction: Czechoslovakia, India, Netherlands, Spain and Switzerland; five others are in the planning state: Austria, Brazil, China, Pakistan and the United Arab Republic. *Op. cit.* note 11 above, IAEA Doc. GC(IX)/299, p. 59.

the above factors, and in the case of certain large facilities, such as the Yankee reactor, they are subject to "right of access at all times"; that is, inspection by Agency inspectors at any time.

The initial Agency inspection team which made a two-day visit to the Yankee plant in November, 1964, consisted of three inspectors—a Japanese, a Swede and a Yugoslav. The plant is capable of producing about 100 kilograms of plutonium a year—enough for about 10 small atomic weapons.¹⁶ This 175-megawatt plant produced over one billion electrical kilowatt hours in 1964.

Agency inspectors conducted inspections of the Yankee plant without prior notice in February and April, 1965. The February inspection was conducted by an Argentine inspector and the April inspection by Argentine and Japanese inspectors. In June the Yankee plant was inspected again, this time by three inspectors. These inspections without previous notice initiated an important precedent for the application of Agency safeguards.

The Antarctic Treaty entered into force in June, 1961, for the 12 signatories.¹⁷ In September, 1963, the United States announced its intention to conduct inspections as authorized by the treaty; it was the first of the signatories to issue such an announcement. The United States observed in its announcement that planning for the conduct of this inspection had been under way for some time and that other signatories had already been advised of the intention of the United States to conduct an inspection in Antarctica. The United States noted that the inspection being undertaken was not based on any anticipation that there had been treaty violations by any signatory. The United States stated that it would welcome the inspection of its stations by other signatories.¹⁸

Secretary of State Rusk, in appointing nine U.S. Antarctic observers in November, 1963, cautioned them to "bear constantly in mind that all states active in Antarctica have been both friendly and cooperative with the United States in matters relating to the continent, and it is the policy of the United States to preserve and enhance this situation." They were instructed to conduct their inspections in compliance with this policy.¹⁹

The Antarctic Treaty utilizes the term "observers" rather than inspectors; the treaty states, however, that they are to carry out inspections. The treaty provides that all areas of Antarctica, including all stations, installations and equipment within those areas, and all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica shall be open at all times to inspection by observers designated by signatories. Signatories are also authorized to carry out aerial observation at any time over any or all areas of Antarctica.

Although the United States was the first to announce its intention to

¹⁶ New York Times, Nov. 15, 1964. See also *ibid.*, April 9, 1965.

¹⁷ See note 3 above.

¹⁸ Dept. of State Press Release, No. 469, Sept. 13, 1963; 49 Dept. of State Bulletin 513 (1963); 58 A.J.I.L. 166 (1964).

¹⁹ Dept. of State Press Release, No. 591, Nov. 18, 1963; 49 Dept. of State Bulletin 932 (1963); 58 A.J.I.L. 462 (1964).

conduct an inspection in Antarctica, New Zealand in fact was the first to send its observers to inspect U.S. stations. The two New Zealand observers visited the McMurdo, South Pole and Byrd stations November 29 to December 9, 1963. At the end of their inspections, they reported:

The installation, equipment and activities observed by us at all three stations, together with the information gleaned in discussions and in documents, were in our firm opinion, fully consistent with the objectives and provisions of the Antarctic Treaty and in particular with the specific requirements of that Treaty as set out in Articles I (the use of Antarctica for peaceful purposes only) and V (the prohibition on nuclear explosions in Antarctica and on the disposal there of radioactive material).

Although the United States has a nuclear power reactor at McMurdo station, in compliance with Article V there is no disposal of any radioactive waste material from the reactor in Antarctica.

In accordance with Articles VII and IX, each signatory designating observers is required to provide other signatories with the names of its observers, their reports and notice of the termination of their appointment.

Australia and the United Kingdom each sent one observer in December, 1963, to three U. S. stations: McMurdo, South Pole and Byrd, and the New Zealand Scott station. They reported that they did not see any infringement of the Antarctic Treaty.

The United States despatched two groups of observers to conduct inspections in January, 1964.²⁰ One group of three observers visited two Argentine stations (Deception and Esperanza), two Chilean stations (Gabriel Gonzalez Videla and Pedro Aguirre Cerda) and two United Kingdom stations (Base B and Base F). These six stations are fairly close to one another and situated in the Antarctic Peninsula area of West Antarctica. The U. S. group was transported to these stations by a U. S. Coast Guard icebreaker.

The other group of four U. S. observers visited the New Zealand Scott station near McMurdo and two Soviet Union stations in East Antarctica—Mirnyy and Vostok. The U. S. observers were transported to the latter two stations by U. S. aircraft based at McMurdo station. In addition, the U. S. observers conducted an aerial overflight of the French station Dumont d'Urville because of the unavailability of landing facilities at this station. Photographic and visual observations were conducted. A representative photograph of the station was reproduced in the report of the U. S. observers.

The U. S. observers concluded in their report as follows:

Observations made by United States observers during the inspection of ten Antarctic stations indicated that the activities of the stations visited were being conducted in consonance with the provisions and

²⁰ For Report of the United States Observers on Inspection of Antarctic Stations, 1963-64 Austral Summer Season, see "United States Policy and International Cooperation in Antarctica, Message from the President of the United States transmitting Special Report on United States Policy and International Cooperation in Antarctica," referred Sept. 2, 1964, to the Committee on Foreign Affairs, 88th Cong., 2d Sess., House Doc. No. 358, pp. 49-56.

spirit of the Antarctic Treaty. No evidence was revealed by these inspections which would indicate that Antarctica is being used for other than peaceful purposes.

Argentina sent two observers in February, 1965, to inspect the United States Palmer station under construction on the Antarctic Peninsula. They arrived by an icebreaker from their nearby stations on the Peninsula.

Grigory I. Tunkin, who was co-chairman of the Soviet Delegation to the Conference in Washington in 1959 which drafted the Antarctic Treaty, has observed that the Soviet Union could agree to unlimited inspections under the conditions existing in Antarctica, "where inspections cannot be used against national security."²¹

The exercise of the right of inspection is particularly significant in Antarctica because of the territorial claims of some countries. Although the Soviet Union and the United States have not made formal claims to territory in Antarctica, the following seven signatories to the Antarctic Treaty have done so: Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom. Neither the Soviet Union nor the United States recognizes any of these claims.

Inspections have been carried out without prejudice to the spirit of good will and co-operation which exists between expeditions in Antarctica. In fact, the sense of mutual confidence in that area is enhanced even further by the findings in reports thus far made as a result of these inspections that no evidence of any violation of the terms of the Antarctic Treaty has been found.

The IAEA safeguards system was adopted by the Agency without a negative vote. It should be noted that although the system is in effect, it is applicable, as pointed out above, only to Agency projects or to other projects where the Agency is requested by the parties concerned to apply safeguards. The safeguards system is presently being applied to only the reactors of non-nuclear Powers, with the exception of four reactors in the United States.

Dr. Glenn T. Seaborg, Chairman of the U. S. Atomic Energy Commission, has pointed out that we must consider the achievements of the IAEA thus far, however, as only a beginning. Safeguards are obviously designed to prevent the spread or proliferation of nuclear weapons. They are meant to prevent the "have nots" from becoming "haves" as far as nuclear weapons are concerned. The ultimate need is of course to create and enforce a comprehensive program of arms control and disarmament which will include the uniform application of safeguards to the programs of nuclear and non-nuclear Powers alike.

Dr. Seaborg commended the attitude of the less developed countries concerning the application of safeguards to nuclear reactors in their countries; he observed that the majority of them have not only readily accepted safeguards but have vigorously assisted in their development. Dr. Seaborg observed that safeguards have been so designed and are being so adminis-

²¹ G. I. Tunkin, "An Example of International Cooperation," *International Affairs* (U.S.S.R.), February, 1960.

tered that they do not impede the nuclear industrial or economic development of the developing countries nor are these countries placed in any disadvantageous position by these arrangements.

As nuclear power becomes increasingly economical to produce, there will be additional demands for its use for industrial and other purposes. Large nuclear power plants with high load factors are already competing with other energy sources. It was observed at the Third United Nations International Conference on the Peaceful Uses of Atomic Energy in Geneva in September, 1964, that the peaceful uses of nuclear power are rapidly expanding. In 1955, at the time of the first atomic energy conference in Geneva, the installed nuclear capacity of the world was only five megawatts; by 1958, at the time of the second atomic energy conference in Geneva, that capacity had grown to 185 megawatts; and by 1964, when the third conference was held, it had grown to about 5,000 megawatts. It is predicted that some 15-20% of all new electrical capacity built between 1970 and 1980 will be nuclear and that more than half the electric power requirements of some large industrial countries will be met by nuclear electricity by the end of this century.²² With such an enormous expansion anticipated in the use of nuclear power reactors, the administration of a sound international program of safeguards to ensure the peaceful uses of this power will have increasing importance.

Notwithstanding the special status of Antarctica and the limited applicability of the IAEA safeguards system thus far, both of these programs are significant in several respects: (1) they have initiated the precedent of providing in international agreements provisions for on-site inspections of the facilities of states; (2) inspection teams have in fact already carried out on-site inspections and submitted reports on these inspections; (3) continuing attention is being given in these two programs to the practical aspects of inspection; and (4) perhaps some of the practical experience being gained in these programs will be useful in related arms control situations.²³

²² Summary of the Third United Nations International Conference on the Peaceful Uses of Atomic Energy by Dr. Glenn T. Seaborg, Proceedings of the Conference, Aug. 31-Sept. 9, 1965, Vol. I, p. 383 (U.N. Doc. A/Conf. 28/1); and *op. cit.* note 11 above, IAEA Doc. GC(IX)/299, p. 5.

²³ As an example of other bodies already drawing on the experience of the IAEA safeguards system, see the preliminary draft articles on verification, inspection and control for the Treaty on the Denuclearization of Latin America, which were drafted at the second session of the Preparatory Commission for the Denuclearization of Latin America held in Mexico City Aug. 23 to Sept. 2, 1965. Article H proposes that the parties to this treaty assume all the obligations and adopt all the procedures of the IAEA safeguards system with regard to any nuclear facilities and activities in their respective territories. The preliminary draft articles were forwarded to governments for study and comment. A copy of the Final Act of this session of the Preparatory Commission was circulated as a U. N. General Assembly document, A/5985. See also Article III of the Draft Treaty to Prevent the Spread of Nuclear Weapons presented by the United States to the Eighteen Nation Disarmament Committee in Geneva on August 17, 1965, which provides: "Each of the States Parties to this Treaty undertakes to cooperate in facilitating the application of International Atomic Energy Agency or equivalent international safeguards on all peaceful nuclear activities." 53 Dept. of State Bulletin 474 (1965).

EDITORIAL COMMENT

JUS DISPOSITIVUM AND JUS COGENS IN INTERNATIONAL LAW: IN THE LIGHT OF A RECENT DECISION OF THE GERMAN SUPREME CONSTITUTIONAL COURT

The Draft Articles on the Law of Treaties prepared by the International Law Commission, with Sir Humphrey Waldock as the special reporter, contain rules governing the conflict between a treaty and a peremptory norm of international law (*jus cogens*). Article 37 of the Draft Articles, as adopted during the Commission's meeting at Monaco, January 3-28, 1966,¹ provides:

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 45 specifies in addition:

If a new peremptory norm of general international law of the kind referred to in article 37 is established, any existing treaty which is incompatible with that norm becomes void and terminates.²

These provisions, because of their far-reaching implications for the nature and structure of customary international law, have evoked widespread attention and discussion, and recently have been the object of a provocative defense by Professor Verdross, an eminent member of the Commission, in the pages of this JOURNAL.³

It may be of general interest in that connection to note that the German Supreme Constitutional Court last year had to deal with that problem in a case where the application of a treaty between the Federal Republic of Germany and Switzerland was challenged as being in conflict with a general norm of international law, and therefore unconstitutional.⁴

In that case petitioner, a Swiss corporation which owned real estate in Hamburg, challenged the legality of a tax assessment levied upon it pursuant to the German Law on the Equalization of Burdens of August 14, 1952.⁵ The statute in question imposes various taxes for the purpose of raising revenue to be used for the payment of compensation for losses suffered by the expellees from the former German territories in the East and by war victims belonging to designated categories.⁶ One of the taxable assets

¹ A/CN.4/184, Annex, p. 3 (1966).

² *Ibid.*, p. 6.

³ Verdross, "*Jus Dispositivum and Jus Cogens in International Law*," 63 A.J.I.L. 55 (1966).

⁴ In the matter of petition for review of the constitutionality of three decisions of the Federal Supreme Tax Court by . . . , a corporation at Zurich (Switzerland), 18 Decisions of the Federal Supreme Constitutional Court (hereafter cited as BVerfGE) 441 (April 7, 1965).

⁵ Bundesgesetzblatt (hereafter cited as BGBl.) 1952, Pt. I, pp. 446-553.

⁶ Equalization of Burdens Act, Secs. 1, 4, 11-15, 228-304.

is labeled as mortgagors' profits and involves pecuniary advantages obtained by mortgagors and owners of otherwise encumbered real estate as a result of the currency reform in 1948.⁷ The statute does not differentiate between German nationals and foreign property owners. The application of the statute in question to Swiss nationals is regulated by a convention between the Federal Republic of Germany and Switzerland of August 26, 1952,⁸ which, after due ratification and promulgation, went into force on March 19, 1953.⁹ Section 1 of that convention stipulates that the Law on the Equalization of Burdens shall apply to Swiss nationals, including corporations incorporated in Switzerland, to the extent that it applies to nationals of the most-favored nations. The principal treaty which accords preferential treatment with respect to some of the taxes covered by the Law on the Equalization of Burdens is the Convention of May 26, 1952, between France, the United Kingdom, the United States of America and the Federal Republic of Germany on the Settlement of Matters Arising out of the War and the Occupation,¹⁰ as revised by the protocol of October 23, 1954.¹¹ The convention consists of several chapters and an Annex establishing an Arbitral Commission on Property, Rights and Interests in Germany.¹² Chapters V and X as well as the Annex were open to accession by other Powers, and seven nations (Belgium, Denmark, Greece, Italy, Luxembourg, The Netherlands and Norway) have exercised this option.¹³ Chapter X, Article 6, paragraph 2,¹⁴ grants an exemption from certain of the taxes imposed by the Law on the Equalization of Burdens to nationals of any of the United Nations and to corporations owned by such nationals, but in a test case it was held by the Arbitral Commission on Property, Rights and Interests in Germany that the dispensation did not include the mortgagors' profits tax.¹⁵ The Federal Supreme Tax Court followed this interpretation of the treaty between the Three Powers and the Federal Republic of Germany in the instant case.¹⁶

In challenging the decision of the Federal Supreme Tax Court in the Federal Supreme Constitutional Court on constitutional grounds, petitioner

⁷ *Ibid.*, Secs. 3 and 91-160.

⁸ The text is published in BGBl. 1953, Pt. II, p. 24.

⁹ Notification of April 15, 1953, BGBl. 1953, Pt. II, p. 127.

¹⁰ The revised text is reproduced in 6 U. S. Treaties, Pt. 4, p. 5652 (1955); and 49 A.J.I.L. Supp. 69 (1955).

¹¹ The protocol and the schedule revising the convention are reproduced in 6 U. S. Treaties, Pt. 4, pp. 4117 and 4149 (1955).

¹² The annex containing the Charter of the Arbitral Commission on Property, Rights and Interests in Germany is reproduced in 6 U. S. Treaties, Pt. 4, p. 5679, and 49 A.J.I.L. Supp. 113 (1955).

¹³ See the information in U. S. Dept. of State, Treaties in Force 247 (1965).

¹⁴ 6 U. S. Treaties, Pt. 4, at p. 5673 (1955).

¹⁵ Decision of the Arbitral Commission on Property, Rights and Interests in Germany, Second Chamber, of March 23, 1963, In the matter of Gilis, 5 Entscheidungen der Schiedskommission für Güter, Rechte und Interessen in Deutschland 43; 18 Betriebsberater 130 (1963).

¹⁶ Bundessteuerblatt 1963, III, p. 300 (1963).

argued, *inter alia*, that the convention with Switzerland was inconsistent with the general rule of international law to the effect that foreigners could not be compelled to contribute to the raising of revenues collected for the purpose of defraying expenditures resulting from war. As a result, petitioner claimed, any application of the convention in question contravened Article 25 of the Bonn Constitution, which declares general rules of international law to be part of the German federal law. The Supreme Court rejected this contention in the following passage¹⁷ which, because of its general interest, is translated in full:

- b) Petitioner invokes a general rule of customary international law to the effect that the resort to aliens for the purpose of defraying expenditures resulting from consequences of a war is not permissible. The contractual arrangements in the convention with Switzerland with respect to the German equalization of burdens were, however, apt to displace this rule of international law—assuming its validity—and to preclude its application.

Pursuant to the Bonn Constitution, Art. 25, general rules of international law become part of the federal law only with their current content and in their current scope.¹⁸ The Bonn Constitution, Art. 25 opens the German legal order to them only in the state of their international validity,¹⁹ which is measured also by the extent to which they, in their relation to the individual states, are displaced by contractual arrangements. Bonn Constitution Art. 25 does not preclude that contractual agreements that are permitted by international law obtain, by statute, the force of German internal law although they do not fully completely correspond to the general rules of international law.²⁰

Customary international law is essentially *jus dispositivum*. A proposition to the effect that the general rules of customary international law as a matter of principle enjoy priority over contractual stipulations is foreign to general international law. International treaty law, to the extent that the parties to the agreement are concerned, possesses as a rule priority over customary law since it is the later and the more special law. Only a few elementary legal mandates may be considered to be rules of customary international law which cannot be stipulated away by treaty. The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community.²¹ The rule that no resort may be had to aliens for the defrayal of ex-

¹⁷ 18 BVerfGE 441 at 448 (1965). Footnotes 18 *et seq.* are citations of the Court.

¹⁸ BVerfGE Vol. 15 p. 25; Vol. 16 p. 27.

¹⁹ Cf. Mosler, Das Völkerrecht in der Praxis der deutschen Gerichte p. 40, 44.

²⁰ Cf. BVerfGE Vol. 16 p. 276, and Wengler, Völkerrecht, Vol. I p. 483 fn. 2 (1964); Dahm, Völkerrecht, Vol. I p. 67 (1958); Bertram in the report by Partsch, Die Anwendung des Völkerrechts im innerstaatlichen Recht, Berichte der Deutschen Gesellschaft für Völkerrecht, Issue 6, p. 68 fn. 63 a (1964).

²¹ See Wengler, *op. cit. supra* note 20, at p. 412; Verdross, Völkerrecht (5. ed) p. 130; Menzel, Völkerrecht (1962) p. 106; Dahm, *op. cit. supra* note 20, at p. 16; Guggenheim in Strupp-Schlochauer, Wörterbuch des Völkerrechts Vol. 3 p. 528; Jaenicke, *id.* at p. 766.

penditures resulting from war consequences certainly does not fall into this class of peremptory rules of international law.²²

Therefore, we need not pass on the question of whether the fact that the Federal Republic and a substantial number of other states have entered into or have agreements, the contents of which correspond to the German-Swiss Convention, justifies the conclusion that the rule of international law invoked by petitioner, at any rate, would not have the character of a *general* rule of international law.²³

- c) If therefore the convention with Switzerland concerning the equalization of burdens was capable of excluding the applicability of the general rule of international law invoked by petitioner, the latter rule would have been material for the decision of the Federal Supreme Tax Court only if the convention would have accorded petitioner the option of refusing to be called upon to contribute to the equalization of burdens and of relying instead upon the more favorable rules of general international law.

The Convention [however] contains no clause to the effect that the general rules of international law shall remain unaffected (in contrast, *e.g.*, to Art. 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Basic Liberties of March 20, 1952.²⁴) Treaty law normally has precedence over customary international law. A rule which prohibits resort to aliens for the defrayal of expenditures resulting from consequences of war would not fall in the class of peremptory rules of international law.

The foregoing passage indicates that the German Federal Supreme Constitutional Court accepts the existence of peremptory rules of customary international law, although it accords them only a limited scope and rejects the contention that the immunity of aliens from taxation for the payment of war debts is based upon a rule of such character. The opinion of the Court is also significant because it alludes to the logical difficulties inherent in the continuing existence of such peremptory rules, although some states by agreement attempt to depart therefrom. Is it ever possible to transmute a peremptory rule, once it has become recognized as such, into a rule which is merely "dispositive" in character? In principle this should be possible, at any rate when there is widespread international consensus to such a change. For that reason the second part of the provision of Article 37 of the Draft on Treaties ("which can be modified only by a subsequent norm of general international law having the same character") seems to overshoot the mark. Certainly a peremptory norm might be subject to replacement by a non-peremptory norm. The rule accomplishing

²² See BVerfGE, Vol. 16, p. 276; Judgment of the First Chamber of the Arbitral Commission on Property, Rights and Interests in Germany of June 2, 1959, *Entscheidungen der Scheidskommission*, Vol. 2 p. 79; Judgment of March 22, 1962, *Entscheidungen* Vol. 5 p. 40, the 3. headnote of which states that the stipulation governing the contributions to the equalization of burdens in Chapter Ten of the Agreement on the Settlement of Matters Arising out of the War and the Occupation possesses precedence over all other rules of international law.

²³ See Wengler, *op. cit. supra* note 20, at p. 395 and *Entscheidungen der Schiedskommission*, Vol. 5 p. 40, et seq., especially at p. 67.

²⁴ Law of Dec. 20, 1956, BGBl. 1956, pt. 2 p. 1879.

this change in status would itself be non-peremptory. The essential question is, how widespread the international acceptance of such a *capitis diminutio* would have to be.

STEFAN A. RIESENFELD

PHILIP MARSHALL BROWN

1875-1966

The AMERICAN JOURNAL OF INTERNATIONAL LAW announces with deep regret the death in Williamstown, Massachusetts, on May 10, 1966, of Philip Marshall Brown, of the Board of Editors, who had just completed fifty years of membership on that Board. Professor Brown was a Charter Member of the American Society of International Law, having joined the Society in August of 1906. He had been an honorary vice president of the Society from 1932 to 1961. He was elected to the Board of Editors in 1916 and served actively until 1944, when he became an honorary editor. From 1921 to 1961 he had been a member of the *Institut de Droit International*. He had served as a member of the Advisory Committee of the Harvard Research in International Law, and as President of the American Peace Society from 1940 to 1946.

Professor Brown entered the diplomatic service in 1900 as Secretary to the United States Minister to Turkey at Constantinople. Subsequently he served as Secretary of Legation in Honduras and Guatemala, Chargé d'Affaires in Guatemala, and as Secretary and Chargé d'Affaires of the Embassy in Constantinople. He was later Minister to Honduras and played a leading rôle in negotiations in the crisis between Honduras and Nicaragua in 1910.

Graduating from Williams College in 1898, Professor Brown took a master's degree in international law at Harvard in 1912 and began his teaching career there. He went to Princeton University in 1913 and, after the First World War broke out, he was United States Attaché on the staff of Field Marshal Viscount Allenby in Egypt and Palestine. He served as an observer on the staff of the United States Commission to Negotiate Peace at Paris in 1919.

Following the Peace Conference, Professor Brown returned to Princeton where he taught international law until his retirement in 1935.

Professor Brown actively participated in the meetings of the Society for many years and contributed a wealth of stimulating articles and editorials to the JOURNAL, beginning in 1915 with an article on "The Theory of the Independence and Equality of States." His last editorial, contributed to the JOURNAL in 1953, was entitled "Protective Jurisdiction over Marginal Waters." His first address before the Society in 1916 dealt with "Munitions and Neutrality," which might properly be classified as the explosive issue of the day.

He took an active interest in the study and teaching of international law and participated in the conferences of teachers organized by the Carnegie

Endowment for International Peace in co-operation with the Society.

Professor Brown's contributions to the JOURNAL and *Proceedings* were distinguished by clarity and forthrightness as well as scholarship. He was a scholar and diplomat of the old school, with all the attributes of charm and courtesy which in former years usually accompanied these vocations. Those members of the Society who knew him join the Editors of the JOURNAL in mourning the passing of a good friend and able colleague in the field of international law and relations.

ELEANOR H. FINCH

NOTES AND COMMENTS

INSTITUT DE DROIT INTERNATIONAL: THE WARSAW SESSION, 1965

The *Institut de Droit International* held its fifty-second session in Warsaw, Poland, September 2 to 11, 1965, under the presidency of Judge Bohdan Winiarski, former President of the International Court of Justice, with fifty-five Members and Associates in attendance.¹

All ten Associates proposed for titular membership were elected: Georges S. Maridakis (Greece); Sir Kenneth Bailey (Australia); Kisaburo Yokota (Japan); Rolando Quadri (Italy); Nathan Feinberg (Israel); Josef L. Kunz (U. S. A.); Alberto Ulloa (Peru); André Gros (France); Yuen-li Liang (China); Constantine John Colombos (Malta). For the seven vacancies in the rank of Associates, thirteen candidates were presented and the following were elected: Pierre Lalive (Switzerland); Oscar Schachter (U. S. A.); Sir Francis Vallat (U. K.); Pierre Pescatore (Luxembourg); Vladimir Koretsky (U.S.S.R.); Étienne Szászy (Hungary); Stanislaw Hubert (Poland). Although Ambassador Abdullah El-Brian (U.A.R.) had the same number of votes as Professor Hubert, the regulations of the *Institut* provide that in case of a tie the older candidate is elected. Of five candidates presented by the Bureau from countries having no members in the *Institut*, the following three were elected Associates: José María Ruda (Argentina); Jorge Castañeda (Mexico); Florentino P. Feliciano (Philippines). Following the elections at Warsaw, the *Institut de Droit International* is composed of an Honorary President (Charles De Visscher), five Honorary Members, fifty-seven Members, and fifty-five Associates, the total membership coming from thirty-nine countries.

In recent years the *Institut* has developed new working methods which involve the convening of various Commissions during a session rather than developing a topic merely by correspondence on the basis of reports prepared by a rapporteur. At Warsaw particular effort was made to promote this method, no less than thirteen Commissions finding opportunity to meet. A listing of the Commissions which met in Warsaw gives some indication of the program which the *Institute* has under way:

1st Commission: *The Diplomatic Protection of Individuals in International Law: The Nationality of Claims*. Herbert W. Briggs, Rapporteur.

2nd Commission: *Space Law*. C. Wilfred Jenks, Rapporteur.

3rd Commission: *The International Effects of Nationalizations*. Paul de La Pradelle, Rapporteur.

4th Commission: *The Equal Application of Rules of the Law of War to Parties to an Armed Conflict*. J.P.A. François, Rapporteur.

¹ Of the United States group, Judge Philip C. Jessup, Professors Elliot Cheatham, Quincy Wright, Oscar Schachter and the writer were present.

- 5th Commission: *The Problem Posed by Massive Weapons of Destruction and the Distinction between Military and Non-Military Objectives*. Baron von der Heydte, Rapporteur.
- 6th Commission: *International Commissions of Inquiry*. Mustafa Kamil Yasseen, Rapporteur.
- 7th Commission: *Adoption in Private International Law*. Rodolfo De Nova, Rapporteur.
- 10th Commission: *Testamentary Succession in Private International Law*. Riccardo Monaco, Rapporteur.
- 11th Commission: *Termination of Collective Treaties*. Shabtai Rosenne, Rapporteur.
- 19th Commission: *The Contract of Transport in Private International Law*. Leon Babinski, Rapporteur.
- 23rd Commission: *Renvoi in Private International Law*. Georges Maridakis, Rapporteur.
- 26th Commission: *Delictual Obligations in Private International Law*. Johannes Offerhaus, Rapporteur.
- 28th Commission: *Companies in Private International Law*. George van Hecke, Rapporteur.

The *Institut* discharged the old 1st, 4th, 18th (*Commissions, etc., in Private International Law*), 23rd and 28th Commissions and constituted new Commissions on *The Application of the Laws of War to Military Operations of the United Nations and Regional Organizations* and *The Most-Favored-Nation Clause in Multilateral Conventions*.

In eleven plenary meetings, the *Institut* considered three topics—*Companies in Private International Law*, *The Nationality of Claims*, and *Renvoi*—and adopted substantive resolutions on the first two. The debate on *Renvoi*, continued from earlier sessions, led to no agreement and the *Institut* discharged the 23rd Commission and expressed appreciation to its distinguished Rapporteur, Professor Georges Maridakis, in the following resolution:

RENOI IN PRIVATE INTERNATIONAL LAW
(*Twenty-third Commission*)

The Institute of International Law

Considering that it was the purpose of the 23rd Commission, which had the task of dealing with *Renvoi in Private International Law* and which had been created in 1952 to study the problem of *renvoi* in its classical form such as it presented itself at the end of the 19th and the beginning of the 20th centuries,

Considering further that the eminent Rapporteur has made a thoroughgoing study of the matter in this spirit and that the members of the Commission have presented important observations,

But considering on the other hand that in the course of the last years this subject has been developed and enlarged because new questions have emerged which affect in a general way the treatment of foreign conflicts rules, that these questions deserve special and detailed study, but that they have not yet been sufficiently clarified to form the object of a Resolution,

Expresses to the Rapporteur of the 23rd Commission its admiration and its very deep gratitude,

And resolves to dissolve the 23rd Commission and to recommend to the Programme Commission to examine the possibility of creating a new Commission with the task of studying the problems relating to the treatment of foreign conflicts rules.

The topic *Companies in Private International Law* was subjected to the animated debate so characteristic of experts in private international law and occupied their attention throughout the session. With great skill, the Rapporteur, Professor George van Hecke, steered the project through to adoption by a vote of 36-0-2. An English translation of the resolution adopted is appended. The writer would not presume to discuss it in detail and hopes that other members of the American Society of International Law will give it the attention it deserves.

The sole topic on public international law presented to the plenary session at Warsaw was an aspect of *The Diplomatic Protection of Individuals in International Law*, namely, *The Nationality of Claims*. At its sessions of 1931 and 1932 in Cambridge and Oslo, the *Institut* had failed to reach agreement on this topic.² A draft then presented by Professors Edwin M. Borchard and Herbert Kraus, Rapporteurs, was opposed because it set forth unchanged the established rule of international law that an international claim is inadmissible unless it possesses the nationality of claimant state both at the date of injury and at the date of presentation of the claim. After hearing arguments that the traditional rule requiring that a claim should possess the national character of claimant state at the date of injury was unjust, outmoded, and theoretically unsound, the *Institut* rejected the rule by a vote of 27 *for*, 29 *against*, with 6 abstentions.³

Although this vote of the *Institut* has received some doctrinal support, it had no effect on the practice of states or the jurisprudence of international tribunals. Thus, in the *Panevezys-Saldutiskis Railway Case*, the Permanent Court of International Justice observed in 1939:

In the opinion of the Court, the rule of international law on which the first Lithuanian objection is based is that in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse. . . . The Lithuanian Agent is therefore right

² Cf. *Annuaire de l'Institut de Droit International*, Session de Cambridge, 1931, Vol. I, pp. 256-491, Vol. II, pp. 201-212; *ibid.*, Session d'Oslo, 1932, pp. 235-282, 479-529.

³ *Ibid.*, Session d'Oslo, 1932, p. 525.

in maintaining that Estonia must prove that at the time when the injury occurred which is alleged to involve the international responsibility of Lithuania the company suffering the injury possessed Estonian nationality.⁴

In 1963 and 1965, the Rapporteur of the 1st Commission, after a thorough study of doctrine, practice and jurisprudence,⁵ resubmitted to the *Institut* the rule requiring the nationality of claimant state both at the date of injury and at the date of presentation. Both within the 1st Commission and in the plenary meetings at Warsaw, some members wished to ameliorate the rigors of the existing rule of international law by proposing, *de lege ferenda*, that where the nationality of the injured person was changed by operation of law, or where the beneficiary was of a different nationality from that of the person originally injured, an international claim could be brought either (1) by the state of the original nationality of the person injured, even though he had ceased to be its national; or, alternatively, (2) by the state whose nationality the beneficiary possessed at the date of presentation of the international claim, even though he was not its national at the date of injury.

Perhaps because, under the first alternative, a claim could be brought on behalf of a non-national, and, under the second alternative, a claim would be admissible if brought by a state whose rights under international law had not in the circumstances been violated by the respondent state against whom it was invoking international responsibility, the *Institut* was not prepared to recommend modification of the existing rule and contented itself with two preambular clauses reserving for later study any amelioration of the rules set forth in Articles 1 (a) and 2 of the resolution adopted.⁶

Although many members thought that, without preliminary study, the *Institut* should take no position with regard to the legal effect of succession of governments or states on the nationality of claims, the *Institut* was prevailed upon in its final meeting to insert the exception set forth in Article 1 (b).

In adopting paragraph (a) of Article 4, the *Institut* deliberately decided to reaffirm Article 4 of the Hague Convention of April 12, 1930, on Certain Questions relating to the Conflict of Nationality Laws,⁷ which provides: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses," instead of applying to such cases the principle of "active" nationality as decided by the Italian-

⁴ Panevezys-Saldutiskis Railway Case, (Preliminary Objections), *Estonia v. Lithuania*, Judgment of Feb. 28, 1939, P. C. I. J., Series A/B, No. 76, pp. 16-17. See also *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of April 11, 1949, [1949] I. C. J. Rep. 181-182; *Nottebohm Case*, Second Phase, *Liechtenstein v. Guatemala*, Judgment of April 6, 1955, [1955] I. C. J. Rep. 20, 21, 24.

⁵ Cf. Herbert W. Briggs, *La Protection Diplomatique des Individus en Droit International: La Nationalité des Réclamations*, Exposé préliminaire, November, 1963, 124 pp.; *idem*, *Rapport et Projet de Résolution*, March, 1965, 102 pp. Both reports will be published in the *Annuaire de l'Institut de Droit International*, Session de Varsovie, 1965, along with the discussions in plenary meetings.

⁶ See appended translation of the resolution.

⁷ 179 L. N. Treaty Series 89.

United States Conciliation Commission in the *Mergé* (1955) and other cases.⁸ Nevertheless, the *Institut*, with even less justification in practice or jurisprudence, adopted the "active" nationality rule in paragraph (b) of Article 4. By providing in paragraph (c) of Article 4 that a claim is inadmissible if presented on behalf of a person, whether or not of dual nationality, upon whom *naturalization* has been conferred in the absence of any link of attachment, a majority of the members sought to give some endorsement to the *Nottebohm* case without going so far as to endorse its rationale in the case of nationality acquired at birth.

The resolution as a whole was adopted by a vote of 31-0-7. While not all the provisions set forth in the resolution may meet the test of the first preambular paragraph as rules "developed from the practice of States and from international jurisprudence," at least the basic rule set forth with such a wealth of scholarship by Edwin Borchard in 1931 and 1932, and here reaffirmed in paragraph (a) of Article 1, meets that test. If, indeed, the rule requiring that an international claim possess the national character of claimant state both in origin and at the date of presentation is unjust or outmoded, the fourth preambular paragraph notes the right of states to modify it by agreement. So far, little inclination to do so has been evident.

Perhaps a concluding reflection may be permitted: the Rapporteur who braves the august and learned *confrérie* of the *Institut de Droit International* may at times have the impression that he has been *le taureau dans une vraie corrida*.

It remains to note the warm hospitality of the Polish legal fraternity.

At its final administrative meeting, the *Institut* elected Judge Jean Spiropoulos of the International Court of Justice as president, and the next session will be held in Athens in September, 1967.

HERBERT W. BRIGGS

ANNEX

RESOLUTIONS ADOPTED BY THE INSTITUTE OF INTERNATIONAL LAW, WARSAW SESSION, SEPTEMBER 2-11, 1965

I. The National Character of an International Claim Presented by a State for Injury Suffered by an Individual *

Adopted September 10, 1965

(First Commission)

The Institute of International Law,

Considering it opportune to formulate with precision the rules regarding the national character of claims as developed from the practice of States and from international jurisprudence;

Reserving the study of proposals which might improve the protection of individuals whether by diplomatic protection or by other methods and in

⁸ 1955 Int. Law Rep. 443.

* English translation by Herbert W. Briggs.

particular by any special procedures established by an international organization;

Reserving more especially for later examination the case where the nationality of the injured individual has changed as a consequence of territorial modifications of the State of which he was a national or by modifications of his personal statute;

Adopts the following rules as applicable in the absence of contrary provisions agreed upon by the Parties:

Article 1

(a) An international claim brought by a State for injury suffered by an individual may be rejected by the State to which it is presented unless it possessed the national character of the claimant State both at the date of its presentation and at the date of the injury. Before a court (*jurisdiction*) seised of such a claim, absence of such national character is a ground for inadmissibility.

(b) An international claim presented by a new State for injury suffered by one of its nationals prior to the attainment of independence by that State, may not be rejected or declared inadmissible in application of the preceding paragraph merely on the ground that the national was previously a national of the former State.

Article 2

When the beneficiary of an international claim is a person other than the individual originally injured, the claim may be rejected by the State to which it is presented and is inadmissible before the court seised of it unless it possessed the national character of the claimant State both at the date of injury and at the date of its presentation.

Article 3

(a) An international claim presented in respect of an injury suffered by an individual possesses the national character of a State when the individual is a national of that State or a person which that State is entitled under international law to assimilate to its own nationals for purposes of diplomatic protection.

(b) By date of injury is meant the date of the loss or detriment suffered by the individual.

(c) By date of presentation is meant, in case of a claim presented through diplomatic channels, the date of the formal presentation of the claim by a State and, in case of resort to an international court (*jurisdiction*), the date of filing of the claim before it.

Article 4

(a) An international claim presented by a State for injury suffered by an individual who possesses at the same time the nationalities of both claimant

and respondent States may be rejected by the latter and is inadmissible before the court (*jurisdiction*) seized of the claim.

(b) An international claim presented by a State for injury suffered by an individual who, in addition to possessing the nationality of the claimant State, also possesses the nationality of a State other than the respondent State may be rejected by the latter and is inadmissible before the court (*jurisdiction*) seized of the claim unless it can be established that the interested person possesses a closer (*prépondérant*) link of attachment with the claimant State.

(c) An international claim presented by a State for injury suffered by an individual may be rejected by the respondent State or declared inadmissible when, in the particular circumstances of the case, it appears that naturalization has been conferred on that individual in the absence of any link of attachment.

II. Companies in Private International Law

Adopted September 10, 1965

(Twenty-Eighth Commission)

The Institute of International Law,

Taking up this subject already dealt with at its Sessions at Hamburg (1891) and New York (1929) and taking into account the work recently done by the Conference on Private International Law at The Hague and by the International Law Association;

Desiring to make a contribution towards overcoming the controversy which exists at the present time with regard to the connecting factor determining the law governing companies;

Taking into account the interest of the international community in intensifying international economic relations by enabling companies to deploy their activities in States other than the State the law of which governs the company, and to do so directly and exclusively under that law;

Being of the opinion that in order to give due consideration to this interest it is necessary to trace the limitations which States should observe in the exercise of their power to apply the provisions of their own legislation to foreign companies, especially those provisions enacted with the purpose of protecting municipal creditors of foreign companies or of ensuring equal opportunities of competition between foreign companies and companies governed by the municipal law;

Recommends to all States to adopt the following rules in order to resolve the conflicts of law with regard to companies formed under a municipal law.

First Article

A company is governed by the law under which it has been incorporated.

Article 2

Any company established in accordance with the law mentioned in the First Article will be recognised in all other States as a corporate person.

Article 3

If a company's actual seat is situated outside the territory in which the law of its incorporation is in force and if the principal business activities of the company take place outside that territory, the recognition of the company as a corporate person may be refused if its constitution is not in accordance with the law of the place where it has its actual seat.

Article 4

If a company's actual seat is situated outside the territory in which the law of its incorporation is in force and if the company has no real connection with that territory, the recognition of the company as a corporate person may be refused if its constitution is not in accordance with the law of the place where it has its actual seat.

The real connection must be established by facts other than the mere indication of a registered office, and may in particular consist of a place of business in the territory, of the origin of the share or loan capital of the company, of the nationality or habitual residence of the shareholders or of those in control of the company.

Article 5

The actual seat of a company is the place at which it has its principal center of control and management, even if the decisions which are taken at that place follow directives given by shareholders who reside elsewhere.

Article 6

A company which is recognised in accordance with the preceding provisions enjoys all rights which are conferred upon it by the law by which it is governed, except rights which the State by which it is recognised refuses to grant either to foreign nationals in general or to companies of a corresponding type governed by its own law.

It can however carry on its business only under the conditions which are imposed by the local laws concerning the carrying on of business.

Article 7

The law governing the company applies to the form and to the substance of its constitution.

It applies in particular to the requirements concerning its capital, both at the time of its incorporation and in the course of its existence.

Article 8

The law governing the company determines what organs the company must have in order to operate, the powers of those organs, the rights and obligations of the persons serving as organs of the company and of the shareholders, both among each other and in relation to the company, in-

cluding in particular the protection of minority shareholders and the replacement of lost or stolen share documents.

Article 9

If a company has a place of business in a State other than the State of its incorporation, the State in which that place of business is situated may impose upon the company obligations with regard to:

- (a) the publication or the registration of its constitution, its annual accounts, and the powers conferred upon its organs;
- (b) the appointment of a representative in charge of the management of the place of business and, if required, the application to this representative of the local laws concerning the powers and duties of members of organs of management;
- (c) the application of the local provisions concerning the representation of the employees within the enterprise, but only of those which operate at the level of the plant or place of business;
- (d) the protection of creditors through the creation of financial securities.

The State in which the place of business is situated may also, in the interest of the creditors and under the conditions laid down in its own law, liquidate the place of business and the other assets belonging to the company situated in its territory.

Article 10

The public issue of shares is governed by the provisions of the law which governs the company as well as by the law of the country in which the issue takes place. The public issue of debentures is governed by the provisions of the proper law of the contract of loan as well as by the law of the country in which the issue takes place.

Article 11

The powers of the organs of the company to act on its behalf are governed by the law which governs the company. The liability of a person who has entered into a transaction by which the company is not bound is governed by the law of the place at which he has entered into that transaction.

Article 12

If a contract has been concluded in a country other than that in which the company is incorporated, the company cannot rely on any limitations of the power to act on behalf of the company which the law governing the company imposes upon the organ of the company that has concluded the contract if such limitations do not exist under the law of the place where the contract was concluded and if the other party to the contract did not have reasonable notice of the provisions of the law governing the company.

For the purposes of the preceding provision a contract is deemed to have been concluded in a given country only if it has been concluded there *inter praesentes* or, in the case of contracts by correspondence, if both the offer and the acceptance have taken place in that country.

Article 13

Any liabilities incurred by reason of a violation of the law governing the company are governed by that law.

Article 14

Any law which would be applicable by virtue of the preceding articles can be excluded if in a given case its application would lead to a result clearly incompatible with the public policy of the forum.

UNITED NATIONS PROGRAM OF ASSISTANCE AND EXCHANGE IN THE FIELD OF INTERNATIONAL LAW *

At its 1404th plenary meeting held on December 20, 1965, the General Assembly adopted Resolution 2099 (XX) in which it established a United Nations program "to promote the teaching, study, dissemination and wider appreciation of international law." Under the terms of the resolution the Secretary General of the United Nations is required, in conjunction with UNESCO, to take a series of measures designed to foster an increase in the knowledge and application of international law throughout the world.

Following the recommendation of a Special Committee which was set up by the General Assembly in 1963,¹ the program is divided into two halves, the first relating to steps to encourage and co-ordinate efforts now being made by states and by other bodies in the field of international law, and the second dealing with forms of direct assistance which are to be made available, particularly to the developing countries, by the United Nations and UNESCO. Subject to approval by the governing organs concerned, including those of UNESCO, the items which are described below indicate the nature and approximate scale of the program envisaged and will be of interest to all those concerned with the teaching, study or practice of international law.

* This note has been provided by the Office of Legal Affairs of the United Nations. For a summary of the discussions in the Sixth Committee and the Special Committee of the United Nations on this subject, see J. N. Hazard, "Technical Assistance in the New International Law," 60 A.J.I.L. 342 (1966). The text of General Assembly Resolution 2099 (XX) is printed below at p. 664.

¹ Report of the Special Committee on Technical Assistance to Promote the Teaching, Study, Dissemination and Wider Appreciation of International Law, U.N. Doc. A/5887, Feb. 17, 1965. The Special Committee was composed of representatives of Afghanistan, Belgium, Ecuador, Ghana, Hungary and Ireland. Mr. E. K. Dadzie (Ghana) served as Chairman and Mr. E. Bal (Belgium) as Rapporteur.

A. THE ENCOURAGEMENT AND CO-ORDINATION OF EXISTING PROGRAMS

Survey on the Teaching of International Law. During 1966 a UNESCO study will be published giving detailed information on the training in international law offered by universities and institutions of higher learning in Member States. The study will be published in English and French in the series "The University Teaching of Social Studies." Data on opportunities for study and training abroad in international law are also included in the annual UNESCO publication "Study Abroad."

Promotion of Fellowships Offered by States and International Organizations. UNESCO will take steps to encourage states and international organizations active in the field of international law to make offers of fellowships through it, and transmit information regarding such fellowships to all Member States.

Short-term Study at United Nations and Specialized Agency Headquarters. The Special Committee suggested that Member States should be invited every year to send, at their own expense, persons for short-term study of legal questions at the Headquarters of the United Nations or of specialized agencies agreeing to accept them. The Organization concerned would make facilities available for such a course and make a selection of candidates.

Exchange of Teachers and Scholars. The Special Committee also recommended that UNESCO should invite states to transmit to it the names of teachers and scholars who might be available for teaching in other countries. Lists of names would then be made available to Member States.

Legal Libraries and Publications. Besides encouraging institutions already receiving United Nations publications by deposit to make the existence of these collections more widely known, the Special Committee considered that UNESCO might invite states to offer legal libraries and publications, and transmit any offers received to Member States. The United Nations, for its part, will make an effort to improve the system and services of depository libraries and will grant sets of United Nations legal publications to up to fifteen institutions in developing countries in 1967, and to up to twenty such institutions in 1968, as indicated in the annex to General Assembly Resolution 2099 (XX).

Co-operation with Organizations and Institutions Active in the Field of International Law. In accordance with Resolution 1968 (XVIII), in 1964 the Secretary General sent a list of the legal topics placed before various United Nations organs to seventeen international organizations and institutions. They were invited to send to the Secretary General any relevant information or observations which they might care to make on these topics, and also to consider including some of them in their own programs. Replies received from the organizations and institutions concerned were circulated to Member States.

This practice is to be maintained by the Secretary General.

Co-Sponsorship of Meetings. The United Nations and UNESCO may, at their discretion, co-operate with Member States and other institutions in

the organization of conferences, seminars and training courses on legal subjects of interest to the United Nations and UNESCO.

Model Curriculum. UNESCO is to examine the problems of preparing a model curriculum for university courses in international law, oriented towards international legal questions of concern to developing countries.

The Place of International Law in Other United Nations Programs. It was recommended that greater importance should be attached to international law in other United Nations programs, in particular in the activities of the United Nations Institute for Training and Research. It was also proposed that the United Nations and UNESCO should give increased publicity to international law through their information media.

B. DIRECT ASSISTANCE AND EXCHANGE

The following are amongst the activities to be undertaken directly by the United Nations and UNESCO in the field of international law.

Training and Refresher Courses. In Resolution 2099 (XX) the General Assembly decided that a regional training and refresher course, of four weeks' duration, should be held in Africa in 1967, the first of a series of such courses to be held every two years, in rotation, in Africa, Asia and Latin America. The courses will be designed for young teachers, postgraduate students and junior governmental officials coming from the region concerned.

Fellowships. In 1967 the United Nations will award ten, and in 1968 fifteen, fellowships at the request of governments of developing countries to enable the recipients to study the work of the legal organs of the United Nations or other international organizations at their headquarters, or to undertake research on related problems of international law at a recognized university or research institute.

Experts. Under the terms of Resolution 2099 (XX) the United Nations will make available the services of up to three experts in 1967, increasing to a maximum of five in 1968, upon the request of developing countries. Such assistance may cover a wide field, ranging from the establishment or improvement of national programs for teaching international law to the giving of advice on the practical application of rules of international law.

Survey of the Codification of International Law by the United Nations. A survey will be prepared of some of the principal examples of the codification and progressive development of international law which have occurred within the framework of the United Nations.

Regional Seminars. Beginning in 1968 a regional seminar will be held every two years, in rotation, in Latin America, Africa and Asia. These seminars are intended to enable leading scholars and senior national officials drawn from the region to discuss international legal problems of either general or regional interest, and legal topics before United Nations organs.

The program for the encouragement and development of international law which is envisaged in Resolution 2099 (XX) is obviously of broad scope and offers a variety of prospects for future expansion. The program may encompass the establishment of new permanent institutions, for example,

and the provision of financial support to existing ones. The extent to which such possibilities can be realized will clearly depend on the amount of voluntary contributions the United Nations receives from Member States and other sources, as well as on the degree of support the program receives from international lawyers. The international community has already taken the decision, in the form of a General Assembly resolution, to support the series of practical measures designed to strengthen the growth of international law which have been outlined above. It is hoped that the international lawyers of the world will be encouraged by this step and that they will help ensure the success of the venture by giving it their full backing.

EDUCATIONAL AND CULTURAL AGREEMENTS AND ENTENTES: FRANCE, CANADA, AND QUEBEC—BIRTH OF A NEW TREATY-MAKING TECHNIQUE FOR FEDERAL STATES?

On February 27, 1965, France and Quebec signed at Paris an entente on exchange and co-operation in the field of education. On the same day, there took place at Ottawa between the French and Canadian Governments an exchange of letters whereby the Canadian Government signified that the entente met with its concurrence. Later, on November 17, 1965, France and Canada signed at Ottawa an agreement in which was included an exchange of letters permitting the Provinces (*all* of the ten Provinces of Canada) to enter into cultural ententes with France. On November 24, 1965, under the authority of this agreement, France and Quebec signed at Quebec another agreement concerning cultural affairs and, on the same day, the assent of the Canadian Government was signified by an exchange of letters between it and the Government of France. These agreements are important not only because of their subject matter, but, in particular, because they break new ground in the relationships of a political subdivision of a federal state with a foreign unitary state as well as in the relationships of the political subdivision with its own central government in regard to treaty-making powers.¹

I. *Background*

The Canadian Federation has long been faced with the problems of regional particularism versus centralism. In recent years, these problems have taken on larger dimensions in the context of the relations between the Province of Quebec and the Federal Government. Canada, with its two founding cultures, English and French, has striking regional particularisms, especially in cultural and educational matters. There are, in the Province of Quebec, cultural and educational particularisms which have given rise to the thesis that this Province is the mother country of all persons of

¹ For some detailed recent writings on the possibility of increased participation of Canadian provinces in international life, see Louis Sabourin, "La participation des provinces canadiennes aux organisations internationales," 3 *The Canadian Yearbook of International Law* (Annuaire Canadien de Droit International) 73-99 (1965); Jacques-Yvan Morin, "La conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparé," *ibid.* 127-186; and Edward McWhinney, "Federalism, Biculturalism and International Law," *ibid.* 100-123.

French culture in Canada who, according to the proponents of this thesis, constitute a nation, not so much in a political sense as in a cultural sense. Accompanying the increased consciousness of these particularisms has been a move to make Quebec more economically self-sufficient. This economic resurgence, with its emphasis on the slogan "*Maître chez nous*" ("Master in our own house") has also given impetus to a loosening of Quebec's dependence on the Federal Government.

This thrust of the Province of Quebec towards a greater measure of cultural and economic self-sufficiency has once more revived the perennial Canadian dilemma whereby the treaty-making power is vested in the Federal Government but the power of implementation resides in many instances in the Provinces. Like other federations, Canada has had difficulty in securing the implementation of international conventions in cases where the subject matter of these conventions falls exclusively within provincial jurisdiction or where the subject matter is partly within federal, and partly within provincial, jurisdiction. For example, Canada has been unable to give effect, merely through federal ratification, to many labor conventions,² and in order to implement them has had to rely on extensive consultations with provincial governments. Similarly, in the field of human rights, where the subject matter of treaties would fall within the jurisdiction of the federal and provincial governments, extensive consultations would be necessary.

In the case of Quebec, the desire to promote French culture in order to avoid assimilation in the sea of Anglo-Saxon culture on the North American Continent and the wish to modernize the educational system in order to promote the economic betterment of the Province has moved provincial authorities to seek close ties with France which is the cultural mother country of several million French-speaking inhabitants of the Province.

It is against this background that certain developments in Canadian treaty-making techniques may now be examined.

II. *Franco-Quebec Educational Entente of February 27, 1965*

On July 13, 1964, a delegation from the Commission on Cultural, Family and Social Affairs of the French National Assembly visited M. Paul Gérin-Lajoie, Vice President of the Council of Ministers (Quebec) and Minister of Education, and talks were started with a view to developing co-operation between France and the Province of Quebec in the field of education. The proposal presented by M. Gérin-Lajoie at that time became the subject of an interview between the President of the French Republic and the Prime Minister of Quebec, on November 12, 1964, at Paris. Delegations from France and Quebec met on two different occasions: at the Department of Foreign Affairs at Paris, on November 4, 1964, and at the Department of Education at Quebec, on November 20, 1964. As a result of these meetings there was signed at Paris, on February 27, 1965, the "Entente between

² This is due to the decision of the Judicial Committee of the Privy Council in (*Re Weekly Rest, Minimum Wages and Hours of Labour Acts*) *A.-G. for Canada v. A.-G. for Ontario and Others*, [1937] A.C. 326; 31 A.J.I.L. 348 (1937).

France and the Province of Quebec concerning an Exchange and Co-operation Programme in the Field of Education.”³ M. Paul Gérin-Lajoie and M. Claude Morin, Deputy Minister for Federal-Provincial Affairs of Quebec, signed for Quebec, while M. Christian Fouchet, Minister of National Education of the French Republic, and M. Jean Basdevant, Director General of Cultural and Technical Affairs, Ministry of Foreign Affairs, signed for France.

Also on February 27, 1965, an exchange of letters took place at Ottawa between M. Charles de Pampelonne, Chargé d'affaires a.i., Embassy of France, and the Honorable Paul Martin, Secretary of State for External Affairs. The French note requested the Secretary of State for External Affairs make it known whether the entente met with his concurrence. The latter replied that the entente met with the concurrence of the Government of Canada.⁴

This entente covers the following topics: exchange of researchers and university professors, training periods for teachers of Quebec normal schools, development of curricula, technological education, Quebec Technical Normal School, student exchanges and degree equivalence.

The French and Quebec Delegations agreed that implementation of the program defined in the entente would require a joint effort. It was therefore agreed that meetings for the purpose of supervising this implementation should be held from time to time, alternately in Quebec and Paris, within the framework of a Permanent France-Quebec Co-operation Commission.

Some question was raised in the Canadian House of Commons by the Leader of the Opposition as to whether a Province could enter into an agreement with a foreign state without the prior consent of the Federal Government.⁵ During the discussion in the House, the Secretary of State for External Affairs stated that the Federal Government had been aware of the desire of the Government of Quebec with regard to an agreement covering cultural exchanges with France, and reported to the House that the procedure to make effective “this entente, this consensus,” was discussed by him with the Minister of Foreign Affairs for France.⁶ On April 27, 1965, he said:

... well before the accord between the Governments of Quebec and France was executed in February of 1965 three-way discussions took place among the officials of the Canadian, French and Quebec Govern-

³ For an English translation of the text of this entente, see 1 Education Weekly, A Department of Education Bulletin 199-202 (1965) (Province of Quebec).

⁴ The English translation of the exchange of letters obtained from the Department of External Affairs contains in the Canadian letter addressed to the French Government the following passage: “I have the honour to inform you that this ‘Entente between France and Quebec on a Programme of Exchanges and Co-operation in the Field of Education’ meets with the concurrence of the Government of Canada.”

⁵ H. C. Deb. (Can.), April 26, 1965, at 395.

⁶ *Ibid.* 396-397. For text of a statement issued by the Secretary of State for External Affairs on April 23, 1965, see “The Provinces and Treaty-Making Powers,” 17 External Affairs 306 (1965).

ments with a view to working out a procedure by which the arrangements which Quebec wished to enter into with the competent French authorities could have international effect.

The approach agreed upon on all sides was that the Canadian and French Governments would grant their formal assent to or concurrence in the arrangements, and that this would be done by an exchange of notes between representatives of the Federal Government and of France. The exchange of notes was a type of umbrella agreement between the two Governments under which international effect was given to an arrangement which otherwise would have had no standing in international law.

The agreement was signed by Quebec with France in Paris on February 27. By prearrangement an exchange of notes took place on the same day between the French chargé d'affaires here in Ottawa and myself, the Canadian Government concurred in—that is, gave its assent to the agreement between France and Quebec.⁷

III. *Franco-Canadian Cultural Agreement of November 17, 1965;*
Franco-Quebec Entente on Cultural Co-operation of November 24,
1965

On May 14, 1965, the Honorable Paul Martin, then Acting Prime Minister, was asked in the House of Commons concerning a second distinct agreement between the Government of France and the Province of Quebec which the Quebec Cultural Minister was purported to be negotiating with the French Government. The Acting Prime Minister replied that, when in Paris during the previous week, he had discussed the matter of cultural affairs with members of the Government of France. In fact, he reported, the head of the cultural affairs department of the Quai d'Orsay, M. Basdevant, would be coming to Ottawa on May 25 to discuss the general subject of cultural affairs. He recalled that when he had seen the French Foreign Minister in December, 1964, it had been agreed between them that France and Canada would execute "what is called in French an *accord cadre*, a general agreement, in this whole area. It would provide a foundation for separate ententes by any of the Provincial jurisdictions. Some of the Provinces other than Quebec may be very anxious to share in some of the cultural exchanges which the Government of France undertakes with many countries in the world."⁸ In response to a supplementary question, he added the following:

There is a recognition by France of the necessity of the *accord cadre*, and there is recognition of the constitutional allocation of powers provided for in section 92, but none of this disturbs the provision in the constitution as to the treaty-making powers of the federal government.⁹

On November 17, 1965, at Ottawa, France and Canada signed the text of a cultural agreement.¹⁰ The aim of the agreement was described as being

⁷ H. C. Deb. (Can.), April 27, 1965, at 629.

⁸ *Ibid.*, May 14, 1965, at 1290.

⁹ *Ibid.* at 1291. The section 92 to which reference is made is found in The British North America Act, 1867, 30-31 Victoria, c. 3 (United Kingdom).

¹⁰ For the English text of the agreement, see 17 *External Affairs* 514-516 (1965); the French text will be found on the corresponding pages of the French edition of this

to establish a framework for carrying out co-operation in the cultural field between France and Canada. The initiative was also described as being in accord with the desire for a policy of close co-operation between France and Canada expressed by General Charles de Gaulle and the Honorable Lester B. Pearson, Prime Minister during their visit in Paris in January, 1964.

The agreement consists of a preamble, eleven articles and an exchange of letters. The aims of the agreement as set out in the preamble are to strengthen the traditional ties of Franco-Canadian friendship by developing cultural, scientific, technical and artistic exchanges, to encourage the dissemination of the French language, and so to contribute to the strengthening of the traditional bonds of friendship between Canada and France. The means whereby these ends are to be achieved are outlined in the eleven articles of the agreement. Exchanges are to be carried out in the academic, artistic, scientific and cultural fields, and will involve films, television, radio and publications.

As in the case of the earlier Franco-Quebec entente of February 27, 1965, a commission—this time a Franco-Canadian joint commission—was to be set up to facilitate the increased co-operation, to examine how the agreement can be best implemented, and in particular to draw up a program for submission to the two governments.

In an exchange of letters¹¹ between the Canadian and French Governments which took place on November 17, 1965, it was agreed that

Within the framework of the said Agreement exchanges with France in the field of education and of cultural, scientific, technical and artistic relations may be the subject of ententes entered into with Provinces of Canada. In such cases the French Government will inform the Canadian Government.

The authority for the Provinces to enter into such ententes will stem either from the fact that they have indicated that they are proceeding under the Cultural Agreement and the exchange of letters of today's date or from the assent given them by the Federal Government.

The so-called "framework agreement" ("*accord cadre*") was followed by the signature on November 24, 1965, at Quebec, of a Franco-Quebec entente on Cultural Co-operation.¹² But the new entente, while referring to the entente of February 27, 1965, makes no mention of the framework agreement of November 17, 1965, or of the assent of the Federal Government. Also on November 24, 1965, there took place at Ottawa, an exchange of

publication. The agreement was drawn up in the English and French languages, both texts being equally authentic. A further *accord cadre*—this one concerning cultural and technical affairs—was signed in Algiers on March 16, 1966, between Canada and Algeria. See *La Presse*, Montreal, Que., March 17, 1966, p. 33, cols. 7-9.

¹¹ For the English text of the exchange of letters, see 17 External Affairs 516-517 (1965); the French text will be found on the corresponding pages of the French edition of this publication.

¹² For the text of the English translation of this entente, see 17 External Affairs 521-523 (1965); the original French text will be found on the corresponding pages of the French edition of this publication.

letters between the French and Canadian Governments.¹³ The French letter referred to the entente that was to be signed at Quebec on the same day and requested confirmation of the Canadian Government that this entente met with the assent of that Government. Such assent was given in the Canadian letter.

From what has been said above, it would appear that if an entente of a Canadian Province with France refers to the Franco-Canadian framework agreement of November 17, 1965, and the related exchange of letters of the same date, nothing more would seem to be required in the way of assent of the Federal Government. But if no such reference is made—and none was made in the Franco-Quebec entente of November 24, 1965—there must be an express assent given by the Federal Government. The latter was contained in the exchange of letters that took place between the French and Canadian Governments at Ottawa on November 24, 1965.

It may be of interest, at this stage, to refer to some points of comparison between the Franco-Quebec entente of November 24, 1965, and their entente of February 27, 1965:¹⁴ Both ententes are in the French language only. The earlier entente makes no reference to the date of its entry into force; the later one was described as entering into force upon signature. Part of the evolution of the entente technique is seen in the difference in terminology used in the ententes of February 27 and November 24, 1965. The earlier entente refers only to "Delegations," the later one to "contracting parties." While the earlier one was styled as an entente between "France" and "the Province of Quebec," the later one was described as being between "the Government of France" and "the Government of Quebec."

IV. Possible development of an improved treaty-making technique in relation to political subdivisions of federal states

The foregoing recital contains much that can be applied in the development of more fruitful treaty-making techniques where political subdivisions of federal states are involved. At a time when these political subdivisions are increasingly involved in cultural, economic and technological contacts with foreign unitary states it may no longer be appropriate to rely upon the bland approach found in federal clauses now inserted in international instruments. This approach is illustrated by the federal clause in the Constitution of the International Labor Organization which provides, in effect,

¹³ For the English text of this exchange of letters, see 17 *External Affairs* 520-521 (1965); the French text will be found on the corresponding pages of the French edition of this publication.

¹⁴ The Franco-Canadian Agreement of Nov. 17, 1965, and the exchanges of letters dated Feb. 27, Nov. 17 and 24, 1965, were done in the English and French languages. This is in accordance with the practice of the Canadian Government to sign all official international agreements in English and French, each text being equally authentic. See, in this regard, Department of External Affairs Press Release, March 12, 1966: Speech of the Honorable Paul Martin, Secretary of State for External Affairs to the International Relations Club of the Université de Montréal, p. 14. In that speech he pointed out that the new agreement with the United States on air services had been done in English and French.

that the obligation of federal states that are members of the Organization, in the matter of conventions and recommendations accepted by the Organization, is limited to submitting them to constituent States or Provinces.¹⁵ But there may be political subdivisions within a federation that wish to implement a convention signed by the federal government, or even to promote entry into a convention on a particular subject, in circumstances where other such subdivisions are not interested in doing so. In what way could the Franco-Canadian-Quebec technique be applied to such situations? It is submitted that this technique—assuming a suitable constitutional and political context—could be applied so as to permit participation of political subdivisions of federations in bilateral arrangements and, with appropriate adaptations, in multilateral arrangements, the word “arrangements” being used here to cover treaties, conventions, agreements and ententes. The way in which the technique would be applied is now examined.

A. *Bilateral arrangements*: An umbrella agreement would be concluded by the federal government with the government of a unitary state. This agreement would contain the advance assent of the federal government to an entente that would be concluded between the unitary state and the political subdivision of the federation. The assent would be effective either if the entente referred to the umbrella agreement (including an exchange of letters, if any) containing the assent *or*, in the absence of such reference, the government of the federation and that of the unitary state recorded their assent in an exchange of letters. Here it is observed that the Franco-Quebec entente of November 24, 1965, made no mention of the umbrella agreement of November 17, 1965, between France and Canada and hence the assent of the Federal Government was included in an exchange of letters between that Government and the French Government.

B. *Multilateral arrangements*: The technique described above could be adapted so as to enable political subdivisions of a federation to participate in multilateral arrangements whose subject matter falls either wholly or partly within the jurisdiction of such subdivisions.¹⁶ But while the concept of prior assent or concomitant assent of the federal government would be retained, the mode of giving assent would be changed in view of the complex relationships among many states that would fall to be recorded by the depositary of a multilateral arrangement. This would be accomplished by a series of declarations, prescribed by the federal clause outlined below, thus:

¹⁵ For the text of Art. 19(7), which is the federal clause in the Constitution of the International Labor Organization, see Hudson, 9 International Legislation 1942-1945, No. 665a, pp. 763-764. For another example of such a clause, see Art. 41 of the Convention Relating to the Status of Refugees, Geneva, July 28, 1951, in U.N. Doc. ST/LEG/6, Aug. 5, 1957, Handbook of Final Clauses, p. 93. An identical clause is found in the following agreements: Convention on the Recovery Abroad of Maintenance, New York, June 20, 1956 (Art. 11), and Convention Relating to the Status of Stateless Persons, New York, Sept. 28, 1954 (Art. 37).

¹⁶ For a concise summary of the relationships of federal governments and component states in regard to treaties, see K. C. Wheare, Federal Government 169-186 (4th ed., London, New York, Toronto, 1963).

1. With respect to those articles of the convention that fall wholly or partly within the legislative jurisdiction of a political subdivision (*e.g.*, component state, province or canton) of a federation that has signed this convention, the federal government shall bring such articles and this article to the notice of the appropriate authorities of such subdivision and shall file with the depositary a declaration to that effect.

2. The filing of such declaration shall constitute authority under this convention for that subdivision, provided it has taken appropriate constitutional means to implement the articles falling within its jurisdiction, to file a declaration of its own with the depositary stating that it is bound by such articles, that it has taken steps to implement them and that it is also bound by any articles which fall within the federal jurisdiction and in respect of which the federal government has filed a declaration to the effect that it has taken steps to implement them and is bound by them.

4. The political subdivision that files a declaration as aforesaid shall, in respect of those articles by which it is bound, be deemed to be an associate contracting party to this convention.

V. *Conclusion*

It is seen from what has been said above that the treaty-making technique used in the conclusion of the Franco-Canadian-Quebec arrangements in 1965 merits serious study with a view to enabling political subdivisions of federal states, through the adoption of such a technique or an adaptation thereof, to assume international obligations more directly and more extensively. In the case of those federal states whose constitution permits a political subdivision to enter into an obligation with a foreign state—and this is the case for Canada—it may be useful to prepare model guidelines applicable to the case of bilateral conventions as well as a standard federal clause that will enable a political subdivision to assume international obligations, subject always to the consent of the federal government. Where the federal constitution forbids the political subdivisions from entering into obligations with foreign states, it may well be found that nothing short of constitutional amendment will permit the adoption of a more liberal treaty-making technique and, if so, the possibility of an appropriate amendment could be given consideration.

When the world had relatively few federal states it might have been possible to discount the importance of the lack of participation of these states and their political subdivisions in international conventions on the basis that only those few states were involved. But, today, in view of the increased number of federal states that have come into existence, it is no longer possible to seek solutions in terms of bland federal clauses in multilateral conventions or to be content with the absence of effective bilateral arrangements between an important political subdivision of a federal state and a foreign state when there is a community of interest between the subdivision and the foreign state. Accordingly, the treaty-making technique described above is commended for study so that, at least in those cases where

it is constitutionally and politically permissible, there may be effective communication between "the water-tight compartments" of Lord Atkin's "ship of state" and the rest of the world.¹⁷

GERALD F. FITZGERALD *
Montreal, Quebec

REGULATION OF INTERNATIONAL TRADE

SUMMARY REPORT

Board of Review and Development

Meeting, November 5 and 6, 1965

A knowledgeable observer, Professor Harry G. Johnson of the University of Chicago, noting that the past several years have been characterized by a great deal of activity in the international economic field, has recently posed the fundamental problem that has been thrown up by these stirrings:

What is important about all this activity on the international front is not so much the fact that it has been going on, as the fact that it has emphasized and brought to public view serious and sharp divisions among the major countries or groups of countries in the world economy with respect to the direction in which the present system of international economic organization should evolve. These divisions are based on the dissatisfaction of important members of the world economy with the present system of international economic organization, and the international institutions in which that system is incorporated. The international economic system referred to is, of course, the system prevailing among the nations of what is commonly described—with some degree of euphemism—as the "free world," and not of the countries of the Communist *bloc*. The divisions among these nations imply that the present system of international economic organization, built with so much careful thought by the Bretton Woods Agreements, must either evolve in new directions to accommodate the dissatisfied, or run the risk of disintegration. Since the international institutions under which the system is organized have in fact been evolving fairly rapidly in recent years in adaptation to their changing environment and the changing demands made upon them, the problem for the future might perhaps be more accurately described as whether the emerging dissatisfactions can be adequately dealt with by further and accelerated evolution of these institutions, or will require a radical change in the whole framework of international economic organization. In either case, it is clear that the international economic system has arrived at a crossroads; and that which direction it now takes is a vital matter for the future of the world economy.¹

¹⁷ Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 326 at 353-354: "While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure."

* This note was written in a private capacity. Responsibility for opinions expressed is that of the author.

¹ Harry G. Johnson, *The World Economy at the Crossroads: A Survey of Current Problems of Money, Trade and Economic Development* 1-2 (Oxford: Clarendon Press, 1965).

Additional facets of this problem are the changed perspectives consequent upon the steady loosening of inhibitions against East-West trade and the indications of stronger desires for increasing "outside" trade by countries which formerly were much more clearly identified in group terms than now.

The Board of Review and Development of the American Society of International Law decided that it would be profitable to examine one large segment of this mobile area of international economic relations, the regulation of international trade, which in the recent past has witnessed perhaps the greatest amount of legal development in the form of both bilateral and multilateral agreements, and some institutional superstructure as well.

Accordingly, it sponsored a small conference in Washington, November 5 and 6, 1965, to identify more closely the emerging problems of international trade in order to suggest possible lines of future inquiry looking toward recommendations concerning future legal and institutional developments. For this purpose, a group of lawyers and economists with a background of interest and experience in this field was assembled.²

They were asked to address themselves to the following agenda:

A. Trade Relations Within the Western Industrial World

1. What is the nature of existing tensions within EEC (European Economic Community) and what will be their effects upon

(a) EEC trade and other developments, and

(b) EEC-EFTA (European Free Trade Association) trade relations?

2. What will be the effects of such tensions on EEC-U.S. trade relations?

3. Is there a substantial rôle for GATT (General Agreement on Tariffs and Trade) in future Western trading relations? For OECD (Organization for Economic Cooperation and Development)? For other institutional devices? If so, what kinds of rôles?

B. East-West Trade Relations. On the assumption that increased trade in peaceful goods is desirable even though not vital for the Soviet European bloc or the West,

² Those attending were: Hans W. Baade, Duke University School of Law; Joseph D. Coppock, Pennsylvania State University; Kenneth W. Dam, University of Chicago Law School; Richard W. Edwards, Jr., Program Assistant, A.S.I.L.; John R. Garson, Harvard Law School; Kazimierz Grzybowski, Rule of Law Center, Duke University; Luke T. Lee, Rule of Law Research Center, New York City; Monroe Leigh, in practice in Washington, D. C.; John M. Lettiche, University of California; Soia Mentschikoff, University of Chicago Law School; H. C. L. Merillat, Executive Vice President of the Society; Stanley D. Metzger, Georgetown University Law School; Sidney Picker, Jr., Executive Secretary, Trade Information Committee, Office of the United States Special Representative for Trade Negotiations; Stefan A. Riesenfeld, University of California School of Law; Eric Stein, University of Michigan Law School; David Stoner, Office of the Legal Adviser, Department of State; Walter Sterling Surrey, in practice in Washington, D. C.; Raymond Vernon, Graduate School of Business Administration, Harvard University; Herman Walker, Jr., New York State University College; Robert R. Wilson, Duke University Commonwealth-Studies Center.

1. Should strategic goods controls be organized multilaterally more than they have been in COCOM (Coordinating Committee on Export Controls)? If so, how?

2. What measures, unilateral or multilateral, if any, can Western countries take to increase substantially their trade with the Soviet European bloc?

3. What measures, unilateral or multilateral, if any, can bloc members take to increase substantially their trade with the West?

4. Are there bilateral East-West arrangements that are capable of achieving the objectives of 2 and 3?

5. What are the prospects for increased Western-Communist Chinese trade?

C. Trade Relations Within and With the Less-Developed Countries

1. What are the prospects of regional markets such as LAFTA (Latin American Free Trade Association) and the OAU (Organization of African Unity) arrangements for increasing substantially trade within the less-developed world? What effects are they likely to have upon access to less-developed countries of goods of developed countries?

2. Three current proposals in the trade area put forth by less-developed countries are trade preferences, commodity agreements, and compensatory financing. Do any offer substantial prospects for increasing world trade, including trade between developed and less-developed countries? Do any offer substantial prospects for increasing trade between developed and less-developed countries, without increasing world trade?

What measures, if any, are superior to these three proposals from the vantage point of increasing world trade, including that of developed and less-developed countries?

While the discussions sometimes ranged outside the agenda items from time to time, as is inevitable, they did so surprisingly little and hence managed to deal with most of these items, which were suggestive and not binding, in an organized way. For the purposes of this summary, they are all organized within the agenda items.

A. Trade Relations Within the Western Industrial World

Almost as an introduction to this subject, several participants were intrigued by the phenomenon of the "international corporation" or "multinational corporation," the integrated organization that functions in a large number of countries and can, through intra-corporate cost and allied practices, manage to offset a great many barriers to trade erected by governments. The extent to which this kind of institution had grown, the degree to which it embraced or would embrace capital of different countries (*e.g.*, a Franco-German company), its present and future significance for the larger trading relations among countries—these were deemed to be worthy of further research. At the close of the discussion of this agenda item, there was an additional animated discussion of this growing international corporate device as almost a substitute "private government" in terms of

the actual carrying-on of trade. Throughout the meeting the discussions returned repeatedly to the importance of the multinational corporation in international trade, investment, and finance, and there is no doubt that there has been less systematic study of this area than it deserves.

Proceeding from this aspect of trade relations, the discussion turned to present EEC developments. The EEC crisis was seen as a constitutional crisis. Neither the matter of an agricultural financing scheme—on which President de Gaulle would likely get his way—nor the question of future majority voting is really crucial. The future rôle of the European Commission and its power of initiative are more important. This in turn is related to the kinds of relations which the Community can create with the East, with the U. S., and with EFTA.

Will the Commission be able to spur the formation of a common basis within the Six for dealing with state-trading countries? Will the Commission be able to lead in common approaches with the U. S. on antitrust, on non-tariff trade barriers, on shipping policies, on tied lending, on non-discrimination in public works contracts? In the important agricultural field, can it lead on commodity agreements, such as a meaningful world-wide grain agreement? These are apart from further forward movement on corporate and tax problems, and, perhaps for the future, in internationalizing "planning" of economic development, the beginnings of which have been seen in France and The Netherlands.

The movement toward such integrative development clearly was dependent, in short-run terms at least, on the solution of the EEC crisis, and that solution might not be known for some time to come.

In this connection, it was pointed out that it was appropriate that agriculture and primary commodities had been rather forcibly brought back into the focus of trade, since this has shaken people out of a preoccupation with Atlantic matters and turned attention to world trading problems which cut across regional affairs. The "Kennedy Round" of tariff negotiations has had to take account of these matters, and the recent efforts to secure a world-wide wool textile control scheme to go with the cotton textile control scheme is another example of the scope of the commodity problems.

The relationship of regional groupings and consequential trade restraints to the underlying non-discriminatory approach to international trade was deemed of growing significance for the future. The recent Australia-New Zealand agreement, ostensibly a free-trade association but essentially a preferential arrangement, is an example of a growing trend with serious portents for the future growth of world trade.

There can be, however, an over-emphasis on tariffs as a determinant of trade. It was pointed out that the erosion of high tariffs has resulted over the years in their becoming more of a low than a high hurdle. More important, there is growing interest in explaining trade in terms other than price levels: structure of demand, timing of innovations, first investments in large-scale plants, benefits of industrial research in connection with government programs such as those of military and outer space establishments, etc. Nonetheless, the success of the Kennedy Round is of impor-

tance, because the ramifications of protectionists' putting over protectionism once again are wide indeed, indicating the intention of countries in the psychological sense, perhaps, more than in any tangible way. Moreover, tariffs could once again become more significant if countries began raising them. Since motion in trade is inevitable, it makes some difference whether it is motion toward or away from trade liberalization.

Protectionism may also be on the downgrade in agriculture in long-run terms, as the percentage of agriculture in GNP and in the labor force declines. Europe will not reach our 4 percent and 7 percent respectively for some time. When they get down to 10-12 percent, Europeans may begin to be more liberal. Hence, it makes little sense for the U. S. to insist on agricultural liberalization in Europe now, at least on anything like a large scale.

Agriculture, it was thus clearly seen, is one of the major tension-provoking areas within the Western trading world, and within the Common Market as well, with France seeking to ease her surplus problem with a guaranteed market in the Six, at the expense of other insiders as well as of outside suppliers.

In this respect, agriculture is unique. Not only have protectionist measures been of diminishing importance in industrial products trade, but there has been growing interdependence in monetary matters. Even so, the international problems of agriculture may be about to be transformed to some degree through growing food shortages in less-developed countries. The question of degree is difficult: it depends on population increases, which are very difficult to predict; on internal transportation developments, which can do wonders without absolute increases in production; on increased fertilizer utilization in less-developed countries. In other words, it is very difficult to answer the question: Should the U. S. begin developing new surpluses?

The discussion then turned to the future of institutional changes—the enlargement of EEC and the rôle of GATT.

As to the enlargement of EEC, while the gradually emerging common interest of the United Kingdom and France in lower agricultural prices and in joint research and development projects in other fields was noted, an enlargement—adding the United Kingdom to the Six—was not foreseen for several years at least. It was speculated, moreover, that a subtraction from the Six—Italy—ought to be looked at, though most believed that regardless of the weakness of governments there, the national interest of Italy and the political interest of the others precluded such a move.

Generally, however, in longer-run terms, a coming together of EEC-EFTA within a looser structure, joined by Switzerland, Austria, and others, was by no means improbable. The character of EEC would have changed toward, but not necessarily fully embracing, Gaullist concepts in the meantime.

Two further subjects were touched on in this discussion of Western World trade relations: Commonwealth matters, and the future of GATT. On Commonwealth relations, the most notable observation was the lessening

importance of this preferential relationship. The share of intra-Commonwealth trade in the total trade of major members was declining rapidly; Britain's immediate market problem is access to Western Europe, part of which is solved through EFTA, and other members are faced with related, but non-Commonwealth, problems, such as Australia's growing marketing interests in Northern Asia. The lack of Commonwealth purchasing power is the reason for this increasing weakness.

As for GATT, if tariffs, especially after the Kennedy Round, are of lesser importance, can GATT contribute to the solution of the manifold non-tariff trade-barrier problems? It was thought that it had an important rôle in this area, although the question was raised whether it had acquired too heavy a "developed country" orientation to deal effectively with the range of problems that were world-wide rather than Western in scope. OECD tended to be viewed by some as in reserve in the trade area, to do the job that GATT should do if GATT proves to be unable to perform satisfactorily.

B. *East-West Trade Relations*

It was pointed out that there has not yet been an adequate study of the bilateral trade agreements between the U.S.S.R. and the Western developed nations, between the U.S.S.R. and the underdeveloped countries, or between the "juristic personalities" of the U.S.S.R. and private groups outside, in terms of payment terms, the meaning of "usages of trade" in a state-trading context as compared with entities in a competitive market, requirements to ship in Soviet bottoms, subsidization, and the like. In addition, in the view of some, the modes of settlement of disputes, such as arbitration, need systematic study, as well as methods of enforcement, such as execution upon property.

It was observed that generally there were three periods in Soviet economic foreign policy. Until 1935, contracts were made abroad and foreign law applied in arbitrations or adjudications in foreign places and courts. From 1935 to the present, foreign trade was "nationalized" in the sense of having Soviet law apply to Soviet-based arbitration; in both cases, the types and amounts of trade were rigidly controlled from above by the Soviet Government. Now, there is a tendency to allow limited decentralization of trade, from Finland to the Leningrad area, for example, through contracts made directly between Finnish exporters and Leningrad distributors. This may expand; in fact, it may have expanded already. It was believed that fuller exploration of these trends was worthy of research.

On the broader aspects of East-West trade, it was observed that in peaceful goods the determining factor in increased trade, other than "regular" economic factors, was credit. The levels of trade being small, there is insufficient margin for long-term credits generated out of dollar earnings. If the U. S. is willing to be as generous in extending credit to an exporter to Rumania, for example, as to one who trades with an Italian importer, most other problems have loosened sufficiently to permit of solution, including utilization of American management services, technicians, and even "security debentures." In short, once the credit problem is solved, the

problems are much like those involved in trading with less-developed countries generally. The major differences are (1) that there is a public relations problem at home and abroad based upon political attitudes of some years' standing, which it will take time and increased trading to overcome; and (2) that while there has been a marked change in the former "satellite" countries in that technicians are replacing politicians in the trade ministries, there is still some room for improvement. The U. S. is at a disadvantage with Western Europe in credit, with Western Europe offering more attractive terms. This emphasis on credit should not be taken to indicate that the group considered that present U. S. trade discriminations against Soviet goods, such as denial of most-favored-nation treatment, exclusion of selected furs, and the like, should be maintained. Their retention was not considered desirable; their removal, however, would have a greater psychological and political than economic effect.

This difference in East-West trading attitudes, with the U. S. being stricter than many other Western nations, is of course emphasized vis-à-vis Communist China. Western countries other than the U. S. are increasing trade with Communist China; the U. S. continues to embargo all its trade.

While no one believed that East-West trade would assume anything like the economic importance of Western industrial world trade, it was believed that further research would be quite useful in additional areas. Among these are: the rôle of tariffs and price levels in East-West trade, as decentralization within the state-trading area continues to grow; and the extent to which export potentials within the industrializing Eastern areas, other than in "undifferentiated products," are realized.

C. Trade Relations Within and With the Less-Developed Countries

The agenda items were framed with the current drives of the less-developed countries (LDC's) in mind: regional markets (such as LAFTA), commodity agreements, compensatory financing, tariff and other trade preferences for manufactured or processed products. In all of these, trade as an aid to economic development is their frame of reference.

On regional markets, it was pointed out that classical economic theory tested preferential groups, for their benign or malign effects, on the basis primarily of size and competitiveness of product. On this scale, the LDC regional groupings would in all likelihood not qualify as benign both because of lack of size and because their trade was "complementary," not competitive, though one had to look at particular cases.

But, it was added, a great deal depends on objectives, short-run and long-run. Thus, higher national income may deliberately be sacrificed to industrialization. Moreover, political objectives are of great importance: "LAFTA, as we all know, was generated, as most of these groups are, more out of hate than love." Confronting the United States with a united Latin America has long been believed, in Latin America, to be in Latin America's interest, not against it.

In terms of LAFTA, there is a serious question whether "complementarity agreements" (opening one's market on exceptionally favorable terms

to products which do not compete with those produced domestically), which are at its heart, can break down national markets and result in real economies of scale. Moreover, whether the other integrative elements—welcoming foreign investment of LAFTA on a discriminatory basis (that is, on more favorable terms than third-country investments), co-operation in currency stabilization, investment in transportation—will be pursued sufficiently, is very much in question. In addition, whether the legal infrastructure for modern integration can be created, whether credit and other forms for expansion of enterprise can evolve, are also problematical.

Along with integrative techniques, other modernizing drives within countries are felt. In this connection, it was pointed out that import substitution—a major device in Mexico, Argentina, Brazil—appears to have built-in limitations. Modern steel, chemical, electronics industries simply need larger markets than can be provided by even those large countries on an individual national basis. However, preoccupation with expansion of internal transport, in countries like Colombia, or efforts to bring the Indian into the economy, as in Peru, can be expected to compete for attention, even as a precursor to integrative endeavors.

Turning to Arab efforts, it was observed that despite declarations, meetings, and agreements to reduce or eliminate tariffs, little has happened. It is not clear that the requisite degrees of common interest and trust exist among Arab countries. Tariffs are a highly important revenue source, other forms of taxation being much more difficult to operate, given the lack of governmental strength and dependable administrative machinery, and the power of landlord groups who tend to resist direct taxation.

Central America seems quite different. While the time since the efforts of the Central American countries began is still too short to provide a basis for confident judgments, there seems to have been significant development, not unrelated to the complementarity agreements that are at the center of their Common Market. Whether this will continue, or whether the monopolistic character of the initial investments will slow down what looks to be promising progress, is an open question at present.

It was pointed out that there had been very serious problems in East Africa, caused in part by the very differing levels of industrialization.

It was further observed that sometimes a clear preferential arrangement for an “undeveloped” country is dressed up to look like a free-trade area. The Australia-New Zealand agreement, previously mentioned, is a case in point. It covers 60 percent of their trade, of which 58 percent was already duty-free; the purpose apparently was to secure the other 2 percent! While they don’t expect a GATT waiver, they don’t expect condemnation either, since no one else has been condemned by GATT regardless of departures from Article XXIV standards.

Tariff and trade preferences, *per se*, were then discussed. It was observed that LDC’s are as much interested in displacing domestic production in the importing developed countries as they are in displacing developed third-country competitors in those markets; India would like to displace American as well as Italian textiles in the American textile

market. On tariff preferences, one of the problems is that the tariffs for LDC-manufactured products are, on average, not high. Of course, this does not in itself indicate the protective quality of the tariff. Research into the question of the "effective rate" of protection would be most helpful, indeed perhaps essential.

It was further observed that, from the viewpoint of theory, once one adopts the concept of the "economy of scale," the infant industry argument is as applicable to foreign infants as it is to domestic infants: after an initial transitional period, such an infant industry may be more efficient than alternative industries. But, it was quickly added, this has little to do with the fact that preferences are desired. If the advocates need a theory, they will find one.

More important, very few LDC's know much about the foreign trade potentials of their countries through market research and the advice of knowledgeable trade representatives in the potential importing countries. The fact is that the less they know, the poorer position they are in to invest the money to find out what the foreign potential may be. The successful exporting countries, in their early stages, had their export business almost wholly in the hands of foreigners, because the foreigners already had the information about the foreign market. To break through this wall is the greatest problem—and preferences as well as other devices do not begin to solve this problem of finding where the market is, learning how to manage to exploit it, and the like.

Regarding compensatory financing, it was observed that compensatory financing to cover shortfalls in exchange caused by fluctuating exchange earnings had long been considered to be beneficial by the overwhelming majority of economists. The problem is one of control of the funds provided. It was believed that some kind of international control as to the objects for which the funds would be expended was preferable to leaving it entirely to the local government recipient, to expend on "tanks or Cadillacs, or what not."

As to commodity agreements, ten or twelve commodities emerge as possibly susceptible to effective management: tin, wheat, coffee, cotton, wool, and perhaps a few others—all with great problems of negotiation and totaling 5 percent to 8 percent of the output of LDC's as a group.

To the economists, it appeared then that, having looked at preferences, commodity agreements, regional markets, and compensatory financing, the best solution from the points of view of both the developed and the developing countries would be free trade, plus the provision of aid (of which compensatory financing is a form) on a scale determined by the net resource requirements of rates of growth in the developing countries that are accepted by them as approximate targets.

* * * * *

Following the discussion of the agenda items, there was a lively discussion of the research potentialities that had emerged from the discourses. These ranged from the projects already advanced, to a study of the pro-

posed patent convention of the EEC, to a convention on jurisdiction and the enforcement of judgments put forward in the EEC Commission, to uniform bankruptcy statutes, to uniform turnover taxes, looking at EEC alone. In addition, studies of reformed corporation laws in France and Germany were urged.

Perhaps an overriding suggestion was that lawyers and economists together examine—the lawyer on the basis of economic assumptions—the legal and political institutions that need to be created or adapted to meet the emerging problems, so many of which had been uncovered during the two days of provocative discussion.

STANLEY D. METZGER
Rapporteur

ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The American Society of International Law held its 60th annual meeting at the Statler-Hilton Hotel in Washington, D. C., from April 28 to 30, 1966. The meeting was well attended, with a registration of over 300 members. The dinner on Friday, April 29, was attended by over 350 members and guests. The general theme of the sessions was "International Law and Developing Countries," with various aspects of the subject discussed by panels of experts.

The first session was held on Thursday, April 28, at 2:15 p.m., under the chairmanship of John B. Howard of the Ford Foundation. The relevance of international law to the development process was discussed by Professor Harold D. Lasswell of Yale Law School and Professor Wolfgang Friedmann of Columbia University School of Law, the latter directing his paper to the economic and social development processes. Comments on Professors Lasswell's and Friedmann's papers were presented by Florentino P. Feliciano of the Philippine Bar and Professor A. A. Fatouros of Indiana University School of Law. A general discussion followed.

On Thursday evening at 8:15 p.m. two simultaneous panel discussions were held. A panel on the rôle of international business in the transfer of technology to developing countries was held in joint session with the Section of International and Comparative Law of the American Bar Association, and was presided over by Sigmund Timberg of the District of Columbia Bar. The Honorable Edward D. Re, Chairman of the United States Foreign Claims Settlement Commission, opened the session with introductory remarks. The principal paper on the subject was delivered by Karl E. Lachmann, Chief of the Fiscal and Financial Branch, Department of Economic and Social Affairs of the United Nations. The commentators were Gerard Swope, Jr., of the General Electric Company; Sidney Sherwood, Economic Adviser to the Government of India, and Samuel V. Goekjian of the District of Columbia Bar.

The second panel on Thursday evening considered the international regulation of internal conflict in developing countries, under the chairman-

ship of Professor Myres S. McDougal of Yale Law School. The principal speakers were Professor Richard A. Falk of Princeton University, Dr. F. V. Garcia-Amador, Director, Department of Legal Affairs, Pan American Union, and Peter Solbert of the New York Bar, formerly Deputy Assistant Secretary of Defense for International Security Affairs.

On Friday morning, April 29, the subjects of tariff preferences and state succession with reference to the new countries were discussed. Professor Stanley D. Metzger of Georgetown University Law Center presided over the panel on tariff preferences. The speakers were the Honorable K. S. Sundara Rajan, Economic Minister of the Embassy of India, and Robert L. McNeill, Deputy Assistant Secretary for Trade Policy, United States Department of Commerce.

The session on state succession was held jointly with the American Branch of the International Law Association, the President of which, Cecil J. Olmstead, made the introductory remarks. Professor Oliver J. Lissitzyn of Columbia University School of Law presided. Professor Gerard V. La Forest of the Faculty of Law of the University of New Brunswick delivered the principal paper entitled "Towards a Reformulation of the Law of State Succession." Comments were presented by Robert Delson of the New York Bar, in which he discussed succession to concessions and administrative contracts, and contracts contrary to the public interest of the successor state. Professor Gilbert P. Verbit of Columbia University School of Law discussed state succession and treaties from the point of view of a policy adviser in a new state. Comments were also presented by Sam Okunribido of the Office of Legal Affairs of the United Nations.

On Friday afternoon international monetary reform, and problems of self-determination and political rights in the developing countries were considered by two panels. Professor Thomas M. Franck of New York University Law School presided over the discussion of self-determination and political rights. Professor Rupert Emerson of Harvard University discussed the meaning and scope of the right of self-determination under present political conditions, while Professor Derek W. Bowett of Cambridge University treated the subject within the context of "de-colonization" and with respect to relations between states. Political rights in the developing countries were discussed by Robert K. Woetzel of the Center for the Study of Democratic Institutions of the Fund for the Republic.

The second panel on Friday afternoon, which discussed international monetary reform, was presided over by Joseph Gold, General Counsel of the International Monetary Fund. Jorge González del Valle, Alternate Executive Director of the Fund, discussed some basic problems under consideration with respect to international monetary reform. Amon Nikoi, Executive Director of the Fund, discussed proposed changes in the operation of the Fund in relation to the needs of the developing countries. Comments were also offered by Ansel F. Luxford of the District of Columbia Bar.

All the panel presentations were followed by general discussion from the floor.

At the annual dinner on Friday evening, which was preceded by a reception for members and guests, the Manley O. Hudson Medal, awarded to Charles De Visscher of Belgium, one of the leading authorities on international law and a former judge of the World Court, was presented to the Honorable René Lion, Chargé d'Affaires and Minister of the Belgian Embassy, who received it on behalf of Judge De Visscher and read a message from Judge De Visscher as well as one from the Belgian Minister of Foreign Affairs. In his presidential address, Professor MacChesney reviewed the activities of the Society over the past sixty years and called attention to its new activities of the past year. The Honorable George W. Ball, Under Secretary of State, delivered the principal address, in which he discussed the NATO crisis precipitated by the policy of the French Government.

On Saturday, April 30, the business meeting of the Society took place at 9:30 a. m., followed by the Philip C. Jessup Moot Tribunal Competition in the afternoon at 2:15 p. m. The case of the *United Nations v. Afrania* was argued before the arbitral tribunal by the University of Texas Law School team (Harry Tindall and Rob Parker), representing the United Nations, and the University of Wisconsin Law School team (Vance Waggoner and Delbert Smith), representing Afrania. The University of Texas team was declared the winner and Vance Waggoner of the University of Wisconsin Law School was judged best in oral presentation and argument. The judges of the competition were the Honorable Charles Fahy, Judge of the United States Court of Appeals for the District of Columbia; the Honorable Edward D. Re, Chairman of the United States Foreign Claims Settlement Commission; and Stephen M. Schwebel, of the Bureau of International Organization Affairs, Department of State.

Prior to the holding of the final competition an informal luncheon was held for the judges, contestants, students and others attending the annual meeting. Following the conclusion of the case, awards were presented to the winning contestants by Professor J. Forrester Davison of George Washington University Law School and Richard D. Kearney, Deputy Legal Adviser of the Department of State. The George Washington University International Law Society, which was host to the competition this year, tendered a cocktail party to the participants after the presentation of the awards. The winning team received the Philip C. Jessup Trophy Cup, each member of the team received a U. S. Savings Bond, and the winner in oral argumentation received for his school a circulating award presented by the George Washington University Law School in commemoration of its centennial.

At the business meeting on Saturday morning, April 30, the Executive Director's report on the activities of the Society during the past year was presented in his absence by Richard W. Edwards, Jr., Assistant to Mr. Merillat. The report called attention to the Society's 60th anniversary brochure published during the year and to the substantial increase in the membership of the Society, now numbering over 3700, and in the circula-

tion of its publications. The organization's revenues had also greatly increased, while the activities supported by the original grant from the Ford Foundation in 1961 had been broadened under the second Ford grant of \$600,000 in December, 1964, to include the establishment of a Board of Review and Development to explore and develop further fields for the Society's work. A number of publications had been issued on the subject of foreign investment problems in various countries. Study panels had been set up to consider, respectively, problems of law and developing countries, regulation of international trade, peace and war, and the International Law Commission draft on the Law of Treaties. A meeting had also been held on international documentation and electronic data processing, upon which a summary report will shortly become available. In August-September, 1965, the Society had sponsored a conference in Bellagio, Italy, of legal advisers to international organizations.

A number of regional meetings had been held: in Los Angeles, Stanford, Vancouver, B. C., Toronto, Denver, Austin, Charlottesville, Durham, N. C., University, Mississippi, New York City and Syracuse.

Upon the report and recommendation of the Committee on Publications of the Department of State and the United Nations, presented by Denys P. Myers, Chairman, the Society adopted a resolution directing attention to the increasing time lag in the publication of *Foreign Relations of the United States* and calling upon the Department of State to take effective measures to overcome the difficulties which delay such publication.

Professor William Gorham Rice offered the following resolution, which, with an amendment by Mr. Timberg, accepted by Professor Rice, was after discussion, referred to the Executive Council, under the terms of Art. VIII of the Constitution, for consideration and report:

Resolved that,

The Executive Council is requested:

1. To set up an *ad hoc* judicial committee of five or more members of the Society to prepare as soon as may be feasible its advisory opinion on the question: Is the use of military force by the United States in Viet-Nam since January of 1965 consistent with the rules, standards, and principles of international law?

2. To publish this opinion, together with any concurring or dissenting opinions of members of the committee.

It is suggested to the Executive Council that it arrange that a majority of the *ad hoc* committee be judges or lawyers admitted to practice before the United States Supreme Court but not receiving salary for services being rendered to the United States other than in the judicial department, and that, so far as is reasonably possible, the committee be drawn from different parts of the country and be composed of persons of different approaches to international law.

It is further suggested that the *ad hoc* committee be instructed:

1. To invite those members of the Society who desire to do so, to submit to it briefs on the question before the committee; and to consider these briefs in arriving at its conclusions; and

2. To make clear that the opinion or opinions it renders are not that of those of the Society but of the Society's *ad hoc* judicial committee.

The Society's annual award for a meritorious work in international law was conferred on Dr. Wilhelm Wengler of the Free University of Berlin for his two-volume treatise entitled *Völkerrecht*.

The Honorable Ricardo J. Alfaro, former President of Panama and former Judge of the International Court of Justice, was elected an Honorary Member of the Society. Having been a member of the Society since 1913, Judge Alfaro was also declared a Member Emeritus.

Other members declared Members Emeriti by virtue of having been members of the Society for fifty years or more are: Jasper Yeates Brinton, W. Clayton Carpenter, Charles G. Fenwick, Salvador Guerrero Montalvan, Harry F. Guggenheim, Stanley K. Hornbeck, Archibald King, V. K. Wellington Koo, Denys P. Myers, William G. Rice, Francis B. Sayre, Max Thelen, Burton W. Wilson, and Quincy Wright.

The following officers of the Society were elected:

President: John R. Stevenson of the New York Bar;

Honorary President: The Honorable Dean Rusk, Secretary of State;

Vice Presidents: Harold D. Lasswell, Yale Law School; H. C. L. Merillat; Oscar Schachter, New York; Charles M. Spofford of the New York Bar.

Outgoing President MacChesney was elected an Honorary Vice President and the incumbent Honorary Vice Presidents were re-elected.

The following were elected members of the Executive Council for the term ending in 1969: Richard R. Baxter of Harvard Law School; William W. Bishop, Jr., of the University of Michigan Law School; Gerald M. Doppelt of San Francisco; Benjamin Forman of Virginia; Edwin C. Hoyt, Jr., of the University of New Mexico; Richard B. Lillich of Syracuse University College of Law; Saul Mendlovitz of Rutgers University School of Law; and Carl B. Spaeth of Stanford University School of Law. Professor Roger D. Fisher of Harvard Law School was elected to serve on the Council until 1967, filling a vacancy caused by the election of Mr. Spofford as a Vice President.

The Nominating Committee for the coming year was elected as follows: Monroe Leigh, Chairman; Herbert W. Briggs, Edwin C. Hoyt, Jr., James N. Hyde, and Louis B. Sohn.

At its meeting immediately following the business session of the Society, the Executive Council re-elected Judge Edward Dumbauld Secretary and Franz M. Oppenheimer Treasurer of the Society for the coming year. James C. Conner was appointed Assistant Treasurer, and Mr. Merillat was designated Executive Vice President.

The Executive Council elected Messrs. Bishop, Hyde, Lasswell, Leigh, MacChesney, Schachter and Spofford members of the Executive Committee, which also includes the President, Executive Vice President and Treasurer *ex officio*.

The Editor-in-Chief and the other members of the Board of Editors of

the JOURNAL were re-elected,* Professor Herbert W. Briggs becoming an Honorary Editor in accordance with the regulations of the Board.

The papers delivered and summaries of discussions, along with selected committee reports and a report of the business session, will appear in the printed *Proceedings* of the meeting, which all members of the Society and subscribers to the JOURNAL will receive. The volume may also be purchased separately at \$5.00 a copy.

ELEANOR H. FINCH

REGIONAL MEETINGS OF THE SOCIETY

Denver, Colorado

On February 26, 1966, a Western Regional Conference on "Regional Organizations and World Public Order" was held at the University of Denver Law Center under the sponsorship of the Society; the University of Denver College of Law; the Committee on World Peace through Law of the Colorado Bar Association; the Inter-American Bar Association; the Graduate School of International Studies, University of Denver; the Cadet Forum, U. S. Air Force Academy; the University of Colorado School of Law; and the International Law Society of the University of Denver.

Professor Ved Nanda, of the University of Denver College of Law, Chairman of the Conference, made the introductory remarks at the opening session in the morning. Robert Yegge, Acting Dean of the College of Law, and Dr. Josef Korbel, Director of the Graduate School of International Studies at Denver University, made welcoming remarks. Professor Brunson MacChesney, President of the American Society of International Law, delivered the opening address, which was followed by a panel discussion of "The Peacekeeping Operations of the Organization of American States," over which Lucius Wood of the Denver Bar presided. The principal paper was delivered by Professor James Busey of the Department of Political Science of the University of Colorado. Members of the panel were: Professor Joe Wilkinson, Graduate School of International Studies, Denver University; Professor Robert Larson, Department of History, Colorado State College, Greeley; Professor MacChesney and Professor Ved Nanda. A general discussion followed.

At a luncheon for the participants in the conference, Chief Justice Leonard B. Sutton of the Colorado Supreme Court presided as chairman. The principal speaker was His Excellency Radomiro Tomic, Ambassador of Chile to the United States, who was introduced by Dr. Korbel.

At the afternoon session a panel discussion was held on "The Legal and Political Problems of Trade and Investment in Latin America" under the chairmanship of John A. Moore of the Denver Bar, Chairman of the World Peace through Law Committee of the Colorado Bar Association. Papers on the subject were presented by Professor Eliezer Erel of Tulane Uni-

* Professor Philip Marshall Brown, an Honorary Editor, and member of the Board since 1916, died on May 10, 1966. See p. 515 above.

versity School of Law and Professor John McCamant of the Graduate School of International Studies, Denver University. The discussion was lead by Ambassador Tomic, Chief Justice Sutton and Professors Erel and McCamant, and was followed by general discussion from the floor.

New York City

A Conference on "Legal Problems of Investment and Development in Africa" was held in New York City from March 3 to 5, 1966, under the auspices of the Association of Student International Law Societies (ASILS), and sponsored by the American Society of International Law, the International Legal Studies Program at Columbia University School of Law, and the New York University School of Law. The meeting drew more than 150 lawyers, public officials, academics, businessmen and students to the ten sessions at Columbia and New York University Law Schools; the international law societies of the two schools organized the conference and acted as co-hosts.

Phillippe de Seynes, Under Secretary, Department of Economic and Social Affairs, United Nations, delivered the banquet address on "The Outlook for African Economic Development." At luncheons on March 3 and 4, respectively, John Garba (Nigeria), an Executive Director of the World Bank, spoke on "African Attitudes toward Trade and Development," and Gabriel D'Arboussier, Director, UNITAR, spoke on "The New African States and International Law."

Panel sessions, each including a keynote talk and several commentaries, considered the following topics: Investment Climate; Access to the African Market; The Legal Status of Foreign Proprietary Rights; Sources of Capital; Africa and the International Trading Community; The Rôle of the Lawyer in Africa; African Regional Patterns and Co-ordinated Economic Development. The principal speakers on these subjects were: Robert Fleming and John H. Reedy, International Economic Consultants; Henry Harfield, of the New York Bar; Samuel Goekjian, of the District of Columbia Bar; Lester Nurick, Deputy General Counsel, World Bank; William Kling, Bureau of African Affairs, Department of State; William Harvey, Professor of Law, University of Michigan; and His Excellency, Chief Michael Lukumbuzya, Ambassador of the United Republic of Tanzania to the United States.

The proceedings of the conference are being prepared for publication. For further information, please write to Africa Conference, Box 35, Columbia Law School, New York, N. Y. 10027.

Austin, Texas

The Society, in co-operation with the Schools of Law of the University of Texas and Southern Methodist University, and the University of Texas International Law Society, sponsored a regional meeting on March 12, 1966, at Townes Hall Auditorium in Austin. Two sessions were held: the morning session devoted to "United States Trade and Investment in

Central and South America" and the afternoon session to "Reflections on Two Aspects of International Law in the Postwar World."

At the opening session in the morning welcoming remarks were made by W. Page Keeton, Dean of the School of Law of the University of Texas, and the speakers were introduced by Woodfin L. Butte, Professor in the School of Law and Languages and the Area Center for Latin American Studies. Victor C. Folsom, Vice President and General Counsel of United Fruit Company, spoke on "United States Trade and Investment in Central America." David S. Browning of the Houston Bar discussed "International Licensing and Technical Assistance Agreements as a Means of Exporting Services." Jerry Long, of the Office of the Legal Adviser, Department of State, spoke on "Social and Economic Aspects of United States Foreign Policy in Central and South America."

At the second session, in the afternoon, Professor Saul Mendlovitz of Rutgers University Law School spoke on "The Future of United Nations Peacekeeping Forces." Professor Quincy Wright of the University of Virginia discussed "Custom as a Basis of International Law in the Postwar World."

ELEANOR H. FINCH

Vancouver, British Columbia

A regional meeting of the American Society of International Law was held at the Faculty of Law, University of British Columbia, Vancouver, B.C., Canada, on March 5, 1966. Co-sponsors were the Law Schools of the University of British Columbia and the University of Washington; the Vancouver Section of the International Law Association, Canadian Branch; and the Seattle-King County Bar Association. Fifty persons attended; unfortunately, a serious influenza epidemic prevented 15 or more persons from attending. The theme of the conference was, broadly speaking, Canada-United States trade relations.

At the morning session the topic of discussion was "Tax Considerations Affecting Trade and Investment." Mr. P. N. Thorsteinsson of the Vancouver Bar spoke on "The Impact of Canadian Income Tax on American Investment in Canada"; and Mr. Charles F. Osborn of the Seattle Bar spoke on "Some United States Tax Aspects of American Investment in Canada."

Mr. H. C. L. Merillat, Executive Vice President of the American Society of International Law, who was then Visiting Professor of International Law at the University of Washington, spoke at the informal luncheon for those attending the conference; he emphasized the tremendous growth of international law in recent times.

The afternoon session was divided into two parts: Professor K. C. Mackenzie of the Faculty of Law, University of British Columbia, and Professor Roy L. Prosterman of the School of Law, University of Washington, spoke on different aspects of "Canada-United States Anti-Dumping Laws"; and Professor L. G. Jahnke of the Faculty of Law, University of

British Columbia, and Professor John H. Young of the Department of Economics, University of British Columbia, spoke on "The Canada-United States Auto-parts Agreement." Professor Young, the economist, delighted his legal audience with his wit and his insight into the economic and political bases of the legal problems being considered.

A lucky coincidence of the dates of the meeting and of a visit to the University of British Columbia by Professor Myres S. McDougal of Yale University Law School, a former president of the Society and now the president of the Association of American Law Schools, made it possible for Professor McDougal to take part in the proceedings during the day as well as to be the speaker at the banquet that evening. The subject of his address was "International Law in Policy-Oriented Conception." It was a fitting climax to the meeting.

The program of the meeting was enriched by the international law moot competition between the students of the Law Schools of the University of British Columbia and of the University of Washington, which was held on the preceding evening, March 4. Professor McDougal, Mr. Merillat, Mr. Justice Ruttan of the Supreme Court of British Columbia, and Mr. D. M. M. Goldie of the Vancouver Bar were the judges. The case argued was based on the decision of the Japanese court in the *Shimoda* case, concerning the legality of the atomic bombings of Hiroshima and Nagasaki. The award went to the students of the University of Washington.

C. B. BOURNE

Professor of Law

University of British Columbia

THE CARNEGIE-HARVARD SEMINAR ON INTERNATIONAL LAW
FOR LEGAL OFFICERS

Twenty to twenty-five junior and middle-level legal officers dealing with foreign affairs in developing countries will attend a seminar on international law to be held at the Law School of Harvard University from August 22 to September 17, 1966. The Carnegie-Harvard Seminar on International Law for Legal Officers is being jointly sponsored by the Carnegie Endowment for International Peace and the Harvard Law School.

The Seminar, which has been planned in co-operation with the Department of State, is in response to a United Nations General Assembly Resolution on "Technical assistance to promote the teaching, study, dissemination and wider appreciation of international law,"¹ which urged Member States "to undertake broad programmes of training, including seminars . . . in the field of international law." The academic expenses of the Seminar are being met by the Carnegie Endowment, and the Department of State is defraying the travel and maintenance expenses of the lawyers attending the Seminar.

¹ Res. 1816 (XVII), Dec. 18, 1962, U.N. General Assembly, 17th Sess., Official Records, Supp. No. 17 at 67 (A/5217) (1963).

The purpose of the Seminar is to allow the participating lawyers to examine, under the guidance of a faculty of international composition, major questions of international law, procedure and organization that they encounter in their work. The participants will be selected on the basis of nominations made by the governments of those developing countries to which invitations have been extended.

The Seminar will consist of courses of lectures on several specialized areas of the law of international organizations and international law and seminar discussion of a number of typical legal problems as they arise in the practical setting of daily foreign policy-making. Following the Seminar, the participating lawyers will have an opportunity to visit the Office of the Legal Adviser, Department of State, and other government offices in Washington, to observe the workings of the United Nations, and to visit other parts of the United States.

The co-directors of the Carnegie-Harvard Seminar are Professors R. R. Baxter and Abram Chayes of the Harvard Law School. The other two full-time members of the faculty will be Professor Eduardo Jiménez de Aréchaga of the University of Montevideo, Uruguay, and Dr. Abdullah El Erian of the United Arab Republic. Guest lecturers from the international community will also be invited to participate in the Seminar.

R. R. B.

INTERNATIONAL COURSE ON EUROPEAN INTEGRATION, "EUROPA INSTITUUT"
UNIVERSITY OF AMSTERDAM

The problems and solutions which have developed from the Western European integration process over the last eighteen years have become a matter of academic as well as practical political interest. As a result, several universities within the European Economic Community have instituted special courses on the subject none of which as yet is given exclusively in English.

The University of Amsterdam, in co-operation with other Netherlands universities and with the Netherlands Universities Foundation for International Co-operation (NUFFIC), will inaugurate in October, 1966, a course in English on European integration. The course of lectures and seminars will be organized by the "Europa Instituut" of the University of Amsterdam, and will be open to graduates in law, economics or political science. Graduates from Western Europe and the United States are invited to attend the course, so that the study of European integration may be combined with a mutual exchange of knowledge on the European states and the United States Federal system.

The course will begin October 4, 1966, and extend through June 15, 1967. The lectures and seminars, given by distinguished professors, government officials and officials of European Community organizations, will cover the historical background and institutional structure of the European Communities, their economic structure and policy, legal and economic problems involved in integration, problems of competition, comparative law, company

law, conflicts of laws, Federal problems under the American Constitution, United States antitrust laws, and social problems of integration. The course will include study groups to consider some of the subjects dealt with in the lectures. Under supervision of the lecturers and staff members, participants will carry out individual research on specific problems. A diploma will be awarded to those who obtain a sufficient number of credits for attendance, participation in study groups, research papers and examinations.

At the end of the second term an excursion will be made to the European Communities to attend sessions of the European Court of Justice and the European Parliament and to discuss certain questions with members of the Communities staff.

In addition to holding degrees in law, economics or political science, it will be advantageous to applicants if they also have had some practical experience and have some knowledge of the different national systems.

The tuition fee for the 1966-1967 course is 1,000 Dutch guilders, payable in advance to the bursar of the Netherlands Universities Foundation for International Co-operation. A limited number of scholarships are available. Information concerning them, as well as application forms and further details of the course, may be obtained from the Registrar, Dr. E. Jongens, Netherlands Universities Foundation for International Cooperation, 27 Molenstraat, The Hague.

E. H. F.

INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

The annual Congress of the International Association of Young Lawyers was held in Munich, Germany, from September 6 to 8, 1965, with lawyers from 20 countries in attendance. The Congress was opened on September 6 with a special ceremony at the Munich Palace of Justice attended by leading members of the German Bar Association. The President of the Munich Bar Association extended a welcome to the members and their guests attending the Congress. On the evening of the 6th, the Minister of Justice of the Free State of Bavaria held a reception in the Antiquarium der Residenz, the former residence of the Kings of Bavaria.

On September 7 an interesting discussion was held on the practical aspects of attorneys' activities dealing with international matters. There seemed to be general agreement that the concept of the lawyer in international affairs was rapidly changing and that the lawyer today must be prepared to advise his clients with international interests on matters other than their own local law. Such lawyers must have knowledge, *inter alia*, of commercial and tax laws of various countries.

On the evening of September 7 the Burgermeister of Munich tendered a reception at the Munich Rathaus with its famous Glockenspiel. Following the reception the members and their guests adjourned to the Hofbrauhaus for a social evening.

On September 8 the Association's committee dealing with "A Young

Attorney in the Employ of Another Attorney" presented a report indicating that in all countries young attorneys beginning their careers in the employ of other attorneys are rather badly treated. Some strong opinions were expressed on this subject.

After the election of officers and the conclusion of other business, the Congress closed with attendance at a concert by the "Capella Monacensis" of original songs and music of the 13th, 14th and 15th centuries performed on restored musical instruments of those periods. The young attorneys of the Munich Bar Association were hosts at a formal closing dinner at the Regina Palace Hotel.

The Association will hold its next meeting in Athens, Greece, from August 25 to 28, 1966. The members of the Young Lawyers' Section of the American Bar Association are invited to participate. Those interested in attending should write to Mr. Edward F. Farrell at the address given below.

The object of the International Association of Young Lawyers is to foster understanding of foreign laws and, where possible, lend support to young attorneys, their programs and Associations in the various countries. The Association is particularly interested in increasing its American membership. American attorneys under the age of 45 who wish to join the Association should communicate with Mr. Edward F. Farrell, Vice President of the Association for the United States, Calle Santiago Bernabeu 6, Madrid, Spain.

E. H. F.

THE CHINESE SOCIETY OF INTERNATIONAL LAW

The Chinese Society of International Law was established in 1957. Its object, in the words of its Constitution, is "the study and advancement of international law and the related branches of learning" (Article 2). The Society holds annual or biennial meetings, where papers on international law are presented, and, since 1964, each year it publishes a journal in English entitled *The Annals of the Chinese Society of International Law*.¹ Occasionally, it also publishes pamphlets on various problems of international law.²

Membership in the Society is open to "any person who has studied international law or any other related branch of learning" (Article 4 of the Constitution).

The governing bodies of the Society are the Executive Council, composed of nine members, and the Supervisory Board, composed of three members. The officers of both organs are elected annually by the members. The officers for 1966 are: Dr. Tien-fung Cheng, Vice President of Examination Yuan, President; Dr. Yi-ting Chang, Professor of International Law at National Cheng Chi University, Secretary General and Chief Editor of the *Annals*. They are both members of the Executive Council, the other mem-

¹ See review of the first issue in 60 A.J.I.L. 437 (1966).

² E.g., Li Chun, *Why Must The Chinese Communist Regime Be Denied Recognition: A Study from the Standpoint of International Law* (Taipei, 1962).

bers of the Council being: Dr. Tsen-ming Huang, Grand Justice; Chin-chien Chang, Director of the Institute of Public Administration of National Cheng Chi University; Dr. Peiwei S. Lui, Professor of International Law at National Taiwan University; Chien-min Chu, Dean of National Cheng Chi University; Dr. Franklin Chi-ch'ing Yao, Professor of Law at National Taiwan University; Dr. Che-tai Lee, Chairman of the Department of Diplomacy of National Cheng Chi University. The members of the Supervisory Board are: Dr. Lexington E. C. Hung, Grand Justice; Yuan-tsai Tu, President of Taiwan Provincial Normal University; Shih-fu Chen, Adviser to the Committee on Rural Reconstruction.

The headquarters of the Society are at 187-1 Chin-Hua Street, Taipei, Taiwan, Republic of China.

HUNGDAH CHIU

ERRATUM

Attention is called to a typographical mistake on line 3 of page 313 of the April number of this JOURNAL referring to the operation of "private" broadcasting stations. The word in quotation marks should read "pirate." The JOURNAL deeply regrets this error.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section is compiled by Charles I. Bevans, Assistant Legal Adviser, Department of State. Alfred P. Rubin, of the Office of the General Counsel, Department of Defense, and Bruno A. Ristau, of the Department of Justice, provide material originating in their respective Departments.

AIR ACCIDENT IN SPAIN

U. S. rejection of Soviet allegations

Following is the text of an aide-memoire transmitted by the American Embassy in Moscow to the Soviet Ministry of Foreign Affairs on February 25:

The Government of the United States rejects the allegations made by the Soviet Government in its aide memoire of February 16, 1966. The Government of the U.S.S.R. must be aware—or could easily have ascertained—that no nuclear weapon test, no nuclear explosion of any kind, and no radioactive pollution of the sea were involved in the unfortunate accident over the coast of Spain. Consequently, there is no question of a “violation” or of “actions in conflict with” either the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, or of the 1958 Geneva Convention on the High Seas, or of the principle of freedom of the high seas. Accusations to this effect by the Soviet Government are therefore without any foundation.

It is common knowledge that flights of U. S. military aircraft are carried out with the agreement of nations of the free world and for the express purpose of reinforcing their collective security against the threat posed by the huge nuclear forces of the Soviet Union, including its many bomber aircraft. Our policies and practices designed to meet this nuclear threat have been adopted only after the most careful assessment of security requirements and after provision of necessary safeguards.

It is not surprising that the Government of the U.S.S.R. is opposed to military security measures undertaken in defense against the threat of its armed power, or that it should attempt to limit or reduce such defense. It is, however, a matter of deep regret that the Soviet Union should be willing to distort the meaning of international treaties to suit the purpose of a propaganda campaign to that end. It seems clear that if the Soviet Government had been genuinely concerned about possible violations of international agreements and law, it would have requested, and awaited, a reply and clarification from the United States Government instead of resorting to tactics designed to advance purely propaganda objectives.

(54 Dept. of State Bulletin 397 (1966).)

INVESTMENT DISPUTES

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

On February 16, 1966, the President transmitted to the Senate for advice and consent to ratification the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which was approved on March 18, 1965, by the Executive Directors of the International Bank for Reconstruction and Development. The Convention was signed for the United States on August 27, 1965.¹ The report of the Acting Secretary of State, which was transmitted for the information of the Senate, reads in part as follows:

The convention would establish an International Center for Settlement of Investment Disputes under the auspices of the Bank. This new Center would be available on a voluntary basis to settle by conciliation or arbitration investment disputes between private foreign investors and sovereign states in which investments are made. The Center would provide facilities for the conduct of arbitration and conciliation proceedings and it would also maintain panels of specially qualified persons from which arbitrators and conciliators could be selected by parties wishing to use the Center.

The convention is subject to ratification, acceptance, or approval by the signatory states and will enter into force 30 days after the date of deposit of the 20th instrument of ratification, acceptance, or approval.

While the facilities of the Center would be available to a contracting state and its nationals only after that state has become a party to the convention, the action of becoming a party would not bind a state to make use of the facilities provided by the convention. Recourse to conciliation or arbitration would be entirely voluntary and would be based on agreement between a foreign investor and a contracting state. However, once a contracting state and a foreign investor have agreed to arbitrate or conciliate a dispute, such agreement would be binding and neither party would be entitled to withdraw from it unilaterally. An arbitral award rendered under the convention would also be binding on the parties, and any monetary damages included in such an award would be enforceable in the courts of any state which is a party to the convention, execution being governed by the laws of the state concerning the execution of judgments. It is provided, however, that nothing in the relevant provisions shall be construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state from execution.

The recommendations of a conciliation commission would not be binding on the parties, although they would be required to give such recommendations their most serious consideration.

The Center would be located at the headquarters of the International Bank for Reconstruction and Development and, as stated by the Executive

¹ For text of Convention, see 4 Int. Legal Materials 532 (1965).

Directors in their report, the Bank has agreed to provide the Center with office space free of charge and to underwrite the basic overhead expenditure of the Center for a period of years. In the light of these undertakings, the United States would not be required to make any financial contribution to the Center at the time the United States becomes a party to the convention or in the foreseeable future.

The basic objective of the convention is to create an atmosphere of mutual confidence between private foreign investors and capital-importing countries and to stimulate a larger flow of private capital into those countries. There is now no effective international forum to which private foreign investors and capital-importing countries can take the investment disputes that may arise between them. The convention would fill this gap. Thus, the convention will (a) offer significant advantages to private businesses which wish to invest or have invested in capital-importing countries, (b) benefit the conduct of foreign relations by having investment disputes involving other nations settled directly by those nations and the investors concerned, and (c) stimulate the flow of private capital to countries in need of it.

The formulation of the convention was preceded by extensive preparatory work in which the U. S. Governor and the U. S. Executive Director of the Bank, as well as representatives of the Department of State and the Department of the Treasury, actively participated. To assist in drafting the convention and in order to prepare a text which would be acceptable to a large number of member states, the Bank convened a series of consultative meetings of legal experts and submitted to them a preliminary draft for discussion. These meetings were held in Addis Ababa in December 1963, Santiago de Chile in February 1964, Geneva in February 1964, and Bangkok in April 1964, and were attended by representatives of 86 member states. In preparing the final text, the Executive Directors received the further assistance of a legal committee of representatives of 61 member states which met in Washington from November 23 to December 11, 1964. Representatives of the Departments of State and the Treasury attended the regional consultative meetings in Santiago de Chile and the meetings of the legal committee in Washington.

In anticipation of the United States becoming a party to the convention, appropriate legislation will be sought from the Congress for the purpose of implementing the convention.

(Sen. Exec. A, 89th Cong., 2d Sess.)

TAXATION

Convention supplementing and modifying the 1948 Income Tax Convention with The Netherlands

On March 10, 1966, the President transmitted to the Senate for advice and consent to ratification the supplementary convention signed at Washington on December 30, 1965, modifying and supplementing the Convention between the United States of America and the Kingdom of The Netherlands

with Respect to Taxes on Income and Certain Other Taxes signed at Washington on April 29, 1948. The President's message reads in part as follows:

The supplementary convention with the Netherlands would make substantial revisions in the 1948 convention, now in force as modified by supplementary protocols of 1955 and 1963.¹ The revisions will result in benefits for taxpayers, whether individuals or corporations, of one of the countries receiving income from sources in the other country. These benefits will arise from improvements in the convention whereby it will be modernized and brought more closely into line with more recent income tax conventions concluded by the United States, also reflecting certain principles expressed in the model income tax convention proposed by the Organization for Economic Cooperation and Development.

One of the principal purposes of the supplementary convention is to modify the provisions on dividends in order to make it possible for the Government of the Netherlands, in the case of dividends derived from Netherlands sources by U. S. residents and corporations, to impose withholding tax on such dividends at rates corresponding to those which the United States may impose under the existing convention with respect to dividends paid by U. S. corporations to Netherlands residents or corporations. Article V of the supplementary convention, containing the revisions for this purpose, thus is designed to assure reciprocal treatment with respect to dividends.

The scope of the exemption for professors or teachers of either country who perform teaching or research functions at an educational institution in the other country would be expanded by article X of the supplementary convention. Likewise, the scope of the exemption for students and business apprentices would be expanded by Article XI of the supplementary convention, so that, instead of being applicable only to remittances received from abroad for the purpose of maintenance or studies, the exemption would extend also to gifts received from abroad, to certain grants, allowances, and awards, and to income from personal services up to certain amounts.

Important revisions are made also in the provisions regarding interest, royalties, and capital gains. Article VI would provide for a reciprocal exemption of interest, not including interest from mortgages secured by real property. Article VII would expand the definition of what constitutes royalties for the purposes of the provisions on this subject. Article VIII would provide for reciprocal tax exemption, with certain exceptions, for capital gains other than those arising from the sale of real property.

Other revisions, effecting useful modifications in the convention, relate to a variety of subjects. . . .

(Sen. Exec. B, 89th Cong., 2d Sess.)

TREATIES

Reservations by other states—submission to Senate

In response to an inquiry as to whether there have been any instances during the past twenty years of submission to the Senate for its advice and consent to ratification of another state's reservations to a multilateral treaty,

the Department of State, in a letter dated March 2, 1966, conveyed the following information:

During the past twenty years the Administrative Branch of the Government has not referred to the Senate for its advice and consent to ratification any reservation made by another State to a multilateral treaty that had previously been approved by the Senate. The reason for this is that reservations made during this period have been such that they were not regarded as requiring Senate consideration.

Several factors have led to this result, namely, (1) a reservation made at the time of signature before Senate approval and repeated in another State's ratification is regarded as having been before the Senate for consideration; (2) some treaties specifically provide for reservations and either permit them without any referral to the other States for approval or may be made expressly dependent on approval by a stipulated majority of, or absence of objection by, the other States concerned, and the approval of the Senate is normally regarded as advance approval of acceptance of such reservations if made; (3) some reservations are either of such an insignificant character or have been repeated so often that they follow an established pattern that has received Senate approval in substance in other instances; and (4) the "reservation" may not be a true reservation but merely some statement or declaration designated as a "reservation" which does not condition or otherwise affect the legal obligations specified in the treaty.

A reservation made at time of signature normally appears on the text of a treaty submitted to the Senate but if it is not on that text it is especially brought to the attention of the Senate in the report of the Secretary of State to the President and the President's message to the Senate submitting the treaty for advice and consent to ratification. Even though a reservation appears on the text of the treaty it is customary to call attention to it, especially if it is of any substantive significance, when the treaty is transmitted to the Senate by the President. See, for example, the report of the Secretary of State to the President regarding the Geneva Conventions for the Protection of War Victims (Senate Executives D-G, 82d Congress, 1st Session, p. A2; see also the statement made by the Senate in its approval of the Geneva Convention on Prisoners of War with respect to reservations made at time of signature by certain countries. TIAS 3364, p. 200).

Article 20 of the Convention concerning Customs Facilities for Touring, opened for signature at New York June 4, 1954 (TIAS 3879) specifically permits reservations, provided one-third of the Contracting States do not object within ninety days of the date the reservation is circulated. This provision for reservations, which was before the Senate along with the remaining provisions of the treaty for consideration, and the nature of the reservations that were made, were regarded as making it unnecessary to submit such reservations to the Senate for approval before they were tacitly accepted for the United States.

The reservation made by Argentina in her ratification of the Statute of the International Atomic Energy Agency was followed by an explanation

which appeared to make the reservation inconsequential so far as the operation of that Statute was involved. Guatemala's ratification of the Charter of the Organization of American States was followed by a declaration which, in the opinion of the United States, made it compatible with the obligations imposed by the Charter.

With reference to the United States comment on the provisions in the International Law Commission's draft articles on the law of treaties with respect to acceptance of reservations, no comment was made because the procedure followed with respect to acceptance was considered to be a purely national matter.

Even though we have seen no occasion during the past twenty years, after the United States had become a party to a multilateral treaty, to refer to the Senate any reservation made to such treaty, I would not wish to convey the impression that any policy exists that would stand in the way of such referral if the circumstances and nature of the reservation required that procedure. If there were a question whether a particular reservation required approval by the Senate it would be the subject of consultation between the Department of State and the Senate Committee on Foreign Relations and possibly also other Senate leaders before any final determination were made before the reservation were accepted for the United States, either tacitly or affirmatively. The action taken in regard to the Canadian reservation to the North American Regional Broadcasting Agreement signed at Washington on November 15, 1950 (TIAS 4460) may be of interest to you. That Agreement was transmitted to the Senate by the President on February 5, 1951 for advice and consent to ratification. The Senate delayed nearly ten years, until February 23, 1960, in giving that advice and consent. On April 9, 1957, while the Agreement was pending in the Senate Committee on Foreign Relations, Canada deposited an instrument of ratification subject to a reservation. On June 6, 1957, this reservation was brought to the attention of the Senate by a letter from the Department to the Chairman of the Senate Committee on Foreign Relations, with a statement that "The Department of State concurs with the Federal Communications Commission in the view that the Canadian reservation assures adequate protection for United States stations from objectionable interference and is therefore acceptable." The Senate approved the Agreement, therefore, with knowledge of the Canadian reservation, but without referring to it otherwise than in the Committee report.

(Letter of March 1, 1966, on file in the Office of the Legal Adviser,
Department of State.)

VIET-NAM

Legality of United States participation in the defense of Viet-Nam

Following is the text of a legal memorandum which was prepared by Leonard C. Meeker, Legal Adviser of the Department of State, and was submitted to the Senate Committee on Foreign Relations on March 8:

**THE LEGALITY OF UNITED STATES PARTICIPATION IN THE
DEFENSE OF VIET-NAM**

MARCH 4, 1966

**1. THE UNITED STATES AND SOUTH VIET-NAM HAVE THE RIGHT UNDER
INTERNATIONAL LAW TO PARTICIPATE IN THE COLLECTIVE DEFENSE
OF SOUTH VIET-NAM AGAINST ARMED ATTACK**

In response to requests from the Government of South Viet-Nam, the United States has been assisting that country in defending itself against armed attack from the Communist North. This attack has taken the forms of externally supported subversion, clandestine supply of arms, infiltration of armed personnel, and most recently the sending of regular units of the North Vietnamese army into the South.

International law has long recognized the right of individual and collective self-defense against armed attack. South Viet-Nam and the United States are engaging in such collective defense consistently with international law and with United States obligations under the United Nations Charter.

A. South Viet-Nam Is Being Subjected to Armed Attack by Communist North Viet-Nam

The Geneva accords of 1954 established a demarcation line between North Viet-Nam and South Viet-Nam.¹ They provided for withdrawals of military forces into the respective zones north and south of this line. The accords prohibited the use of either zone for the resumption of hostilities or to "further an aggressive policy."

During the 5 years following the Geneva conference of 1954, the Hanoi regime developed a covert political-military organization in South Viet-Nam based on Communist cadres it had ordered to stay in the South, contrary to the provisions of the Geneva accords. The activities of this covert organization were directed toward the kidnaping and assassination of civilian officials—acts of terrorism that were perpetrated in increasing numbers.

In the 3-year period from 1959 to 1961, the North Viet-Nam regime infiltrated an estimated 10,000 men into the South. It is estimated that 13,000 additional personnel were infiltrated in 1962, and, by the end of 1964, North Viet-Nam may well have moved over 40,000 armed and unarmed guerrillas into South Viet-Nam.

The International Control Commission reported in 1962 the findings of its Legal Committee:

. . . there is evidence to show that arms, armed and unarmed personnel, munitions and other supplies have been sent from the Zone in the North to the Zone in the South with the objective of supporting, organizing and carrying out hostile activities, including armed attacks, directed against the Armed Forces and Administration of the Zone in the South.

. . . there is evidence that the PAVN [People's Army of Viet Nam] has allowed the Zone in the North to be used for inciting, encouraging

¹ For texts, see American Foreign Policy, 1950-1955; Basic Documents, Vol. I, Department of State publication 6446, p. 750. [See also pp. 629-646 below.—Ed.]

and supporting hostile activities in the Zone in the South, aimed at the overthrow of the Administration in the South.

Beginning in 1964, the Communists apparently exhausted their reservoir of Southerners who had gone North. Since then the greater number of men infiltrated into the South have been native-born North Vietnamese. Most recently, Hanoi has begun to infiltrate elements of the North Vietnamese army in increasingly larger numbers. Today, there is evidence that nine regiments of regular North Vietnamese forces are fighting in organized units in the South.

In the guerrilla war in Viet-Nam, the external aggression from the North is the critical military element of the insurgency, although it is unacknowledged by North Viet-Nam. In these circumstances, an "armed attack" is not as easily fixed by date and hour as in the case of traditional warfare. However, the infiltration of thousands of armed men clearly constitutes an "armed attack" under any reasonable definition. There may be some question as to the exact date at which North Viet-Nam's aggression grew into an "armed attack," but there can be no doubt that it had occurred before February 1965.

B. International Law Recognizes the Right of Individual and Collective Self-Defense Against Armed Attack

International law has traditionally recognized the right of self-defense against armed attack. This proposition has been asserted by writers on international law through the several centuries in which the modern law of nations has developed. The proposition has been acted on numerous times by governments throughout modern history. Today the principle of self-defense against armed attack is universally recognized and accepted.²

The Charter of the United Nations, concluded at the end of World War II, imposed an important limitation on the use of force by United Nations members. Article 2, paragraph 4, provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

In addition, the charter embodied a system of international peacekeeping through the organs of the United Nations. Article 24 summarizes these structural arrangements in stating that the United Nations members:

... confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

However, the charter expressly states in article 51 that the remaining provisions of the charter—including the limitation of article 2, paragraph

² See, *e.g.*, Jessup, *A Modern Law of Nations*, 163 ff. (1948); Oppenheim, *International Law*, 297 ff. (8th ed., Lauterpacht, 1955). And see, generally, Bowett, *Self-Defense in International Law* (1958). [Footnote in original.]

4, and the creation of United Nations machinery to keep the peace—in no way diminish the inherent right of self-defense against armed attack. Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Thus, article 51 restates and preserves, for member states in the situations covered by the article, a long-recognized principle of international law. The article is a "saving clause" designed to make clear that no other provision in the charter shall be interpreted to impair the inherent right of self-defense referred to in article 51.

Three principal objections have been raised against the availability of the right of individual and collective self-defense in the case of Viet-Nam: (1) that this right applies only in the case of an armed attack on a United Nations member; (2) that it does not apply in the case of South Viet-Nam because the latter is not an independent sovereign state; and (3) that collective self-defense may be undertaken only by a regional organization operating under chapter VIII of the United Nations Charter. These objections will now be considered in turn.

C. The Right of Individual and Collective Self-Defense Applies in the Case of South Viet-Nam Whether or Not That Country Is a Member of the United Nations

1. South Viet-Nam enjoys the right of self-defense

The argument that the right of self-defense is available only to members of the United Nations mistakes the nature of the right of self-defense and the relationship of the United Nations Charter to international law in this respect. As already shown, the right of self-defense against armed attack is an inherent right under international law. The right is not conferred by the charter, and, indeed, article 51 expressly recognizes that the right is inherent.

The charter nowhere contains any provision designed to deprive nonmembers of the right of self-defense against armed attack.³ Article 2,

³ While nonmembers, such as South Viet-Nam, have not formally undertaken the obligations of the United Nations Charter as their own treaty obligations, it should be recognized that much of the substantive law of the charter has become part of the general law of nations through a very wide acceptance by nations the world over. This is particularly true of the charter provisions bearing on the use of force. Moreover, in the case of South Viet-Nam, the South Vietnamese Government has expressed its ability and willingness to abide by the charter, in applying for United Nations membership. Thus it seems entirely appropriate to appraise the actions of South Viet-Nam in relation to the legal standards set forth in the United Nations Charter. [Footnote in original.]

paragraph 6, does charge the United Nations with responsibility for insuring that nonmember states act in accordance with United Nations "Principles so far as may be necessary for the maintenance of international peace and security." Protection against aggression and self-defense against armed attack are important elements in the whole charter scheme for the maintenance of international peace and security. To deprive nonmembers of their inherent right of self-defense would not accord with the principles of the organization, but would instead be prejudicial to the maintenance of peace. Thus article 2, paragraph 6—and, indeed, the rest of the charter—should certainly not be construed to nullify or diminish the inherent defensive rights of nonmembers.

2. The United States has the right to assist in the defense of South Viet-Nam although the latter is not a United Nations member

The cooperation of two or more international entities in the defense of one or both against armed attack is generally referred to as collective self-defense. United States participation in the defense of South Viet-Nam at the latter's request is an example of collective self-defense.

The United States is entitled to exercise the right of individual or collective self-defense against armed attack, as that right exists in international law, subject only to treaty limitations and obligations undertaken by this country.

It has been urged that the United States has no right to participate in the collective defense of South Viet-Nam because article 51 of the United Nations Charter speaks only of the situation "if an armed attack occurs *against a Member of the United Nations*." This argument is without substance.

In the first place, article 51 does not impose restrictions or cut down the otherwise available rights of United Nations members. By its own terms, the article preserves an inherent right. It is, therefore, necessary to look elsewhere in the charter for any obligation of members restricting their participation in collective defense of an entity that is not a United Nations member.

Article 2, paragraph 4, is the principal provision of the charter imposing limitations on the use of force by members. It states that they:

... shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Action taken in defense against armed attack cannot be characterized as falling within this proscription. The record of the San Francisco conference makes clear that article 2, paragraph 4, was not intended to restrict the right of self-defense against armed attack.⁴

One will search in vain for any other provision in the charter that would preclude United States participation in the collective defense of a non-

⁴ See 6 UNCIO Documents 459. [Footnote in original.]

member. The fact that article 51 refers only to armed attack "against a Member of the United Nations" implies no intention to preclude members from participating in the defense of nonmembers. Any such result would have seriously detrimental consequences for international peace and security and would be inconsistent with the purposes of the United Nations as they are set forth in article 1 of the charter.⁵ The right of members to participate in the defense of nonmembers is upheld by leading authorities on international law.⁶

D. The Right of Individual and Collective Self-Defense Applies Whether or Not South Viet-Nam Is Regarded as an Independent Sovereign State

1. *South Viet-Nam enjoys the right of self-defense*

It has been asserted that the conflict in Viet-Nam is "civil strife" in which foreign intervention is forbidden. Those who make this assertion have gone so far as to compare Ho Chi Minh's actions in Viet-Nam with the efforts of President Lincoln to preserve the Union during the American Civil War. Any such characterization is an entire fiction disregarding the actual situation in Viet-Nam. The Hanoi regime is anything but the legitimate government of a unified country in which the South is rebelling against lawful national authority.

The Geneva accords of 1954 provided for a division of Viet-Nam into two zones at the 17th parallel. Although this line of demarcation was intended to be temporary, it was established by international agreement, which specifically forbade aggression by one zone against the other.

The Republic of Viet-Nam in the South has been recognized as a separate international entity by approximately 60 governments the world over. It has been admitted as a member of a number of the specialized agencies of the United Nations. The United Nations General Assembly in 1957 voted to recommend South Viet-Nam for membership in the organization, and its admission was frustrated only by the veto of the Soviet Union in the Security Council.

In any event there is no warrant for the suggestion that one zone of a temporarily divided state—whether it be Germany, Korea, or Viet-Nam—can be legally overrun by armed forces from the other zone, crossing the

⁵ In particular, the statement of the first purpose:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. . . . [Footnote in original.]

⁶ Bowett, *Self-Defense in International Law*, 193-195 (1958); Goodhart, "The North Atlantic Treaty of 1949," 79 *Recueil Des Cours*, 183, 202-204 (1951, vol. II), quoted in 5 *Whitman's Digest of International Law*, 1067-1068 (1965); Kelsen, *The Law of the United Nations*, 793 (1950); see Stone, *Aggression and World Order*, 44 (1958). [Footnote in original.]

internationally recognized line of demarcation between the two. Any such doctrine would subvert the international agreement establishing the line of demarcation, and would pose grave dangers to international peace.

The action of the United Nations in the Korean conflict of 1950 clearly established the principle that there is no greater license for one zone of a temporarily divided state to attack the other zone than there is for one state to attack another state. South Viet-Nam has the same right that South Korea had to defend itself and to organize collective defense against an armed attack from the North. A resolution of the Security Council dated June 25, 1950, noted "with grave concern the armed attack upon the Republic of Korea by forces from North Korea," and determined "that this action constitutes a breach of the peace."

2. The United States is entitled to participate in the collective defense of South Viet-Nam whether or not the latter is regarded as an independent sovereign state

As stated earlier, South Viet-Nam has been recognized as a separate international entity by approximately 60 governments. It has been admitted to membership in a number of the United Nations specialized agencies and has been excluded from the United Nations Organization only by the Soviet veto.

There is nothing in the charter to suggest that United Nations members are precluded from participating in the defense of a recognized international entity against armed attack merely because the entity may lack some of the attributes of an independent sovereign state. Any such result would have a destructive effect on the stability of international engagements such as the Geneva accords of 1954 and on internationally agreed lines of demarcation. Such a result, far from being in accord with the charter and the purposes of the United Nations, would undermine them and would create new dangers to international peace and security.

E. The United Nations Charter Does Not Limit the Right of Self-Defense to Regional Organizations

Some have argued that collective self-defense may be undertaken only by a regional arrangement or agency operating under chapter VIII of the United Nations Charter. Such an assertion ignores the structure of the charter and the practice followed in the more than 20 years since the founding of the United Nations.

The basic proposition that rights of self-defense are not impaired by the charter—as expressly stated in article 51—is not conditioned by any charter provision limiting the application of this proposition to collective defense by a regional arrangement or agency. The structure of the charter reinforces this conclusion. Article 51 appears in chapter VII of the charter, entitled "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," whereas chapter VIII, entitled "Regional Arrangements," begins with article 52 and embraces the two following articles.

The records of the San Francisco conference show that article 51 was deliberately placed in chapter VII rather than chapter VIII, "where it would only have a bearing on the regional system."⁷

Under article 51, the right of self-defense is available against any armed attack, whether or not the country attacked is a member of a regional arrangement and regardless of the source of the attack. Chapter VIII, on the other hand, deals with relations among members of a regional arrangement or agency, and authorizes regional action as appropriate for dealing with "local disputes." This distinction has been recognized ever since the founding of the United Nations in 1945.

For example, the North Atlantic Treaty has operated as a collective security arrangement, designed to take common measures in preparation against the eventuality of an armed attack for which collective defense under article 51 would be required. Similarly, the Southeast Asia Treaty Organization was designed as a collective defense arrangement under article 51. Secretary of State Dulles emphasized this in his testimony before the Senate Foreign Relations Committee in 1954.

By contrast, article 1 of the Charter of Bogotá (1948), establishing the Organization of American States, expressly declares that the organization is a regional agency within the United Nations. Indeed, chapter VIII of the United Nations Charter was included primarily to take account of the functioning of the inter-American system.

In sum, there is no basis in the United Nations Charter for contending that the right of self-defense against armed attack is limited to collective defense by a regional organization.

F. The United States Has Fulfilled Its Obligations to the United Nations

A further argument has been made that the members of the United Nations have conferred on United Nations organs—and, in particular, on the Security Council—exclusive power to act against aggression. Again, the express language of article 51 contradicts that assertion. A victim of armed attack is not required to forgo individual or collective defense of its territory until such time as the United Nations organizes collective action and takes appropriate measures. To the contrary, article 51 clearly states that the right of self-defense may be exercised "*until* the Security Council has taken the measures necessary to maintain international peace and security."⁸

⁷ 17 UNCIO Documents 288. [Footnote in original.]

⁸ An argument has been made by some that the United States, by joining in the collective defense of South Viet-Nam, has violated the peaceful settlement obligation of article 33 in the charter. This argument overlooks the obvious proposition that a victim of armed aggression is not required to sustain the attack undefended while efforts are made to find a political solution with the aggressor. Article 51 of the charter illustrates this by making perfectly clear that the inherent right of self-defense is impaired by "Nothing in the present Charter," including the provisions of article 33. [Footnote in original.]

As indicated earlier, article 51 is not literally applicable to the Viet-Nam situation since South Viet-Nam is not a member. However, reasoning by analogy from article 51 and adopting its provisions as an appropriate guide for the conduct of members in a case like Viet-Nam, one can only conclude that United States actions are fully in accord with this country's obligations as a member of the United Nations.

Article 51 requires that:

Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The United States has reported to the Security Council on measures it has taken in countering the Communist aggression in Viet-Nam. In August 1964 the United States asked the Council to consider the situation created by North Vietnamese attacks on United States destroyers in the Tonkin Gulf.⁹ The Council thereafter met to debate the question, but adopted no resolutions. Twice in February 1965 the United States sent additional reports to the Security Council on the conflict in Viet-Nam and on the additional measures taken by the United States in the collective defense of South Viet-Nam.¹⁰ In January 1966 the United States formally submitted the Viet-Nam question to the Security Council for its consideration and introduced a draft resolution calling for discussions looking toward a peaceful settlement on the basis of the Geneva accords.¹¹

At no time has the Council taken any action to restore peace and security in Southeast Asia. The Council has not expressed criticism of United States actions. Indeed, since the United States submission of January 1966, members of the Council have been notably reluctant to proceed with any consideration of the Viet-Nam question.

The conclusion is clear that the United States has in no way acted to interfere with United Nations consideration of the conflict in Viet-Nam. On the contrary, the United States has requested United Nations consideration, and the Council has not seen fit to act.

G. International Law Does Not Require a Declaration of War as a Condition Precedent To Taking Measures of Self-Defense Against Armed Attack

The existence or absence of a formal declaration of war is not a factor in determining whether an international use of force is lawful as a matter of international law. The United Nations Charter's restrictions focus on the manner and purpose of its use and not on any formalities of announcement.

It should also be noted that a formal declaration of war would not place any

⁹ For a statement made by U. S. Representative Adlai E. Stevenson in the Security Council on Aug. 5, 1964, see *BULLETIN* of Aug. 24, 1964, p. 272.

¹⁰ For texts, see *ibid.*, Feb. 22, 1965, p. 240, and Mar. 22, 1965, p. 419.

¹¹ For background and text of draft resolution, see *ibid.*, Feb. 14, 1966, p. 231.

obligations on either side in the conflict by which that side would not be bound in any event. The rules of international law concerning the conduct of hostilities in an international armed conflict apply regardless of any declaration of war.

H. Summary

The analysis set forth above shows that South Viet-Nam has the right in present circumstances to defend itself against armed attack from the North and to organize a collective self-defense with the participation of others. In response to requests from South Viet-Nam, the United States has been participating in that defense, both through military action within South Viet-Nam and actions taken directly against the aggressor in North Viet-Nam. This participation by the United States is in conformity with international law and is consistent with our obligations under the Charter of the United Nations.

II. THE UNITED STATES HAS UNDERTAKEN COMMITMENTS TO ASSIST SOUTH VIET-NAM IN DEFENDING ITSELF AGAINST COMMUNIST AGGRESSION FROM THE NORTH

The United States has made commitments and given assurances, in various forms and at different times, to assist in the defense of South Viet-Nam.

A. The United States Gave Undertakings at the End of the Geneva Conference in 1954

At the time of the signing of the Geneva accords in 1954, President Eisenhower warned "that any renewal of Communist aggression would be viewed by us as a matter of grave concern," at the same time giving assurance that the United States would "not use force to disturb the settlement."¹² And the formal declaration made by the United States Government at the conclusion of the Geneva conference stated that the United States "would view any renewal of the aggression in violation of the afore-said agreements with grave concern and as seriously threatening international peace and security."¹³

B. The United States Undertook an International Obligation To Defend South Viet-Nam in the SEATO Treaty

Later in 1954 the United States negotiated with a number of other countries and signed the Southeast Asia Collective Defense Treaty.¹⁴ The treaty contains in the first paragraph of article IV the following provision:

Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that

¹² For a statement made by President Eisenhower on June 21, 1954, see *ibid.*, Aug. 2, 1954, p. 163.

¹³ For text, see *ibid.*, p. 162.

¹⁴ For text, see *ibid.*, Sept. 20, 1954, p. 393 [reprinted below, p. 646].

it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.

Annexed to the treaty was a protocol stating that:

The Parties to the Southeast Asia Collective Defense Treaty unanimously designate for the purposes of Article IV of the Treaty the States of Cambodia and Laos and the free territory under the jurisdiction of the State of Vietnam.

Thus, the obligations of article IV, paragraph 1, dealing with the eventuality of armed attack, have from the outset covered the territory of South Viet-Nam. The facts as to the North Vietnamese armed attack against the South have been summarized earlier, in the discussion of the right of self-defense under international law and the Charter of the United Nations. The term "armed attack" has the same meaning in the SEATO treaty as in the United Nations Charter.

Article IV, paragraph 1, places an obligation on each party to the SEATO treaty to "act to meet the common danger in accordance with its constitutional processes" in the event of an armed attack. The treaty does not require a collective determination that an armed attack has occurred in order that the obligation of article IV, paragraph 1, become operative. Nor does the provision require collective decision on actions to be taken to meet the common danger. As Secretary Dulles pointed out when transmitting the treaty to the President, the commitment in article IV, paragraph 1, "leaves to the judgment of each country the type of action to be taken in the event an armed attack occurs."¹⁵

The treaty was intended to deter armed aggression in Southeast Asia. To that end it created not only a multilateral alliance but also a series of bilateral relationships. The obligations are placed squarely on "each Party" in the event of armed attack in the treaty area—not upon "the Parties," a wording that might have implied a necessity for collective decision. The treaty was intended to give the assurance of United States assistance to any party or protocol state that might suffer a Communist armed attack, regardless of the views or actions of other parties. The fact that the obligations are individual, and may even to some extent differ among the parties to the treaty, is demonstrated by the United States understanding, expressed at the time of signature, that its obligations under article IV, paragraph 1, apply only in the event of *Communist* aggression, whereas the other parties to the treaty were unwilling so to limit their obligations to each other.

Thus, the United States has a commitment under article IV, paragraph 1, in the event of armed attack, independent of the decision or action of other treaty parties. A joint statement issued by Secretary Rusk and Foreign Minister Thanat Khoman of Thailand on March 6, 1962,¹⁶ reflected this understanding:

¹⁵ For text, see *ibid.*, Nov. 29, 1954, p. 820.

¹⁶ For text, see *ibid.*, March 26, 1962, p. 498.

The Secretary of State assured the Foreign Minister that in the event of such aggression, the United States intends to give full effect to its obligations under the Treaty to act to meet the common danger in accordance with its constitutional processes. The Secretary of State reaffirmed that this obligation of the United States does not depend upon the prior agreement of all other parties to the Treaty, since this Treaty obligation is individual as well as collective.

Most of the SEATO countries have stated that they agreed with this interpretation. None has registered objection to it.

When the Senate Committee on Foreign Relations reported on the Southeast Asia Collective Defense Treaty, it noted that the treaty area was further defined so that the "Free Territory of Vietnam" was an area "which, if attacked, would fall under the protection of the instrument." In its conclusion the committee stated:

The committee is not impervious to the risks which this treaty entails. It fully appreciates that acceptance of these additional obligations commits the United States to a course of action over a vast expanse of the Pacific. Yet these risks are consistent with our own highest interests.

The Senate gave its advice and consent to the treaty by a vote of 82 to 1.

C. The United States Has Given Additional Assurances to the Government of South Viet-Nam

The United States has also given a series of additional assurances to the Government of South Viet-Nam. As early as October 1954 President Eisenhower undertook to provide direct assistance to help make South Viet-Nam "capable of resisting attempted subversion or aggression through military means."¹⁷ On May 11, 1957, President Eisenhower and President Ngo Dinh Diem of the Republic of Viet-Nam issued a joint statement¹⁸ which called attention to "the large build-up of Vietnamese Communist military forces in North Viet-Nam" and stated:

Noting that the Republic of Viet-Nam is covered by Article IV of the Southeast Asia Collective Defense Treaty, President Eisenhower and President Ngo Dinh Diem agreed that aggression or subversion threatening the political independence of the Republic of Viet-Nam would be considered as endangering peace and stability.

On August 2, 1961, President Kennedy declared that "the United States is determined that the Republic of Viet-Nam shall not be lost to the Communists for lack of any support which the United States Government can render."¹⁹ On December 7 of that year President Diem appealed for additional support. In his reply of December 14, 1961, President Kennedy recalled the United States declaration made at the end of the Geneva con-

¹⁷ For text of a message from President Eisenhower to President Ngo Dinh Diem, see *ibid.*, Nov. 15, 1954, p. 735.

¹⁸ For text, see *ibid.*, May 27, 1957, p. 851.

¹⁹ For text of a joint communique issued by President Kennedy and Vice President Chen Cheng of the Republic of China, see *ibid.*, Aug. 28, 1961, p. 372.

ference in 1954, and reaffirmed that the United States was "prepared to help the Republic of Viet-Nam to protect its people and to preserve its independence."²⁰ This assurance has been reaffirmed many times since.

III. ACTIONS BY THE UNITED STATES AND SOUTH VIET-NAM ARE JUSTIFIED UNDER THE GENEVA ACCORDS OF 1954

A. Description of the Accords

The Geneva accords of 1954²¹ established the date and hour for a cease-fire in Viet-Nam, drew a "provisional military demarcation line" with a demilitarized zone on both sides, and required an exchange of prisoners and the phased regroupment of Viet Minh forces from the south to the north and of French Union forces from the north to the south. The introduction into Viet-Nam of troop reinforcements and new military equipment (except for replacement and repair) was prohibited. The armed forces of each party were required to respect the demilitarized zone and the territory of the other zone. The adherence of either zone to any military alliance, and the use of either zone for the resumption of hostilities or to "further an aggressive policy," were prohibited. The International Control Commission was established, composed of India, Canada and Poland, with India as chairman. The task of the Commission was to supervise the proper execution of the provisions of the cease-fire agreement. General elections that would result in reunification were required to be held in July 1956 under the supervision of the ICC.

B. North Viet-Nam Violated the Accords From the Beginning

From the very beginning, the North Vietnamese violated the 1954 Geneva accords. Communist military forces and supplies were left in the South in violation of the accords. Other Communist guerrillas were moved north for further training and then were infiltrated into the South in violation of the accords.

C. The Introduction of United States Military Personnel and Equipment Was Justified

The accords prohibited the reinforcement of foreign military forces in Viet-Nam and the introduction of new military equipment, but they allowed

²⁰ For text of an exchange of messages between President Kennedy and President Diem, see *ibid.*, Jan. 1, 1962, p. 13.

²¹ These accords were composed of a bilateral cease-fire agreement between the "Commander-in-Chief of the People's Army of Viet Nam" and the "Commander-in-Chief of the French Union forces in Indo-China," together with a Final Declaration of the Conference, to which France adhered. However, it is to be noted that the South Vietnamese Government was not a signatory of the cease-fire agreement and did not adhere to the Final Declaration. South Viet-Nam entered a series of reservations in a statement to the conference. This statement was noted by the conference, but by decision of the conference chairman it was not included or referred to in the Final Declaration. [Footnote in original.]

replacement of existing military personnel and equipment. Prior to late 1961 South Viet-Nam had received considerable military equipment and supplies from the United States, and the United States had gradually enlarged its Military Assistance Advisory Group to slightly less than 900 men. These actions were reported to the ICC and were justified as replacements for equipment in Viet-Nam in 1954 and for French training and advisory personnel who had been withdrawn after 1954.

As the Communist aggression intensified during 1961, with increased infiltration and a marked stepping up of Communist terrorism in the South, the United States found it necessary in late 1961 to increase substantially the numbers of our military personnel and the amounts and types of equipment introduced by this country into South Viet-Nam. These increases were justified by the international law principle that a material breach of an agreement by one party entitles the other at least to withhold compliance with an equivalent, corresponding, or related provision until the defaulting party is prepared to honor its obligations.²²

In accordance with this principle, the systematic violation of the Geneva accords by North Viet-Nam justified South Viet-Nam in suspending compliance with the provision controlling entry of foreign military personnel and military equipment.

D. South Viet-Nam Was Justified in Refusing To Implement the Election Provisions of the Geneva Accords

The Geneva accords contemplated the reunification of the two parts of Viet-Nam. They contained a provision for general elections to be held in July 1956 in order to obtain a "free expression of the national will." The accords stated that "consultations will be held on this subject between the competent representative authorities of the two zones from 20 July 1955 onwards."

There may be some question whether South Viet-Nam was bound by these election provisions. As indicated earlier, South Viet-Nam did not sign the cease-fire agreement of 1954, nor did it adhere to the Final Declaration of the Geneva conference. The South Vietnamese Government at that

²² This principle of law and the circumstances in which it may be invoked are most fully discussed in the Fourth Report on the Law of Treaties by Sir Gerald Fitzmaurice, articles 18, 20 (U.N. doc. A/CN.4/120(1959)) II Yearbook of the International Law Commission 37 (U.N. doc. A/CN.4/SER.A/1959/Add.1) and in the later report by Sir Humphrey Waldock, article 20 (U.N. doc. A/CN.4/156 and Add. 1-3 (1963)) II Yearbook of the International Law Commission 36 (U.N. doc. A/CN.4/SER.A/1963/Add.1). Among the authorities cited by the fourth report for this proposition are: II Oppenheim, *International Law* 136, 137 (7th ed. Lauterpacht 1955); I Rousseau, *Principes généraux du droit international public* 365 (1944); II Hyde, *International Law* 1600 et seq. (2d ed. 1947); II Guggenheim, *Traité de droit international public* 84, 85 (1935); Spiropoulos, *Traité théorique et pratique de droit international public* 289 (1933); Verdross, *Völkerrecht*, 328 (1950); Hall, *Treatise* 21 (8th ed. Higgins 1924); 3 Accioly, *Tratado de Direito Internacional Publico* 82 (1956-57). See also draft articles 42 and 46 of the Law of Treaties by the International Law Commission, contained in the report on the work of its 15th session (General Assembly, Official Records, 18th Session, Supplement No. 9(A/5809)). [Footnote in original.]

time gave notice of its objection in particular to the election provisions of the accords.

However, even on the premise that these provisions were binding on South Viet-Nam, the South Vietnamese Government's failure to engage in consultations in 1955, with a view to holding elections in 1956, involved no breach of obligation. The conditions in North Viet-Nam during that period were such as to make impossible any free and meaningful expression of popular will.

Some of the facts about conditions in the North were admitted even by the Communist leadership in Hanoi. General Giap, currently Defense Minister of North Viet-Nam, in addressing the Tenth Congress of the North Vietnamese Communist Party in October 1956, publicly acknowledged that the Communist leaders were running a police state where executions, terror, and torture were commonplace. A nationwide election in these circumstances would have been a travesty. No one in the North would have dared to vote except as directed. With a substantial majority of the Vietnamese people living north of the 17th parallel, such an election would have meant turning the country over to the Communists without regard to the will of the people. The South Vietnamese Government realized these facts and quite properly took the position that consultations for elections in 1956 as contemplated by the accords would be a useless formality.²³

IV. THE PRESIDENT HAS FULL AUTHORITY TO COMMIT UNITED STATES FORCES IN THE COLLECTIVE DEFENSE OF SOUTH VIET-NAM

There can be no question in present circumstances of the President's authority to commit United States forces to the defense of South Viet-Nam. The grant of authority to the President in article II of the Constitution extends to the actions of the United States currently undertaken in Viet-Nam. In fact, however, it is unnecessary to determine whether this grant standing alone is sufficient to authorize the actions taken in Viet-Nam. These actions rest not only on the exercise of Presidential powers under article II but on the SEATO treaty—a treaty advised and consented to by the Senate—and on actions of the Congress, particularly the joint resolution of August 10, 1964. When these sources of authority are taken together—article II of the Constitution, the SEATO treaty, and actions by the Congress—there can be no question of the legality under domestic law of United States actions in Viet-Nam.

A. The President's Power Under Article II of the Constitution Extends to the Actions Currently Undertaken in Viet-Nam

Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime

²³ In any event, if North Viet-Nam considered there had been a breach of obligation by the South, its remedies lay in discussion with Saigon, perhaps in an appeal to the co-chairmen of the Geneva conference, or in a reconvening of the conference to consider the situation. Under international law, North Viet-Nam had no right to use force outside its own zone in order to secure its political objectives. [Footnote in original.]

responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.

At the Federal Constitutional Convention in 1787, it was originally proposed that Congress have the power "to make war." There were objections that legislative proceedings were too slow for this power to be vested in Congress; it was suggested that the Senate might be a better repository. Madison and Gerry then moved to substitute "to declare war" for "to make war," "leaving to the Executive the power to repel sudden attacks." It was objected that this might make it too easy for the Executive to involve the nation in war, but the motion carried with but one dissenting vote.

In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security. In the SEATO treaty, for example, it is formally declared that an armed attack against Viet-Nam would endanger the peace and safety of the United States.

Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the "undeclared war" with France (1798-1800). For example, President Truman ordered 250,000 troops to Korea during the Korean war of the early 1950's. President Eisenhower dispatched 14,000 troops to Lebanon in 1958.

The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress.

B. The Southeast Asia Collective Defense Treaty Authorizes the President's Actions

Under article VI of the United States Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Article IV, paragraph 1, of the SEATO treaty establishes as a matter of law that a Communist armed attack against South Viet-Nam endangers the peace and safety of the United States. In this same provision the United States has undertaken a commitment in the SEATO treaty to "act to meet the common danger in accordance with its constitutional processes" in the event of such an attack.

Under our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U. S. forces to South Viet-Nam is required, and that military

measures against the source of Communist aggression in North Viet-Nam are necessary, he is constitutionally empowered to take those measures.

The SEATO treaty specifies that each party will act "in accordance with its constitutional processes."

It has recently been argued that the use of land forces in Asia is not authorized under the treaty because their use to deter armed attack was not contemplated at the time the treaty was considered by the Senate. Secretary Dulles testified at that time that we did not intend to establish (1) a land army in Southeast Asia capable of deterring Communist aggression, or (2) an integrated headquarters and military organization like that of NATO; instead, the United States would rely on "mobile striking power" against the sources of aggression. However, the treaty obligation in article IV, paragraph 1, to meet the common danger in the event of armed aggression, is not limited to particular modes of military action. What constitutes an adequate deterrent or an appropriate response, in terms of military strategy, may change; but the essence of our commitment to act to meet the common danger, as necessary at the time of an armed aggression, remains. In 1954 the forecast of military judgment might have been against the use of substantial United States ground forces in Viet-Nam. But that does not preclude the President from reaching a different military judgment in different circumstances, 12 years later.

C. The Joint Resolution of Congress of August 10, 1964, Authorizes United States Participation in the Collective Defense of South Viet-Nam

As stated earlier, the legality of United States participation in the defense of South Viet-Nam does not rest only on the constitutional power of the President under article II—or indeed on that power taken in conjunction with the SEATO treaty. In addition, the Congress has acted in unmistakable fashion to approve and authorize United States actions in Viet-Nam.

Following the North Vietnamese attacks in the Gulf of Tonkin against United States destroyers, Congress adopted, by a Senate vote of 88-2 and a House vote of 416-0, a joint resolution containing a series of important declarations and provisions of law.²⁴

Section 1 resolved that "the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." Thus, the Congress gave its sanction to specific actions by the President to repel attacks against United States naval vessels in the Gulf of Tonkin and elsewhere in the western Pacific. Congress further approved the taking of "all necessary measures . . . to prevent further aggression." This authorization extended to those measures the President might consider necessary to ward off further attacks and to prevent further aggression by North Viet-Nam in Southeast Asia.

The joint resolution then went on to provide in section 2:

The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in

²⁴ For text, see BULLETIN of Aug. 24, 1964, p. 268.

southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Section 2 thus constitutes an authorization to the President, in his discretion, to act—using armed force if he determines that is required—to assist South Viet-Nam at its request in defense of its freedom. The identification of South Viet-Nam through the reference to “protocol state” in this section is unmistakable, and the grant of authority “as the President determines” is unequivocal.

It has been suggested that the legislative history of the joint resolution shows an intention to limit United States assistance to South Viet-Nam to aid, advice, and training. This suggestion is based on an amendment offered from the floor by Senator [Gaylord] Nelson which would have added the following to the text:

The Congress also approves and supports the efforts of the President to bring the problem of peace in Southeast Asia to the Security Council of the United Nations, and the President's declaration that the United States, seeking no extension of the present military conflict, will respond to provocation in a manner that is “limited and fitting.” Our continuing policy is to limit our role to the provision of aid, training assistance, and military advice, and it is the sense of Congress that, except when provoked to a greater response, we should continue to attempt to avoid a direct military involvement in the Southeast Asian conflict.²⁵

Senator [J. W.] Fulbright, who had reported the joint resolution from the Foreign Relations Committee, spoke on the amendment as follows:

It states fairly accurately what the President has said would be our policy, and what I stated my understanding was as to our policy; also what other Senators have stated. In other words, it states that our response should be appropriate and limited to the provocation, which the Senator states as “respond to provocation in a manner that is limited and fitting,” and so forth. We do not wish any political or military bases there. We are not seeking to gain a colony. We seek to insure the capacity of these people to develop along the lines of their own desires, independent of domination by communism.

The Senator has put into his amendment a statement of policy that is unobjectionable. However, I cannot accept the amendment under the circumstances. I do not believe it is contrary to the joint resolution, but it is an enlargement. I am informed that the House is now voting on this resolution. The House joint resolution is about to be presented to us. I cannot accept the amendment and go to conference with it, and thus take responsibility for delaying matters.

I do not object to it as a statement of policy. I believe it is an accurate reflection of what I believe is the President's policy, judging from his own statements. That does not mean that as a practical matter I can accept the amendment. It would delay matters to do so. It

²⁵ 110 Cong. Rec. 18459 (Aug. 7, 1964). [Footnote in original.]

would cause confusion and require a conference, and present us with all the other difficulties that are involved in this kind of legislative action. I regret that I cannot do it, even though I do not at all disagree with the amendment as a general statement of policy.²⁶

Senator Nelson's amendment related the degree and kind of U. S. response in Viet-Nam to "provocation" on the other side; the response should be "limited and fitting." The greater the provocation, the stronger are the measures that may be characterized as "limited and fitting." Bombing of North Vietnamese naval bases was a "limited and fitting" response to the attacks on U. S. destroyers in August 1964, and the subsequent actions taken by the United States and South Viet-Nam have been an appropriate response to the increased war of aggression carried on by North Viet-Nam since that date. Moreover, Senator Nelson's proposed amendment did not purport to be a restriction on authority available to the President but merely a statement concerning what should be the continuing policy of the United States.

Congressional realization of the scope of authority being conferred by the joint resolution is shown by the legislative history of the measure as a whole. The following exchange between Senators Cooper and Fulbright is illuminating:

MR. COOPER [John Sherman Cooper]. . . . The Senator will remember that the SEATO Treaty, in article IV, provides that in the event an armed attack is made upon a party to the Southeast Asia Collective Defense Treaty, or upon one of the protocol states such as South Vietnam, the parties to the treaty, one of whom is the United States, would then take such action as might be appropriate, after resorting to their constitutional processes. I assume that would mean, in the case of the United States, that Congress would be asked to grant the authority to act.

Does the Senator consider that in enacting this resolution we are satisfying that requirement of article IV of the Southeast Asia Collective Defense Treaty? In other words, are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?

MR. FULBRIGHT. I think that is correct.

MR. COOPER. Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?

MR. FULBRIGHT. That is the way I would interpret it. If a situation later developed in which we thought the approval should be withdrawn it could be withdrawn by concurrent resolution.²⁷

²⁶ *Ibid.*

²⁷ 110 Cong. Rec. 18409 (Aug. 6, 1964). Senator [Wayne] Morse, who opposed the joint resolution, expressed the following view on August 6, 1964, concerning the scope of the proposed resolution:

Another Senator thought, in the early part of the debate, that this course would not broaden the power of the President to engage in a land war if he decided that he wanted to apply the resolution in that way.

That Senator was taking great consolation in the then held belief that, if he voted for the resolution, it would give no authority to the President to send many troops into Asia.

The August 1964 joint resolution continues in force today. Section 2 of the resolution provides that it shall expire "when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress." The President has made no such determination, nor has Congress terminated the joint resolution.²⁸

Instead, Congress in May 1965 approved an appropriation of \$700 million to meet the expense of mounting military requirements in Viet-Nam. (Public Law 89-18, 79 Stat. 109.) The President's message asking for this appropriation stated that this was "not a routine appropriation. For each Member of Congress who supports this request is also voting to persist in our efforts to halt Communist aggression in South Vietnam."²⁹ The appropriation act constitutes a clear congressional endorsement and approval of the actions taken by the President.

On March 1, 1966, the Congress continued to express its support of the President's policy by approving a \$4.8 billion supplemental military authorization by votes of 392-4 and 93-2. An amendment that would have limited the President's authority to commit forces to Viet-Nam was rejected in the Senate by a vote of 94-2.

D. No Declaration of War by the Congress Is Required To Authorize United States Participation in the Collective Defense of South Viet-Nam

No declaration of war is needed to authorize American actions in Viet-Nam. As shown in the preceding sections, the President has ample authority to order the participation of United States armed forces in the defense of South Viet-Nam.

Over a very long period in our history, practice and precedent have confirmed the constitutional authority to engage United States forces in hostilities without a declaration of war. This history extends from the undeclared war with France and the war against the Barbary pirates at the end of the 18th century to the Korean war of 1950-53.

I am sure he was quite disappointed to finally learn, because it took a little time to get the matter cleared, that the resolution places no restriction on the President in that respect. If he is still in doubt, let him read the language on page 2, lines 3 to 6, and page 2, lines 11 to 17. The first reads:

The Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

It does not say he is limited in regard to the sending of ground forces. It does not limit that authority. That is why I have called it a predated declaration of war, in clear violation of article I, section 8, of the Constitution, which vests the power to declare war in the Congress, and not in the President.

What is proposed is to authorize the President of the United States, without a declaration of war, to commit acts of war. (110 Cong. Rec. 18426-7 (Aug. 6, 1964)). [Footnote in original.]

²⁸ On March 1, 1966, the Senate voted, 92-5, to table an amendment that would have repealed the joint resolution. [Footnote in original.]

²⁹ For text, see BULLETIN of May 24, 1965, p. 822.

James Madison, one of the leading framers of the Constitution, and Presidents John Adams and Jefferson all construed the Constitution, in their official actions during the early years of the Republic, as authorizing the United States to employ its armed forces abroad in hostilities in the absence of any congressional declaration of war. Their views and actions constitute highly persuasive evidence as to the meaning and effect of the Constitution. History has accepted the interpretation that was placed on the Constitution by the early Presidents and Congresses in regard to the lawfulness of hostilities without a declaration of war. The instances of such action in our history are numerous.

In the Korean conflict, where large-scale hostilities were conducted with an American troop participation of a quarter of a million men, no declaration of war was made by the Congress. The President acted on the basis of his constitutional responsibilities. While the Security Council, under a treaty of this country—the United Nations Charter—recommended assistance to the Republic of Korea against the Communist armed attack, the United States had no treaty commitment at that time obligating us to join in the defense of South Korea. In the case of South Viet-Nam we have the obligation of the SEATO treaty and clear expressions of congressional support. If the President could act in Korea without a declaration of war, *a fortiori* he is empowered to do so now in Viet-Nam.

It may be suggested that a declaration of war is the only available constitutional process by which congressional support can be made effective for the use of United States armed forces in combat abroad. But the Constitution does not insist on any rigid formalism. It gives Congress a choice of ways in which to exercise its powers. In the case of Viet-Nam the Congress has supported the determination of the President by the Senate's approval of the SEATO treaty, the adoption of the joint resolution of August 10, 1964, and the enactment of the necessary authorizations and appropriations.

V. CONCLUSION

South Viet-Nam is being subjected to armed attack by Communist North Viet-Nam, through the infiltration of armed personnel, military equipment, and regular combat units. International law recognizes the right of individual and collective self-defense against armed attack. South Viet-Nam, and the United States upon the request of South Viet-Nam, are engaged in such collective defense of the South. Their actions are in conformity with international law and with the Charter of the United Nations. The fact that South Viet-Nam has been precluded by Soviet veto from becoming a member of the United Nations and the fact that South Viet-Nam is a zone of a temporarily divided state in no way diminish the right of collective defense of South Viet-Nam.

The United States has commitments to assist South Viet-Nam in defending itself against Communist aggression from the North. The United States gave undertakings to this effect at the conclusion of the Geneva conference in 1954. Later that year the United States undertook an international obligation in the SEATO treaty to defend South Viet-Nam against Com-

munist armed aggression. And during the past decade the United States has given additional assurances to the South Vietnamese Government.

The Geneva accords of 1954 provided for a cease-fire and regroupment of contending forces, a division of Viet-Nam into two zones, and a prohibition on the use of either zone for the resumption of hostilities or to "further an aggressive policy." From the beginning, North Viet-Nam violated the Geneva accords through a systematic effort to gain control of South Viet-Nam by force. In the light of these progressive North Vietnamese violations, the introduction into South Viet-Nam beginning in late 1961 of substantial United States military equipment and personnel, to assist in the defense of the South, was fully justified; substantial breach of an international agreement by one side permits the other side to suspend performance of corresponding obligations under the agreement. South Viet-Nam was justified in refusing to implement the provisions of the Geneva accords calling for reunification through free elections throughout Viet-Nam since the Communist regime in North Viet-Nam created conditions in the North that made free elections entirely impossible.

The President of the United States has full authority to commit United States forces in the collective defense of South Viet-Nam. This authority stems from the constitutional powers of the President. However, it is not necessary to rely on the Constitution alone as the source of the President's authority, since the SEATO treaty—advised and consented to by the Senate and forming part of the law of the land—sets forth a United States commitment to defend South Viet-Nam against armed attack, and since the Congress—in the joint resolution of August 10, 1964, and in authorization and appropriations acts for support of the U. S. military effort in Viet-Nam—has given its approval and support to the President's actions. United States actions in Viet-Nam, taken by the President and approved by the Congress, do not require any declaration of war, as shown by a long line of precedents for the use of United States armed forces abroad in the absence of any congressional declaration of war.

(54 Dept. of State Bulletin 474 (1966); Congressional Record, March 10, 1966, p. 5274.)

JUDICIAL DECISIONS

BY JOHN R. STEVENSON *

Of the Board of Editors

UNITED STATES COURTS
CASES

Sovereign immunity—Inter-American Development Bank not subject to jurisdiction of United States courts as to loan policy—Bank is free to make loans to competing borrowers

LUTCHER S. A. CELULOSE E PAPEL v. INTER-AMERICAN DEVELOPMENT BANK.

U. S. Dist. Ct., Dist. Columbia, March 25, 1966 (not yet reported).

[An action was brought in the United States District Court for the District of Columbia by a Brazilian paper company seeking to enjoin the Inter-American Development Bank from making a proposed loan to a Brazilian competitor. The court held that the Bank was immune from suit on such a claim and that the complaint did not state a valid claim. The full text of the opinion (except for certain deleted footnotes) follows:]

This cause came on for hearing on plaintiffs' motion for preliminary injunction and defendant's motion to dismiss. Plaintiffs seek to enjoin the Inter-American Development Bank from augmenting a loan to one of plaintiffs' competitors. The loan would facilitate the development of a pulp mill in Brazil. Plaintiffs are engaged in a similar business and contend that the market will not support two mills. Plaintiffs further contend that the Bank has ignored certain alleged market conditions and that if consummated, the additional loan to plaintiffs' competitor would not be a prudent act.

Defendant's motion to dismiss is predicated upon two points: (1) the Bank is immune from suit, such as the one filed in the instant case, and (2) the complaint does not state a claim upon which relief can be granted. For the reasons hereinafter set forth, the Court agrees with both of defendant's contentions.

The International Organizations Immunities Act provides, in part:

"International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit in every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."¹

* Assisted by John E. Donnelly, Cornelius B. Prior, Jr., and William J. Williams, Jr., of the New York Bar.

¹ 22 U.S.C. § 288a(b).

An Executive Order of President Eisenhower dated April 8, 1960, designated the Inter-American Development Bank as a public international organization which would be entitled to the immunities and exemptions flowing from the above-quoted statute.² A subsequent Executive Order promulgated by President Kennedy provided that the first Executive Order should not be construed as affecting a certain provision of the Bank's Charter, which provides:

"Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.

"No action shall be brought against the Bank by members or persons acting for or deriving claims from members. However, member countries shall have recourse to such special procedures to settle controversies between the Bank and its members as may be prescribed in this Agreement, in the by-laws and regulations of the Bank or in contracts entered into with the Bank.

"Property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."

These pronouncements of executive policy and the Bank's position on its amenability to suit should be considered as important factors relating to the existence of jurisdiction of this Court in the instant case.

The Supreme Court has recognized that sovereign immunity has become part of the fabric of our judicial system through the adjudications of the courts.³ While there is nothing in the Constitution on the subject, it was early recognized that the dignity and standing of foreign sovereigns could be preserved and maintained by not subjecting them or their agents to the jurisdiction of the United States Courts.⁴ When a suit filed in a court of law could conceivably involve delicate matters of international relations, the courts should recognize that under our Constitution such matters are confided to the judgment and discretion of the Executive Branch of the Government.⁵ Plaintiff argues that the Bank has been sued in previous situations: where a customer fell on the floor, where there was an alleged breach of a contractual relationship with a coffee shop, and where workmen's compensation was involved. However, situations comparable to the one in which the Court is confronted are clearly distinguishable for the reason that cases involving the discretion and judgment of the Bank's governing board in matters of economic policy closely associated with consideration of international politics are vastly different from cases involving simple torts and contracts. Where delicate, complex issues of international economic policy are involved, jurisdiction should be denied.

Assuming *arguendo* that this Court does have jurisdiction, it is highly

² Executive Order 10873, 3 C.F.R. 404 (1959-1963 Comp.).

³ *National City Bank v. Republic of China*, 348 U. S. 356, 358 (1955).

⁴ *The Schooner Exchange v. M'Faddon*, 11 U. S. (7 Cranch) 116 (1812).

⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936).

questionable whether even a domestic bank could properly be sued by one of two competing customers who alleged that the bank had imprudently loaned money to the second customer and thereby made more difficult the customer's obligation to respond. Here, it is clear that the situation with which the Court is confronted in this complaint is even more lacking in merit in the judicial sense. Plaintiffs' standing to raise the issues on which they rely is by no means established irrespective of the foreign policy consideration. Counsel does not urge that there is any clause of the contract between plaintiffs and the Bank which specifically concerns the matter of limiting possible competition. He relies on implication. The contract provides for the ultimate sale of Twenty-five Percent (25%) of plaintiffs' stock. Plaintiffs contend that the Bank is required to act prudently in other matters so that the plaintiffs' stock will be marketable. Plaintiffs also complain about repayment features of the loan. In the opinion of the Court, none of these contentions are sufficient to establish an implied contract guaranteeing plaintiffs what amounts to a virtual monopoly in the borrowing of the Bank's funds to establish a pulp mill in Brazil. Furthermore, where the contract between the parties is detailed and specific, as in the instant case, the courts will not improvise an implied contract.

Plaintiffs have failed to demonstrate irreparable injury or the probability of ultimate success.

Although counsel for the Bank has not raised the question of an indispensable party, nevertheless, the Court notes that the competing customer (the Klabin group) is not before the Court. This familiar doctrine alone would preclude the taking of such action as is sought by the plaintiffs in that it would be highly prejudicial to this missing indispensable party.

For these reasons, plaintiffs' motion for preliminary injunction should be and is denied, and defendant's motion to dismiss is granted.

United States coast line and inland waters

UNITED STATES *v.* CALIFORNIA. 382 U.S. 448.

United States Supreme Court, Jan. 31, 1966 (Supplemental decree).

[In accordance with the Supreme Court's opinion in *United States v. California*, 381 U. S. 139, reported in 59 A.J.I.L. 930 (1965), proposed decrees were submitted to the Court by the parties. In a per curiam opinion dated January 31, 1966, the Court entered the following supplemental decree, herein excerpted:]

1. As against the State of California and all persons claiming under it, the subsoil and seabed of the continental shelf, more than three geographical miles seaward from the nearest point or points on the coast line, at all times pertinent hereto have appertained and now appertain to the United States and have been and now are subject to its exclusive jurisdiction, control and power of disposition. The State of California has no title thereto or property interest therein.

2. As used herein, "coast line" means—

(a) The line of mean lower low water on the mainland, on islands, and on low-tide elevations lying wholly or partly within three geographical

miles from the line of mean lower low water on the mainland or on an island; and

(b) The line marking the seaward limit of inland waters.

The coast line is to be taken as heretofore or hereafter modified by natural or artificial means, and includes the outermost permanent harbor works that form an integral part of the harbor system within the meaning of Article 8 of the Convention on the Territorial Sea and the Contiguous Zone, T.I.A.S. No. 5639.

3. As used herein—

(a) "Island" means a naturally-formed area of land surrounded by water, which is above the level of mean high water;

(b) "Low-tide elevation" means a naturally-formed area of land surrounded by water at mean lower low water, which is above the level of mean lower low water but not above the level of mean high water;

(c) "Mean lower low water" means the average elevation of all the daily lower low tides occurring over a period of 18.6 years;

(d) "Mean high water" means the average elevation of all the high tides occurring over a period of 18.6 years;

(e) "Geographical mile" means a distance of 1852 meters (6076.10333 ... U. S. Survey Feet or approximately 6076.11549 International Feet).

4. As used herein, "inland waters" means waters landward of the baseline of the territorial sea, which are now recognized as internal waters of the United States under the Convention on the Territorial Sea and the Contiguous Zone. The inland waters referred to in paragraph 2 (b) hereof include—

(a) Any river or stream flowing directly into the sea, landward of a straight line across its mouth;

(b) Any port, landward of its outermost permanent harbor works and a straight line across its entrance;

(c) Any "historic bay," as that term is used in paragraph 6 of Article 7 of the Convention, defined essentially as a bay over which the United States has traditionally asserted and maintained dominion with the acquiescence of foreign nations;

(d) Any other bay (defined as a well-marked coastal indentation having such penetration, in proportion to the width of its entrance, as to contain landlocked waters, and having an area, including islands within the bay, at least as great as the area of a semicircle whose diameter equals the length of the closing line across the entrance of the bay, or the sum of such closing lines if the bay has more than one entrance), landward of a straight line across its entrance or, if the entrance is more than 24 geographical miles wide, landward of a straight line not over 24 geographical miles long, drawn within the bay so as to enclose the greatest possible amount of water. An estuary of a river is treated in the same way as a bay.

5. In drawing a closing line across the entrance of any body of inland water having pronounced headlands, the line shall be drawn between the points where the plane of mean lower low water meets the outermost extension of the headlands. Where there is no pronounced headland, the line

shall be drawn to the point where the line of mean lower low water on the shore is intersected by the bisector of the angle formed where a line projecting the general trend of the line of mean lower low water along the open coast meets a line projecting the general trend of the line of mean lower low water along the tributary waterway.

* * * * *

12. With the exceptions provided by § 5 of the Submerged Lands Act, 67 Stat. 32, 43 U.S.C. § 1313 (1964 ed.), and subject to the powers reserved to the United States by § 3 (d) and § 6 of said Act, 67 Stat. 31, 32, 43 U.S.C. §§ 13311 (d) and 1314 (1964 ed.), the State of California is entitled, as against the United States, to the title to and ownership of the tidelands along its coast (defined as the shore of the mainland and of islands, between the line of mean high water and the line of mean lower low water) and the submerged lands, minerals, other natural resources and improvements underlying the inland waters and the waters of the Pacific Ocean within three geographical miles seaward from the coast line and bounded on the north and south by the northern and southern boundaries of the State of California, including the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law. The United States is not entitled, as against the State of California, to any right, title or interest in or to said lands, improvements and natural resources except as provided by § 5 of the Submerged Lands Act.

13. The parties shall submit to the Court for its approval any stipulation or stipulations that they may enter into, identifying with greater particularity all or any part of the boundary line, as defined by this decree, between the submerged lands of the United States and the submerged lands of the State of California, or identifying any of the areas reserved to the United States by § 5 of the Submerged Lands Act. As to any portion of such boundary line or of any areas claimed to have been reserved under § 5 of the Submerged Lands Act as to which the parties may be unable to agree, either party may apply to the Court at any time for entry of a further supplemental decree.

14. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree or to effectuate the rights of the parties in the premises.

* * * * *

Foreign patents—International Convention for the Protection of Industrial Property

ELI LILLY AND COMPANY v. BRENNER. 248 F. Supp. 402.

U. S. Dist. Ct., Dist. Columbia, Dec. 6, 1965. Jackson, D. J.

[Plaintiff's application for a patent was denied by a Patent Office Examiner on the ground that another patent was entitled to priority, based

upon earlier patent applications filed in the British Patent Office and with the United States Patent Office for the same invention. Plaintiff challenged this finding in the United States District Court for the District of Columbia, arguing that its assignor had reduced his invention to practice in the United States prior to the actual filing date in the United States of the other application, although admittedly after the filing date in the British Patent Office. The text of the portions of the opinion (with renumbered footnotes) setting forth the Court's holdings is as follows:]

The important question to be settled in this case is one of first impression in this Court. The issue may be stated to be whether, in a situation where a foreign inventor has been granted a United States patent on a United States patent application which is entitled under 35 U.S.C. § 119 to the benefit of an earlier application filing date in a foreign country, this United States patent is available as a reference under 35 U.S.C. § 102(e)¹ for all disclosed subject matter, whether claimed or unclaimed, as of the filing date of the earlier foreign application. This Court agrees with defendant and holds that the foreign filing date is the effective reference date as to all subject matter which is disclosed, whether claimed or not, in the foreign application, to the extent that such disclosures are brought forward and included in both the United States application and the United States patent granted on this application, the latter, of course, being the basis for a 35 U.S.C. § 102(e) rejection.

An important related question is whether another inventor, by proving a date of invention in this country, by either actual or constructive reduction to practice,² during the time interval between the foreign filing date and the actual United States filing date of a foreign inventor's patent applications, the foreign inventor's United States application being entitled under 35 U.S.C. § 119 to benefit of the earlier filing date of the foreign application, can thereby remove the foreign inventor's United States patent as a reference. The Court holds that such reduction to practice during the time interval between the foreign inventor's foreign and actual United States filing dates will not suffice to remove the foreign inventor's United States patent as a reference as to subject matter disclosed in the United States patent reference, whether claimed therein or not, provided that the disclosed subject matter in the United States patent corresponds to disclosures

¹ In this Circuit a copending patent under 35 U.S.C. § 102(e) is considered part of the "prior art" under 35 U.S.C. § 103, so that no distinction is made, with regard to the effective reference date between an anticipation rejection under 35 U.S.C. § 102(e) and an obviousness rejection under 35 U.S.C. § 103. The copending patent is effective as a reference as of its application filing date for everything disclosed, whether claimed or not, in the originally filed application, to the extent that such original disclosure is not cancelled from the application during prosecution and thus becomes part of the disclosure in the patent ultimately granted. *Hazeltine Research, Inc. v. Ladd*, D.C., 226 F. Supp. 459, affirmed, 340 F. 2d 786 (C.A.D.C.). It should be noted, however, that both parties and the Court agree that the rejection presently under consideration is solely of the 35 U.S.C. § 102(e) type.

² Actual reduction to practice according to the facts of this case, but this Court sees no difference whether the reduction to practice is actual or constructive. A date of invention is a date of invention, and may be established by proof of either actual or constructive reduction to practice.

in the foreign patent application, or applications as the case may be, which serves as the basis of the right of priority accorded to the foreign inventor's United States patent application. It is likewise immaterial whether the subject matter relied upon for reference purposes is claimed or not in the foreign application, so long as it is disclosed therein.

* * * * *

Section 119 of present Title 35 is the successor of section 4887 of the old Revised Statutes. In 1903 R.S. 4837 was amended in order to provide for a right of priority guaranteed to foreign inventors by Article 4 of a treaty known as the International Convention for the Protection of Industrial Property concluded at Paris on March 20, 1883. The United States Senate first ratified this treaty on March 2, 1887.

The Convention itself has been revised several times, at Brussels on December 14, 1900, at Washington on June 2, 1911, at the Hague on November 6, 1925, at London on June 2, 1934, and at Lisbon on October 31, 1958. The latest (Lisbon) text of the Convention was ratified by the United States Senate on August 17, 1960, and the Senate bill of ratification was signed on August 29, 1960 by President Eisenhower. On January 2, 1962, President Kennedy proclaimed and made public "the said Convention to the end that the same and every article and clause thereof shall be observed and fulfilled with good faith, on and after January 4, 1962, by the United States of America" * * * * *

CASE NOTES

Acts of state purporting to confiscate property within the United States —Federal law controlling

The Court of Appeals for the Second Circuit has affirmed the decision of the District Court in the case of *Republic of Iraq v. First National City Bank*, 241 F. Supp. 567 (1965), digested at 60 A.J.I.L. 120 (1966), holding that the Iraqi Ordinance of July 19, 1958, which attempted to confiscate all the property of the late King Faisal II, would not be given effect as to property situated in New York at that time. In reaching this conclusion, Judge Friendly further held that "all questions relating to an act of state are questions of federal law . . ." pointing out that

. . . the exercise of discretion whether or not to respect a foreign act of state affecting property in the United States is closely tied to our foreign affairs, with consequent need for uniformity. . . . It would be baffling if a foreign act of state intended to affect property in the United States were ignored on one side of the Hudson but respected on the other . . .

Iraq v. First National City Bank, 352 F.2d 47 (U. S. Ct. App., 2d Cir., November 8, 1965).

³ The Presidential Proclamation and the Lisbon text of the Convention for the Protection of Industrial Property are printed in the February 13, 1962 Patent Office Official Gazette at 775 O. G. 321.

Historic waters—Hawaii—inter-island waters beyond three-mile limit are “high seas”

The Court of Appeals for the Ninth Circuit has affirmed the decision of the United States District Court for Hawaii, 235 F. Supp. 990, digested at 59 A.J.I.L. 635 (1965), holding that the channels between the Hawaiian Islands are not Hawaiian territory but international waters and that the boundaries of Hawaii are the islands plus a three-mile belt around each. *Island Airlines, Inc. v. Civil Aeronautics Board*, 352 F.2d 735 (U. S. Ct. App., 9th Cir., October 29, 1965).

Warsaw Convention—limitation of carrier's liability inapplicable where passengers not advised of limitation in time to procure own insurance

The personal representatives of soldiers riding on a plane of The Flying Tiger Line, Inc., which disappeared between Guam and the Philippine Islands en route from California to Viet-Nam, appealed a decision by the United States District Court for the Northern District of California, which had held the carrier's liability was limited to \$8,300 for each passenger, as provided by Article 22 of the Warsaw Convention (44 Stat. 3014). Libelants based their argument on Article 3¹ of the Convention, which requires the carrier to deliver to each passenger a ticket containing a statement that the carrier's liability is limited by the Convention.

The Court of Appeals reversed, holding that the limitations of liability of the Convention were not applicable. The court found that the passengers had received their tickets containing the information required by Article 3 only as they reached the ramp of the plane, just prior to take-off. The court then reasoned as follows:

Article 3 of the Convention, provides that if the carrier “accepts a passenger without a passenger ticket having been delivered,” it shall not be entitled to the limitation of liability afforded

1

“Article 3:

“(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

“(a) The place and date of issue;

“(b) The place of departure and destination;

“(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

“(d) The name and address of the carrier or carriers;

“(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

“(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.”

by Article 22(1). This provision, considered alone, could perhaps be construed as entitling a carrier to preserve its limitation of liability by delivering the passenger ticket at any time before the passenger boards the plane, or even thereafter and prior to takeoff.

But the provision in question does not stand alone. It is part of an Article of the Convention in which the particulars to be contained in the passenger ticket are spelled out in detail. One of these particulars, contained in Article 3(1)(e) is the inclusion of a statement "* * * that the transportation is subject to the rules relating to liability established by this convention." The purpose of such a statement is to notify passengers of the applicability of the Convention, thus affording them an opportunity to take steps to protect against the limitation of liability. The most common self-protective measure is, of course, the procurement of additional flight insurance. . . .

Having in view this purpose in providing a passenger ticket, we are of the opinion that it is an implied requirement of Article 3(2), that delivery of the passenger ticket be made sufficiently in advance of the flight so that the passenger may, if he desires, obtain additional insurance protection. . . .

The court rejected an argument by the carrier that the passengers could have obtained insurance during a stop in Hawaii, ruling that they were entitled to an opportunity to purchase insurance covering the entire flight at the time the airline accepted them as passengers. *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (U. S. Ct. App., 9th Cir., October 25, 1965).

Foreign arbitration—Treaty of Friendship, Commerce and Navigation between the United States and Japan

An action on certain sale contracts was brought in the United States District Court for the District of Oregon by a United States buyer against a Japanese seller and others. The sale contracts provided for arbitration in Japan in the event of dispute, and the defendant argued that the suit should be stayed pending the outcome of arbitration in Japan.

In granting the stay sought by the defendant Japanese seller, the court rejected an argument by the plaintiff American buyer that foreign arbitration was an undertaking outside the scope of the apparent authority of plaintiff's agent:

The argument that the agreement to arbitrate the claim in Japan is such an unusual and extraordinary undertaking, that it cannot be viewed within Connolly's apparent authority, is fundamentally unsound. The plaintiff's officers, including Connolly, knew they were dealing with a business concern in Japan. For better or for worse, plaintiff is presumed to know the provisions of the Treaty of Friendship, Commerce and Navigation between the United States and Japan (April 2, 1953), which provided, among other things:

"Contracts entered into between Nationals and companies of either party and Nationals and companies of the other party, that provide for the settlement *by arbitration* of controversies, shall not be deemed unenforceable within the territories of such other party merely on the grounds that the place designated for the arbitration proceedings is outside such territories, or that the nationality of one or more of the arbitrators is not that of such other party."

All nationals of the United States, including plaintiff, are bound by this provision. This treaty, insofar as it affects the parties, is read into and becomes a part of the contract. . . .

Oregon-Pacific Forest Products Corp. v. Welsh Panel Co., 248 F. Supp. 903 (U. S. Dist. Ct., D.Ore., October 12, 1965).

Comity—recognition of judgment of English court where service of process extraterritorial

Plaintiff obtained a judgment by default in England in 1964 against defendant New York corporation, after the defendant had declined to appear upon advice of counsel that the English court lacked jurisdiction. The High Court of Justice, Queen's Bench Division, had authorized the service of process made personally upon the defendant in New York City pursuant to a rule of court permitting such service of process outside the jurisdiction in certain classes of suits, including suits for breaches of contracts committed within the jurisdiction where the contract stipulates that English law shall govern the contract.

Plaintiff brought suit in New York upon the default judgment entered by the English court. In finding that the defendant was subject to the jurisdiction of the English court, and that the judgment of that court was conclusive upon the merits, the New York court stated:

It is far too late to defend now by asserting any substantive allegations in opposition to the claim in main. If the facts were the reverse, this court would have taken jurisdiction of the English defendant by extraterritorial service under our statutes. We can do no less now in affording the English court reciprocal acquisition of jurisdiction over the defendant here.

The court pointed out that, in accordance with "modern legal thought," New York has taken a "new approach to *in personam* jurisdiction," making a non-resident subject to jurisdiction when a "single act" took place in the State. This "new public policy of the State" complied with the legal requirements laid down by the Supreme Court in *International Shoe v. Washington*, 326 U. S. 310. *Plugmay Limited v. National Dynamics Corporation*, 266 N.Y.S. 2d 240 (Civil Court of the City of New York, N. Y. Cty., Special Term, Part I, Jan. 12, 1966).

Decedents' estates—choice of New York law by United States citizen resident in Switzerland

The decedent, a United States citizen, died in 1964 as a domiciliary of Switzerland, having executed his will in New York in 1961. This will, which bequeathed his entire residuary estate to his second wife, directed that it be submitted for probate in New York, and be governed by New York law pursuant to Section 47 of the Decedent Estate Law authorizing a United States citizen resident abroad to provide by will that his property in New York State be disposed of under New York law.

In the probate proceeding in Surrogate's Court, the testator's first wife,

as general guardian of two infant children, contended that the court should distribute testator's property in conformity with the Swiss law of succession under which the infant children would be entitled to their "legitimate" shares of the estate as forced heirs. Her argument that testator's choice of New York law pursuant to Section 47 of the Decedent Estate Law was ineffective as conflicting with an 1850 treaty between the United States and the Swiss Confederation was rejected by the court. The court determined that the "primary purpose of the treaty was to assure to the citizens of each country equality of treatment with the nationals of the country in which they might reside" and that the treaty did not conflict with the choice of law authorized by Section 47 of the Decedent Estate Law. *In re Estate of Prince*, 267 N.Y.S. 2d 138 (Surr. N. Y. Cty., June 17, 1964).

Payment of inheritance to beneficiaries resident in Bulgaria

Petitioners, residents of Bulgaria, applied to the Surrogate's Court to withdraw estate assets being held for them as beneficiaries, contending that they would in fact receive the "benefit or use or control of the money" transmitted to them in Bulgaria (Surrogate's Court Act, Sec. 269-a).

The court found that a Bulgarian resident receiving an inheritance from New York could elect either to have the inheritance paid to him in Bulgarian currency after conversion from dollars at the official exchange rate or to have the inheritance deposited in dollars to his account with a government enterprise, Corecom, which would furnish a variety of goods and services at favorable exchange rates. The court also found that the difference between the official exchange rate established by the Bulgarian Government and the alleged rate on the open market was not so great as to amount to confiscation.

Stating that Section 269-a "is intended to safeguard an inheritance by withholding it temporarily when payment would result in confiscation, in whole or in part, until the time arrives when the beneficiary might use and enjoy it for himself," the court concluded that the Bulgarian applicants would receive the benefit of funds transmitted to them, and authorized payment. *In re Estate of Petroff*, 267 N.Y.S. 2d 8 (Surr. Ct., N. Y. Cty., Jan. 26, 1966).

Jurisdiction—activities of Bahamian corporation in Texas too remotely related to its business in Bahamas to constitute valid basis for in personam jurisdiction.

Defendant Jack Tar Grand Bahamas, Ltd. was incorporated under the laws of the British Crown Colony of Bahama and owned a hotel there at which plaintiff was allegedly injured. Plaintiff brought suit in the United States District Court for the Southern District of Texas, seeking to base jurisdiction on the facts that the defendant's officers and directors resided in Texas, that they sometimes held conferences in Texas to discuss hotel operations, and that the defendant was managed by Jack Tar Management

Company, a buying agent which had its principal place of business in Texas. The Management Company also managed two Jack Tar hotels in Texas which solicited business and made reservations for defendant's hotel in the Bahamas.

The court rejected the argument that the defendant was doing business in Texas through the Jack Tar Management Company, on the ground that the defendant had no control over the Management Company and that common stock ownership and identity of officers did not in themselves establish an agency relationship. As to the type of solicitations carried on for the defendant, and the officers' and directors' residence and management conferences in Texas, the court held that these were "too remotely related to [defendant's] 'business' to provide a sufficient basis for *in personam* jurisdiction." The court's interpretation of the applicable Texas statute was predicated on the assumption that it was intended to exercise *in personam* jurisdiction to the fullest extent permitted by the Federal Constitution. *Turner v. Jack Tar Grand Bahamas Ltd.*, 353 F. 2d 954 (U. S. Ct. App., 5th Cir., December 10, 1965).

FEDERAL REPUBLIC OF GERMANY (BAVARIA)

CASE NOTE

*Property rights of Czechoslovakian city in land within German territory—legal identity of City of Cheb with former City of Eger—effect of expulsion of Sudeten Germans—effect of nationalization in Czechoslovakia—retaliation in international law—public policy.**

Decision of the Supreme State Court of Bavaria, Second Civil Chamber, March 23, 1965. B. Reg. 2 Z 65/64.

Entscheidungen des Bayerischen Obersten Landesgerichts in Zivilsachen, Neue Folge, Jahrgang 1965, Heft 1, pp. 108-127.

According to the Land Register of the County Court of Waldsassen (Bavaria) the City of Eger (Czechoslovakia) owns a large piece of land called "Town Forest of Eger," which is situated in Bavaria, just across the border. The City of Eger, whose Czech name is Cheb, sold part of this land to the Bavarian town of Waldsassen, which needed the land for purposes of water supply. When Waldsassen applied to the County Court to have the appropriate entry made in the Land Register, the court denied the application on the grounds that the present City of Cheb was not identical with the former City of Eger, the registered owner of the Town Forest; since the indigenous population of that city [the Sudeten Germans] had been expelled after World War II, the City of Eger had ceased to exist; Cheb was established as a new municipality, in which a new population was settled; it was not the legal successor of Eger. Both parties to the sale contract appealed. The District Court affirmed the decision. It denied the identity of Eger and Cheb on the theory developed by Georg von Beseler and Otto von Gierke, according to which a corporate entity is

* Digested by M. Magdalena Schoch of the District of Columbia Bar.

not a fiction but a real, living organism formed by the totality of its members, and concluded that where the population forming the corporate entity is expelled and deprived of its governing power and autonomy, the corporate entity dies. Consequently the entry in the Land Register could not be amended to show Cheb as the lawful successor of Eger. Upon appeal by both parties the Supreme Court of Bavaria reversed, in a learned decision supported by numerous references to precedents, legal writings, and opinions of legal experts. (The summary which follows omits most citations.)

The Court reasoned as follows:

1. When the Sudetenland, as a consequence of the Munich Four-Power Pact of September 29, 1938, was incorporated into the German Reich by virtue of the Law for the Reunion of the Sudeten German Territories with the German Reich of November 21, 1938, the City of Eger (Cheb) became, at least *de facto*, a German territorial corporate unit (*Gebietskoerperschaft*). In the case of municipalities and communes it is generally recognized that they retain their identity when their territory is transferred to another sovereign, especially where the territorial and personal basis of the municipality or commune is not affected by the change in the state frontiers.

Whether the Munich Pact was null and void *ab initio* or whether it became invalid in the course of subsequent events, is a matter of dispute. According to the Czechoslovakian view, which the appellants have adopted, the cessions of territory under the Pact were null and void not only because of unlawful duress but also because the President of Czechoslovakia put the Pact into effect without the authorization of the National Assembly required by the Constitution. On the other hand there is a widespread view that, while the Pact was validly concluded under international law, it was nullified by the forceful annexation of the remaining part of Czechoslovakia in violation of international law. However that may be, in May of 1945 the sovereignty of the Czechoslovakian state was *de facto* again extended to the Sudeten territories with the approval of the Allies, and the territories were *de facto* removed from the German Reich.

The "Statement" of the four Allied Governments of June 5, 1945 (Official Gazette of the Control Council for Germany, Supp. No. 1, p. 11), subdivided Germany into zones of occupation within the frontiers as they existed on December 31, 1937. Thus in the view of the Allies the Sudeten territory was no longer to be a part of Germany. Although the territorial changes resulting from World War II have not been the subject of a peace treaty nor of a treaty between Germany and Czechoslovakia, nevertheless the Statement and other Allied pronouncements regarding the frontiers of 1937 have had certain legal effects. Moreover, the German Basic Law itself proceeds on the assumption of these frontiers (Article 116, par. 1). It follows that the City of Cheb is a Czechoslovakian territorial corporate unit.

2. Under the rules of international law governing the succession of states the property rights of a municipality are not treated analogously to prop-

erty of the state but rather in analogy to property rights of private individuals, even though they are situated in a "foreign" territory by reason of a change of the state frontiers.

The question of who owns a piece of land in the Federal Republic of Germany and of who may dispose of it is governed by the law of the situs *i.e.*, German private international law. German law also determines who has legal capacity. If a certain unit is a legal entity under its national law, it is recognized as such in Germany. This rule applies to corporations of private law as well as to corporations of public law. Hence the question whether the municipality of Cheb is identical with the City of Eger is to be answered by Czechoslovakian law.

3. Legal theory and practice in the Soviet-occupied zone of Germany hold that the legal entities of public law in the zone are not identical with the corresponding entities that existed prior to May 8, 1945, for the reason that they have taken on a new and different "class structure."

In the Czechoslovak Socialist Republic (C.S.S.R.) a different view prevails. The Czechoslovakian state has always regarded itself as identical with the Czechoslovak Republic which was established in 1918. Whether it ceased to exist in 1939 due to its annexation as a protectorate of the German Reich is a matter of dispute among international lawyers. The question need not be decided here, since, even if this theory is accepted, it does not preclude the subsequently reconstituted state from being retroactively identified with the former state by way of a legal fiction, so that it is regarded as if it had existed without interruption. No doubt a state that has temporarily ceased to exist can by virtue of its restored sovereignty decree that its new legal order shall be identical with and a continuation of the legal order of the former state. This is what Czechoslovakia did in 1945.

This deliberate continuity of the legal status prior to 1938 applied also to the territorial subdivisions of the state. The status of the municipal territories was restored, even though the internal organization of the communes was largely changed. "National committees" took over the functions of the municipal assemblies and of the mayors. But throughout the post-1945 development the City of Eger continued to exist as a municipality.

4. The change of name is immaterial to the question of legal succession.

5. More serious is the argument that the former City of Eger has ceased to exist as a consequence of the expulsion of the predominant portion of its [German-speaking] population. In the discussion of this argument the legal or ethical evaluation of the expulsion must be clearly distinguished from the question of what effect that measure has had on the continued existence of the City of Eger as a juridical person under public law. As already stated, the question of the identity of the City of Cheb with the City of Eger is governed by Czechoslovakian law. But even if German law should be applicable, the legal consequences which the courts below attributed to the expulsion of the Sudeten Germans are erroneous. The notion of a commune in German municipal law does not rest upon the idea

of a "living organism" which is formed by its members and hence ceases to exist when the members disappear. What is decisive is rather the territorial element.

The opinion of political scientists that a state ceases to exist when one of its three elements (state territory, state people, state power) vanishes, cannot be applied to municipalities. The power of a municipality or commune to govern is derived from the power of the state. It is that state which lays down the norms for the establishment of new and the dissolution of existing communes. Significantly, German statutory municipal law has always related these two events only to changes in the territory of a commune but not to changes in the population. This view is supported by the majority of the authors on the subject. The same result is reached by application of Czechoslovakian law, which goes back to the Municipal Code of Bohemia of 1846, and according to which communes can be established, dissolved, merged or otherwise subjected to territorial changes by public act only and not by factual events such as the settlement of a new population in the commune. Neither under German nor under Czechoslovakian law does it matter whether Eger (Cheb) was actually for a time without a communal population. In fact the City of Eger (Cheb) has never lacked a population. The expulsion of the Sudeten Germans began in May of 1945 and occurred in several waves. When the Potsdam Agreement of August 2, 1945, became effective it had been carried out partially. The losses in German inhabitants were in part compensated for by the arrival of Czechs.

6. The identity of Eger and Cheb cannot be challenged on the theory, propounded by some authors, that the former German communes in the affected territories which own assets in the Federal Republic continue to exist here as German corporations *sui generis*. This theory cannot be sustained legally, as this Court already decided in 1959 (Decisions 1959, pp. 408-413, 414). The so-called "split corporation theory," which the courts have developed for private corporations whose property was confiscated in their home state and which are deemed to remain in existence with regard to property located in the Federal Republic, cannot be applied to a Czechoslovakian municipality.

7. Once the identity of the City of Cheb with the City of Eger that is entered in the Land Register is established, the presumption of section 891, par. 1, of the Civil Code [*i.e.*, that such entry is correct until there is proof to the contrary] applies, with the result that Cheb is the owner of the Eger Town Forest. The presumption is binding on the Land Register unless it obtains knowledge or evidence of facts showing that the entry is in error. No such facts have been established here.

8. In particular there is no showing that, as has been argued, the City of Eger has lost its title to the real estate through confiscation or legal succession by the Czechoslovak Republic. The Beneš decrees of 1945 ordered the confiscation without compensation of all property owned by German natural or juridical persons at the termination of the German occupation. These emergency decrees did not apply to communes situated within the

former borders of Czechoslovakia. Nor did the "nationalization" of local government, which had already begun before the second world war, affect the ownership of real estate of the territorial subdivisions. The same holds true for the far-reaching nationalization of the economy and of "property serving the general welfare."

9. Even if one assumes for the sake of argument that the structural changes in the political and economic organization of the C.S.S.R. had the result that the state became the legal successor to the real property of the City of Eger (Cheb), nevertheless, under existing Czechoslovakian law, the City National Committee of Eger (Cheb) (the governing municipal body) has the authority to make dispositions of those parts of the national property which have been transferred to it for purposes of administration. The legality of the present transaction is further evidenced by the foreign-exchange permit granted by the Ministry of Finance of the C.S.S.R.

Again assuming *arguendo* that the state became the owner of the real estate of the communes by "nationalization," such action cannot be regarded as confiscation in this instance. The effect of such a confiscation could not extend to real estate located outside Czechoslovakia. Consequently this property would become *bona vacantia* and could be occupied by the Federal Republic—"an impossible result."

10. Finally the title of the City of Eger in the Eger Town Forest or its power of disposition over that property cannot be denied by way of retaliation. "Judges are enjoined from exercising revenge. They are subject to the law, and the law is indivisible. Its benefits cannot be withheld from the City of Eger (Cheb) because its former German inhabitants have been expelled or because the CSSR has expropriated the Sudeten Germans without compensation."

11. As a matter of precaution it should be pointed out that, according to Part VI, Article 2, of the Settlement Convention, Allied High Commission Law No. 63 has remained in effect. Under Article 3 of that Law and Part VI, Article 3, of the Settlement Convention, the seizures of German external assets by the Allies are withdrawn from the jurisdiction of German courts. Accordingly, any defenses based on such seizures cannot be heard in a German court, and German public policy cannot be invoked against them.

12. Finally, it should be noted that the object of the contract here is merely a small sector of the Eger Town Forest, which the town of Waldsassen, the German purchaser, needs for its water supply. Thus there is no perceivable reason why the transaction should violate German public policy.

BOOK REVIEWS AND NOTES

LEO GROSS

Book Review Editor

International Law. 4th ed. By Charles G. Fenwick. New York: Appleton-Century-Crofts, 1965. pp. liii, 849. Appendices. Index. \$7.50.

When the third edition of this work appeared in 1948, insufficient time had elapsed to evaluate the new order which San Francisco sought to impose upon the society of nations. In that edition Dr. Fenwick rightly complained of the relative lack of real progress in international law since he brought out the first edition in 1924. With almost twenty years of experience under the United Nations and its family of specialized activities, one might suppose that the future course of international law, if not wholly predictable, would be at least more discernible than in the years immediately following the war. Yet we are still without satisfactory answers to some of the critical questions which the author asked in his 1948 volume: "Can institutions be established which will not only restrain lawless violence but so far promote the common interests of the nations as to take away the incentives to the use of force? How can national 'sovereignty' and 'independence' . . . be brought into harmony with the rule of law and with the actual interdependence of States?" Indeed, with the intensified range of effort by Communist states to subvert independent governments, the ever-present nuclear weapons issue, the emergence of a host of newly independent nations which have taken their seats in the shrinking hall of the General Assembly, these pointed questions have become more acute than ever and the answers no less elusive. Nor does Dr. Fenwick pretend to any gifts of prophecy. This is a book on international law, and its roots are anchored deep in the soil of the existing, the visibly evolving and the realistically possible. Produced at an age when most men are quite content to coast upon their past achievements, the volume adds still more laurels to the many already collected by the Dean of American International Lawyers. With the present work, and the author's recent *Organization of American States*,¹ students and practitioners are provided with an effective and highly convenient key to explore the major legal problems affecting relations within the community of mankind, and the special international area of the Western Hemisphere.

The third edition of this work was described by a qualified observer as "one of the best and most useful in the field."² The present one is even better. It is a thoroughgoing treatise covering virtually every primary subject of inquiry and most of the secondary ones. As a quick check-reference

¹ Washington, D. C.: Office of Publication Services, Pan American Union, 1963; reviewed in 58 A.J.I.L. 207 (1964).

² Berdahl in 42 A.J.I.L. 960 (1948).

on the general principles of international law, it is one of the best-organized tools this reviewer has examined, and should be most helpful to students and teachers alike—as well as to many lawyers—provided they do not try to make it serve for what it is not, *i.e.*, an encyclopedia for problems dealt with more extensively in works of greater compass or in specialized articles and monographs. But within its assigned radius, it should be difficult to match it for a long time. From a mechanical and pedagogical standpoint, the presentation is a great improvement over its predecessors. Concentration and perception are facilitated by clearer printing and sharpness of type. The marginal headings which identified text treatment in the earlier edition—an archaic device of dubious value—have been replaced by appropriate topic headings in prominent print at the beginning of paragraphs, greatly simplifying the location of subjects. Dr. Fenwick's book fills admirably the pressing need for a reliable one-volume current reference.

While the organization and chapter titles repeat the arrangement of the 1948 edition, much new material has been added (the book is 100 pages longer) covering most of the principal international legal problems which have arisen since 1948. There has been considerable text revision where a different perspective or a change in emphasis may have been dictated by postwar progress. Among the new topics are developments in United Nations practice (such as the Uniting for Peace Resolution, the perennial Chinese U. N. representation question, the Korean police action, and the *U-2* incident), the Cuban missile crisis, NATO and other regional arrangements, outer space law, the *Sabbatino* case, and many more. The General Assembly Resolution on Permanent Sovereignty over Natural Resources is appropriately noted. Of the larger headings, Fenwick's treatment of jurisdiction over vessels (Chapter XVI) is particularly valuable. The material on intervention (in Chapter XII on the Right of National Existence) has been re-worked to take into account not only most recent developments in the inter-American system, but also the possible use of intervention as a means of self-defense.

On a number of items, such as the punishment of war crimes, the Kellogg-Briand Pact and aggressive war, and similar recurrent issues, few revisions, if any, have been made; and this is as it should be in a work designed as a basic, elementary treatise. The section dealing with the future of the laws of war (as distinct from the substantive content of those laws) has been rewritten and enlarged to deal with the significance of United Nations action in Korea and the Congo, along with the action taken by Great Britain in Suez. The "doubtful legality" (in the third edition) of the atomic bomb as used against Hiroshima and Nagasaki—because its range and destructiveness rendered it impossible to observe the restriction upon bombardment of undefended cities—becomes the "illegality" of the bomb in the present edition, a slight but significant change which need not detain us. Somewhat more controversial—and indigestible for this writer—is Dr. Fenwick's view as to whether use of the atomic bomb would be lawful in a future war:

The question obviously falls within the prohibition of war itself under the provisions of the Charter of the United Nations. As observed above, it is not to be expected that the United Nations itself, in resorting to force to restrain a state which has had recourse to violence, would go beyond the most moderate measures called for by the situation; and the use of the bomb by the state violating its obligations under the Charter not to have recourse to force would clearly be illegal. In consequence the sole permissible use of the bomb would be in self-defense against a state which has illegally used it; and here we have the paradox of a situation in which a state would be justified in possessing an unlawful instrument of warfare in order to deter another state from using an unlawful instrument, the two negatives making a positive . . . (p. 672.)

This reviewer has never seen a compelling legal brief for the contention that existing international law contains a comprehensive prohibition against the use of nuclear weapons *per se*, apart from use against non-military objectives. The question, from the beginning, has remained in the political realm and is not readily resolved by legalistic considerations. But Dr. Fenwick is on sounder terrain when he asserts that in an all-out nuclear war—distinct, as we must assume, from tactical battlefield use, nothing would remain of the Hague distinction between military and civilian objectives, or between combatants and noncombatants, and that this prospect “defies the conditions contemplated at the Hague.” Despite that lugubrious prospect and the depressing record of conventional weapons use in World War II, the author has not succumbed to the tendency in some quarters to write off the rules of land warfare as something that is too anachronistic to merit our present attention. Instead, in Chapters XXIX and XXX he has retained the materials on land, air and maritime warfare, with more current illustrations to modernize the text. The Cuban missile crisis and the Nuclear Test Ban Treaty are samples of the breadth of new materials. Chapter XXXI on the treatment of resident enemy aliens, Chapter XXXII on what’s left of the law of neutrality (“Adoption of the United Nations Charter . . . finally marked the end of neutrality as a legal system”), Chapters XXXIII and XXXIV on neutral rights and duties “In Retrospect,” complete a *précis* of the international law of war that it would profit layman and lawyer to review. The 134 pages devoted to this subject are a masterpiece of simplicity and conciseness.

In a general, introductory work, which nevertheless strives for reasonably adequate coverage, dimensional limitations necessarily dictate a choice of materials to be included or omitted; and this is where any author exposes himself to differences of opinion on the selections made. Yet the range of the volume (really 773 pages, as 73 pages are devoted to an appendix and index) is sufficiently extensive to occasion some bewilderment at the absence of any reference to the impact of Soviet doctrine on international legal principles, or the degree to which positions taken by newly independent nations of Asia and Africa may be eroding some of the accepted pillars of international law—at least to the point where it is not so comfortable to leave unqualified many accustomed generalizations of the past. Somewhat less understandable is the omission of any mention of the Tate letter

which marked a significant change in the Department of State's position on the immunity of public vessels operated *jure gestionis*. No account seems to have been taken of the American Law Institute's prestigious *Restatement of Foreign Relations Law*, which, while admittedly of more concern to lawyers than to students at the undergraduate level, deserved inclusion in the magnificent bibliography of 23 pages which Dr. Fenwick has marshaled. One is troubled by the misleading interpretation placed upon the decision of the International Court of Justice in the *Nottebohm* case (Second Phase) (p. 306), in which, incidentally, this volume is not alone. The formulation in the text suggests that Liechtenstein's naturalization of Nottebohm was without legal force; in reality the Court could not impugn the validity of the naturalization, but denied it could be invoked against a government in the position of Guatemala because of the claimant's unique (but non-national) attachment to the respondent state. In short, the decision for the first time in international jurisprudence separated valid nationality from the right of diplomatic protection,³ for which it has been vigorously castigated by writers on both sides of the Atlantic.

But these strictures are minuscule in comparison with the mass of material brought together in a volume of outstanding quality which should continue to serve for many years as the most useful, one-volume work on the subject. *Viva* Dr. Fenwick! And *Viva* his latest scholarly contribution!

ALWYN V. FREEMAN

The Common Wealth in Ocean Fisheries. By Francis T. Christy, Jr., and Anthony Scott. Baltimore: The Johns Hopkins Press, 1966. pp. xiii, 281. Index. \$6.00; 48 s.

Uniquely, authors of two separate themes justify their jointure in one book by their united advocacy of solving the world's fishery problems by a social science approach. In the first portion Mr. Christy, a research analyst, deals with fishing processes, statistics and economics. It contains many tables. Mr. Scott, an economics professor, then discusses treaties, fish commissions and the law of the sea. Though neither purports to be a lawyer, both freely assume full competence in international law.

The book is sponsored by Resources For the Future, Inc., whose president, Joseph I. Fisher, in the preface indicates the tone of the book, commenting on the inadequacy of present scientific knowledge of the seas, the lack of co-operation among nations, and that the absence of individual and national rights on the high seas creates serious problems for management and an obstacle to an economically efficient system of exploitation.

Pointing out that the two basic concepts of Grotius that the high seas are "inappropriable" and their resources "inexhaustible" are obsolete, the authors discuss international law from the standpoint of what it ought to be (*lex ferenda*). The conclusion is not clear except that the answer will come through social scientific research. Five prevalent doctrines they

³ Notwithstanding *Canevaro*, which involved dual nationality.

consider questionable—keeping the seas free, looking after the special interests of coastal states, paying respect to historic rights, conserving fish stocks, abstaining from fishing where other states are fully utilizing a fishery.

The authors repeat a common misconception of the Truman fishery proclamation—that it asserts no high sea rights. This completely overlooks the facts that the proclamation was evolved under Cordell Hull to supplement his forceful assertion of American rights to Bristol Bay salmon, that it includes the meaningful word “control” which the proclamation enemies consistently ignore, and that it was officially claimed by the accompanying White House release that the proclamation would protect American rights to North American salmon. To be sure, the Departments of State and Interior apparently did not like the proclamation and completely failed to carry out the express executive mandate to implement it, but that does not change the proclamation.

Sustained maximum yield is criticized as a goal inferior to maximum economic yield. This alternative theory has many academic supporters, but thus far has made little impression on administrators or fishermen, largely because of the comparative complexity of its application. There can be little question but that the authors are sound in their criticism of present excessive fishery manpower, but this is difficult to remedy under our American attitude that anyone who wishes to has the right to enter any fishery.

In conclusion, much emphasis is placed upon the necessity for social and economic research in every aspect of fisheries to develop new concepts of high seas fishery management and of pertinent international law. Although new material in the book is not extensive, what is presented is set forth in a clear and useful manner, making it worth reading.

EDWARD W. ALLEN

Les Organismes Internationaux Spécialisés. Contribution à la Théorie Générale des Établissements Publics Internationaux. 2 vols. By H. T. Adam. Paris: Librairie Générale de Droit et de Jurisprudence, R. Pichon et R. Durand Auzias, 1965. Vol. I: pp. 325; Vol. II: pp. 338. Index. Fr. 83.50.

This book is an interesting and valuable attempt to contribute to the theory and analysis of the increasingly important public international agencies (*Établissements Publics Internationaux*). It consists of two volumes. The first is an analysis, in fourteen chapters, of the principal aspects of specialized public international agencies: their constitutions, composition, powers, jurisdiction, function and policies. The second volume contains the texts of Constitutions of twenty-nine such agencies which the author considers as falling within his definition of “*Établissements Publics Internationaux*.” It is the author’s somewhat narrow and artificial definition of public international organizations that limits the value of his contribution to the analysis of functional public international

bodies. He establishes the following five criteria: (1) a constituted enterprise or organism; (2) a special purpose (*vocation spéciale*); (3) an international status (*régime international*); (4) autonomy of means and powers; (5) loans to individual legal subjects or regulation of the use of the public or interstate domain (*Prestations à des particuliers ou réglementation de l'usage du domaine public ou interétatique*). The reason for this somewhat surprising limitation of his subject is the author's conviction that only a decentralized autonomous status, the capacity to "assure regularly and continuously the satisfaction of a specified need for the public," qualifies a public international institution as an "Établissement Public International." He therefore feels able to include in his analysis—and the constitutions given in the second volume—such diverse institutions as the Bank for International Settlements, the European Investment Bank, the Inter-American Development Bank, the Danube Commission, the Franco-German Moselle Company, Eurochemic, Eurofima and the Mont Blanc tunnel. But his definition compels him to exclude the International Bank for Reconstruction and Development—as distinct from its affiliated organizations, the International Finance Corporation and the International Development Association—and all the European communities, though not the "Agence d'Approvisionnement d'Euratom." The reason for such surprising distinctions is that the World Bank itself can only make loans to governments or to private enterprises with a government guarantee, whereas the IFC, the IDA or the IDB can make loans direct to private enterprises. The European communities are excluded because they are essentially interstate agencies, even though private enterprises have a direct juridical status under the Community treaties, notably by being able to bring actions before the European Court of Justice against orders of the executive authorities. For an analysis of public international institutions, in terms of juridical status, powers, financial autonomy or functions, such distinctions are highly artificial. By the same token, the author would have to exclude from an analysis of international commercial transactions those that have an export credit guarantee from a governmental institution as they exist in Britain, West Germany and the United States, or that protect investments in developing countries by a government guarantee, as it is now available in the United States, West Germany and Japan. In terms of a structural analysis of the rôle of public international agencies in international development aid, the differentiation between the International Bank for Reconstruction and Development on the one hand, and its affiliated institutions on the other hand, makes little sense, especially since the World Bank in recent years has increasingly resorted to lending to private development banks, which surely would come under the author's definition of direct consumers. Moreover, a growing number of international loans are now mixed transactions, in which the World Bank gives one part of the credit on commercial terms, and the IDA gives a "soft loan" on non-commercial terms. It is regrettable that Professor Adam has completely ignored Professor Paul Reuter's fundamental analysis and classification of "*Institutions Internationales*." Of the many criteria available: financial autonomy, juridical

status, functional purposes, etc., he has selected only one, the direct link between the organization and private legal subjects without government participation.

Subject to this serious and self-imposed limitation, this work is an important contribution to the growing science of public international organizations, and the functional approach to the international law of co-operation, which is one of the main hopes of our generation. It is particularly valuable for its analysis of such new and hitherto neglected bodies as Eurofima, Eurochemie, and the Moselle Canal Company, which constitute important advances in the organization of joint international co-operative activities of an economic, scientific or social welfare character. Some of these, such as Eurofima, are constituted only by governments, others, such as Eurochemie, have as members both government and private enterprises. The latter agency is also an important advance towards a more genuinely international status since, though having its seat in Belgium, it is primarily governed by its own statute and only in a subsidiary way by the law of Belgium.

W. FRIEDMANN

Foreign Enterprise in Nigeria. Laws and Policies. By Paul O. Proehl. (American Society of International Law Studies in Foreign Investment and Economic Development.) Chapel Hill: University of North Carolina Press, 1965. pp. xiv, 250. Index. \$7.50.

By its studied moderation in the tumult of African rivalries, its sensitivity to regionalism, minorities, and the challenges of modernization, as well as by magnitude of territory, population and wealth, Nigeria occupies a dominating position on the continent of Africa. Its selection by the American Society of International Law as the third state to be considered in its series of studies on legal environment for foreign investment (India,¹ Colombia,² Nigeria, Mexico and Japan), and of Professor Proehl for that inquiry, is therefore a felicitous one. It is a tribute to the author's objectivity that he should be concerned (page xii) lest the warmth of his feelings for Nigeria should lead him to overstate the case. Perhaps this is so when he observes that

Nigeria is, happily, among those few of the new nations that . . . suffers least from . . . the tendency toward arbitrary and partisan action that puts the foreigner at a serious disadvantage and robs the future of any predictability as to the safety of alien-owned property against non-market risks.

"Essentially," he adds, "Nigeria enjoys a rule of law based on a constitution respected by its leaders and enforced by its courts" (page x). In fact, not only do recent upheavals detract from these conclusions, but the study itself constitutes a searching indictment of abuses and of politically dominated judicial and administrative decisions and procedures in a state

¹ Reviewed in 59 A.J.I.L. 963 (1965).

² Reviewed below, p. 624.

noted for its professed attachment to Western legal values. What, then, of the more autocratically controlled states of the continent?

The work is concerned, not with the international protection of foreign interests, but with domestic legislative protection of alien investments. The recent suspension of the Constitution, following the military takeover, heightens the significance of that inquiry. Important in this respect is the rôle of the body of received (1900) English legislation and of post-1900 decisions of English courts interpreting that legislation. The book presents a useful review of the legislation and commentaries in this field. Less satisfying is the analysis of the jurisprudence of the Nigerian courts, not only in that same context, but also as evidence of the traditional law of Nigeria bearing on these problems and the treatment to be expected of the courts. The few cases discussed serve to underscore the conclusion that foreign investors, inured to expect arbitrariness in administrative rulings and procedures, cannot hope even to avoid it in the courts. This political subservience has been heightened by the suppression of the Judicial Service Commission designed to ensure the independence of judicial appointments and tenure. Moreover, the courts have made sweeping use of the even more sweeping language of the Constitution permitting infringements of human rights where the former are "reasonably justifiable in a democratic society." In sharing Grove's assessment that the "Courts . . . leave to Parliament the task of striking the balance between the state and the individual," the author's views coincide with the severe indictment delivered by (then) President Azikiwe in the April, 1965, issue of *Foreign Affairs*. Professor Proehl's investigations demonstrate the need for comprehensive legislative innovations affecting foreign investment, particularly a new Companies Law to replace the English Act of 1908 still in force, and for the development of new legislative safeguards in lieu of constitutional restraints. His study provides a necessary incentive to this end at a highly critical but opportune moment.

JOHN H. SPENCER

World Peace Through Diplomacy and Law. By Roberto Regala. Manila: Central Book Supply, Inc.; Dobbs Ferry, N. Y.: Oceana Publications, 1964. pp. ix, 270. Appendices. Index. \$5.50.

The author of this book is both a lawyer and a diplomat. During the course of a distinguished career in the Philippines he has served as the Legal Adviser of the House of Representatives, Chief of the Legal Staff and Legal Research Division of the Department of Justice, Legal Adviser to the Office of the President of the Republic, Legal Adviser of the Department of Foreign Affairs, Ambassador to Australia and Italy, a delegate to the Conferences of the United Nations on the Law of the Sea and on Diplomatic Intercourse and Immunities, and to the Conferences of the Food and Agriculture Organization and the International Atomic Energy Agency. He is now an Associate Justice of the Philippine Supreme Court. In this book are collected speeches and addresses made by him during the

period 1960-1963. They deal with various aspects of diplomacy, international law and the independence of the judiciary in the Philippines.

Justice Regala would like to see a Third Peace Conference, similar to the Hague Conferences of 1899 and 1907, "to revise and coordinate the existing rules and regulations of international law in order to meet the new conditions or circumstances, and to promulgate new principles and regulations governing the other new developments in science and technology, including outer space." (p. 120.) He suggests also a conference to revise the Charter of the United Nations to modify the structure of the various bodies and to curtail the veto (p. 75). His proposal for enlarging the Security Council to fifteen members has already been put into effect. While one can easily agree with him that India should be made a permanent member of that Council, similar status should be given at the same time to the two largest industrial Powers not having permanent membership, Japan and Germany (as soon as the latter becomes a Member). Justice Regala considers it essential that the veto be limited to "decisions involving military, economic and political sanctions" (*ibid.*). Alternatively, it might be possible to limit the veto to the binding decisions of the Security Council and abolish it with respect to the Council's recommendations. As the recommendations of the Council do not have any greater force than those of the General Assembly, and as the permanent members cannot veto the recommendations of the General Assembly, there does not seem to be any reason for retaining the veto as to the Security Council's recommendations.

The author supports strongly the proposal that the International Law Commission be placed on a full-time basis. As the Commission meets for only two months each year, he considers its work insufficient, "because with the increased inventions or achievements of science and technology, there is a tremendous need to provide rules and regulations regarding these matters. The achievements of science and technology constantly demand a redoubling of efforts in law to avoid a fatal lagging behind." (p. 121.)

He repeatedly urges the withdrawal, or at least a substantial modification, of the reservations which have been attached to acceptances of the compulsory jurisdiction of the International Court of Justice (pp. 60, 68, 108, 117). He advocates greater use of the Court by the nations which have accepted its jurisdiction, and would welcome the submission to the Court of the dispute between the Philippines and Malaysia relating to North Borneo (p. 60).

In discussing diplomacy, Justice Regala emphasizes the fact that military conflicts are being replaced by economic competition (p. 27). He warns against possible abuses of economic aid, and recommends that all economic and technical assistance be channeled through the United Nations or its specialized agencies (pp. 49, 62, 83). The idea of a Southeast Asian Common Market appeals to him strongly, as that part of the world has both great resources and sufficient manpower, and lacks only their effective use and proper marketing facilities (pp. 81-85).

In opposing Communist subversion in Southeast Asia, the author expresses the view that in Viet-Nam "the free world, particularly the free

peoples in this region, must prove once again as they did in 1950 that aggression is unprofitable." He adds that the countries of Southeast Asia cannot remain indifferent to the problems of Laos and Viet-Nam. "Their fight for freedom is also our fight" (pp. 50, 86).

It is in the nature of speeches that they lack depth, and this book is not free of that fault. Nevertheless, it contains many interesting ideas, presented vigorously by an expert with an amazing range of experiences.

LOUIS B. SOHN

UN: The First Twenty Years. By Clark M. Eichelberger. New York: Harper and Row, 1965. pp. xiv, 176. \$3.50.

Clark Eichelberger continues here the broad review of the United Nations record first begun in 1955, then extended in 1960. The present volume carries his survey through the crisis over financing at the Nineteenth Session of the General Assembly and coincides with the twentieth anniversary of the organization. Students of international affairs will find this a fast-moving, readable chronicle of the main concerns of the United Nations and a forward-looking anticipation of some of the principal issues that must be faced in the future. The author acknowledges that in a book of this size he can at best show by a few broad strokes what has been accomplished and wherein the institution has fallen short. This is not a detailed study but rather intended for the general reader.

The first third of the book is devoted to questions of peaceful settlement, collective security, peacekeeping, and the issues surrounding the activities and policies of the Secretaries General. The author feels that the United Nations made a retreat from the concept of collective security after the Korean War. Disappointments with the U.N. actions at that time and unwillingness on the part of the newer states to take sides have in his opinion been responsible for this. But he professes to see some hope for a return to collective security as a result of recent Soviet statements and a rising acknowledgment in the West that a fresh attempt should be made to make the Security Council work. It of course remains to be seen to what extent Soviet pretensions will be carried through to the stage of collective action.

Subsequent chapters review the record on disarmament, human rights, the specialized programs, and the expanding membership. Taking the long-run point of view, the author understandably finds the achievements less than desired, but still sufficient to afford room for hope that more can be done in the future.

The final chapters are directed toward the problems of strengthening the United Nations. Mr. Eichelberger would like to see it moving more dynamically in directions analogous to the thinking of Messrs. Clark and Sohn and of Arthur Larson. Thus, he would give the United Nations administrative authority over activities in outer space, though it is not clear how the United Nations could control the Powers in their experiments and uses

of outer space when it does not have itself the means of getting there. He would like to see the organization have independent means of income such as permitting surcharges on international mails, cables, air and sea traffic, passports and the like as a means of curing its financial ills. And he would like to see the jurisdiction of the International Court of Justice expanded so that it might play a more positive rôle in creating new law after the fashion of the courts of the United States.

Mr. Eichelberger does not hesitate to express his conviction that the organization would have been more effective had some of the ideas which he expressed during the formative days been followed. His intimate association with the organization and with American policy certainly entitles him to put these views on the record, although others may disagree with his prescriptions as they did earlier. The optimistic attitude that pervades the book as a whole is no doubt a reflection of the years he has spent as a leading advocate of the United Nations and the use of its procedures. In the reviewer's opinion the frustrations so often produced in the past by Communist tactics are not always given their full due. On the question of admitting Red China, the author presents both sides of the case quite fairly and admits that its voice would be a strident one were it seated. One is left with the feeling that as an early believer in the principle of universality he would accept the hazards for the sake of his logic.

Taken by and large, Mr. Eichelberger has produced a lucid, comprehensive, highly compact account of the high points of what has happened at the United Nations and has added some provocative suggestions for strengthening the institution in the future. The volume will appeal mainly to general readers searching for a brief, well-informed résumé with suggestions for further thought. It is to be regretted that no index was provided to enhance the usefulness of the book.

NORMAN J. PADELFORD

Security in Disarmament. Edited by Richard A. Falk and Richard J. Barnet. (Princeton Center of International Studies.) Princeton: Princeton University Press, 1965. pp. x, 440. \$10.00; 80 s.

This volume is a scholarly attempt to appraise what is involved in making a start on disarmament, to weigh the fears of governments that they may jeopardize their national interests if they commit themselves to disarmament arrangements, and to construct a number of models of what a disarmed world might be, with a view to weighing the needs, dangers, and protections possible. Eleven leading scholars have contributed papers to the symposium. In the first part particular attention is devoted to the question of inspection—what kind, under what conditions and by whom—it being felt that, even though the U.S.S.R. has explicitly rejected inspection, there is no substitute for this as a means of assuring others that a disarmament agreement is being carried out. Conceding that overt, formalized inspection may be difficult or impossible, the authors explore other conceivable verification techniques as possible substitutes, having in mind

such things as stand-still production accords, mixed international inspectorates, overflights and other monitoring techniques as applied during and since the Cuban missile crisis. The object of the editors is not to arrive at a simple agreed solution but to prompt thinking and discussion of feasible alternatives.

The fear of getting "locked into" a disarmament agreement to such an extent that security may be jeopardized if others do not live up to the agreement or seek to take advantage of it through clandestine measures, occupies the attention of the second third of the volume. How to overcome fears and reluctance to agree to disarmament? Simple withdrawal arrangements as in the Test Ban Treaty offer one solution. The papers in this section endeavor to see what could be done on the one hand to preserve the supposed advantages gained by disarmament, while on the other hand safeguarding the legitimate interests of states, if one or more parties violate the accord. Several alternatives are explored, such as the use of police forces, sanctions of various kinds, court and U.N. actions. Rather than coming out for any one solution, the authors focus more on trying to lay out principles and guide lines for discussion. There are both advocates and opponents of international forces, sanctions machinery, and world government represented in these pages.

Taking the theoretical hypothesis of agreement upon general and complete disarmament, the authors address themselves in the last part to a few of the problems of peaceful change and the resolution of on-going conflicts in national interests under such assumed conditions. Again, the object appears to be to open up vistas for thinking about what such a world would be like and to promote consideration of how the international society might function. Klaus Knorr contributes a constructive final chapter by synthesizing several international and supra-national models from the writings of the other collaborators. He concludes the book on the note that the world is in need of a more active search by *all* societies—developing as well as mature—of practical measures for attaining a disarmed world. The volume is a stimulating, provocative contribution to serious thought on arms reduction.

NORMAN J. PADELFORD

Yearbook of the European Convention on Human Rights, 1963. Vol. VI.¹
The Hague: Martinus Nijhoff, 1965. pp. xvi, 849. Index. Gld. 81.

1963 was an important year in the history of the European human rights authorities. In the course of the year three Protocols to the European Convention on Human Rights of 1950 were completed and signed; they are printed on pages 1 to 21 of the publication under review.² 1963 was also the year of the tenth anniversary of the entry into force of the European Convention.

¹ For a reference and cross-references to the reviews of the five preceding volumes, see 59 A.J.I.L. 187 (1965).

² Also in 58 A.J.I.L. 331 (1964).

In 1963 the most tangible success, so far, of the working of the European Commission on Human Rights was consummated: In the cases of *Pataki v. Austria* and *Dunshirn v. Austria* the Commission had found that certain provisions of the Austrian Code of Criminal Procedure relating to criminal appeals were incompatible with the Convention. These provisions made it possible for the Court of Appeals to hear and to decide, in certain situations, appeals in the presence of the Public Prosecutor, without the presence of the accused or his counsel. The Commission held that what is generally called "the equality of arms" ("*Waffengleichheit*"), that is, procedural equality of the accused with the public prosecutor, was an inherent element of a fair trial, which the states parties to the Convention had undertaken to secure. In deference to the Commission's view, the Austrian Government proposed and the Austrian Parliament enacted new legislation. One statute, enacted in 1962, amended the controversial provision of the Austrian Code of Criminal Procedure *pro futuro* and another, enacted in 1963, amended the law retrospectively in favor of the successful petitioners. The amended law was found to be in conformity with the Convention; the Committee of Ministers agreed and expressed its satisfaction at the Austrian legislative measures (pp. 714 to 738).

In the year under review the European Commission on Human Rights declared admissible, without prejudice to the merits, a number of petitions concerning which the proceedings have become known as the "Belgian Linguistic Cases." The decisions on the admissibility of two of them (23 Inhabitants of Alsemberg and Beersel against Belgium, p. 332, and Charlent and others against Belgium, p. 444) are reproduced in the volume. Under Belgian legislation the national territory is divided into four regions, in three of which the exclusive use of the Flemish, French or German language is prescribed as the medium for primary and secondary (*moyen*) education, while in the fourth (the Brussels area) the mother tongue or the accustomed language (*langue usuelle*) of the child is the criterion. The petitioners, French-speaking inhabitants of the Flemish region, claim in their own names and on behalf of their children that the statutory arrangements violate their rights under the Convention and under the First Protocol (of 1952) thereto. The Commission declared the application admissible in respect of the alleged violations of Article 8 (respect for family life), Article 14 (prohibition of discrimination on the grounds, *inter alia*, of language, association with a national minority or property) and Article 2 of the Protocol of 1952 (right to education.) Since the publication of this Yearbook the Commission has brought these cases before the European Court of Human Rights, which is thus seised of one of the most delicate and politically explosive problems ever referred to an international tribunal.³

In 1963 the Commission declared admissible a total of 20 applications, which number includes the Belgian linguistic cases, another case against Belgium (*Boeckmans v. Belgium*, p. 370) which involves the allegation that certain temperamental expressions by the President of a Chamber of a Court of Appeal had been prejudicial to the Applicant's right to a fair

³ Council of Europe Press Release C(65)11, Sept. 17, 1965.

trial, and a series of cases against Austria raising problems of criminal appeals procedure similar to those decided in the *Pataki* and *Dunshirn* cases referred to above (p. 118).

Of the eighteen decisions declaring petitions to be inadmissible which are printed in the volume, the following two appear to this reviewer to be of particular interest:

In *Iversen v. Norway* (p. 278), the petitioner, a young dentist, had, by virtue of special legislation enacted to secure dental service for the inhabitants of the sparsely populated, barren and mountainous regions of Northern Norway, been directed to serve for one year as a district dentist in a community north of the Arctic Circle. He left his post before completing his term of duty and was, as a consequence, found guilty of a statutory offense and fined. The Supreme Court of Norway rejected his appeal by three votes to two. In his petition to the European Commission on Human Rights he alleged that, by applying the Norwegian statute to him and by punishing him for its violation, the Norwegian authorities had violated Article 4(2) of the Convention providing that "No one shall be required to perform forced or compulsory labor."

Four of the ten members of the Commission present and voting were of the opinion that Iversen's service was not forced or compulsory labor within the meaning of the Convention. Two members, having regard to Article 4(3)(c), which permits the exacting of services "in case of an emergency or calamity threatening the life or well-being of the community," held that the case came within this exception. Thus a majority of six out of ten voted for the rejection of the petition. The minority of four members stressed the fact that the work had been imposed upon the petitioner subject to penal sanctions and that the applicability of the exceptional provision concerning service in an emergency required further examination. Having regard to the diversity of opinions, even among the six members forming the majority, the minority did not find it possible to declare this part of the application inadmissible as *manifestly* ill-founded and held that it should be declared admissible.

In the case of *X. v. the Federal Republic of Germany* (p. 494), the petitioner had been sentenced by courts in East Germany to a long term of imprisonment, after having been found guilty of several thefts, of receiving stolen goods, the violation of an Ordinance on Economic Offenses and of resistance to public authority by escaping from prison. After recapture he escaped again and came to the Federal Republic of Germany. The East German Public Prosecutor requested his West German opposite number to have the petitioner serve the remainder of the sentence. The West German Prosecutor, after having conducted proceedings in accordance with the Federal Act on intra-German judicial and administrative assistance in penal matters of 1953 (*Bundesgesetz über die innerdeutsche Rechts- und Amtshilfe in Strafsachen*), authorized the enforcement of the sentence. His decision was upheld by the competent West German Court of Appeal.

In his application to the European Commission on Human Rights the

petitioner complained that the West German authorities were executing the arbitrary decisions and unjust action of the East German courts and, at least by implication, that Article 5 (permitting only a "lawful detention of a person after conviction by a competent court") and Article 6 (fair hearing) were being violated. The Commission rejected the petition. The growth of international co-operation, it said, is increasingly reflected in the judicial field and states are proving more willing than before to apply their own legal machinery to enforce decisions, including criminal sentences, pronounced elsewhere. This argument, the Commission went on to say, is valid *a fortiori* in the case of a state consenting, as here, to enforce judgments which it regards as having been pronounced, not abroad, but on a part of its national soil which the events of history have removed from its authority. While the West German court had not been called upon to review the finding of facts of the East German courts, it had, under the statute of 1953, to be satisfied that there were no objections to them from the point of view of the rule of law (*keine rechtsstaatlichen Bedenken*). The Commission found that it had performed this supervisory task conscientiously and thoroughly and that the petitioner was therefore not the victim of a violation of the Convention. While it cannot be denied that the result at which both the German court and the Commission arrived is supported by common sense, it is nevertheless remarkable that the Federal Government was engaged in protracted international proceedings to vindicate its right to enforce the penal judgment rendered in a territory which it does not recognize as a state, the authorities of which it does not recognize as a government and the system of law of which it does not recognize as legal.

EGON SCHWELB

Law and Politics of the Danube. An Interdisciplinary Study. By Stephen Gorove. The Hague: Martinus Nijhoff, 1964. pp. xvi, 171. Index. Gld. 20.75.

Since the end of World War II no major study on the international status of the Danube River has been published in any of the Western languages. Conversely, several works on the legal position of this river have appeared in Russian, almost as if to demonstrate the changed political and legal circumstances surrounding the navigation of the Danube in the post-World-War II period. Stephen Gorove's book deserves attention if for no other reason than the topic which he has undertaken to treat. The author has termed his volume an "interdisciplinary" study, thereby indicating that he has not devoted himself entirely to a legal analysis of the Danube's latest metamorphosis. Indeed, without an examination of the new political background which has provided the basis for a changed legal system, the juridical appraisal could hardly be successful.

The Danube is more than the second longest river of Europe; it is a connecting link between the European West and European East; it is the artery of a fluvial basin which includes countries highly interested in the juridical status of this lane of navigation.

The author traces the history of the legal status of the Danube from the Vienna Congress in 1815 to the present day, but the emphasis of the book is on the developments during and subsequent to World War II. After 1919 the Danube became internationalized, open to navigation by ships of all flags, and under the supervision of an international commission throughout its entire navigable length (the "maritime" Danube had been under the control of the European Commission since 1856). During World War II the Germans suppressed both commissions and tried to convert the Danube into a "German" river. But due to the changed status of power at the end of hostilities, the Danube, from its mouth to the Soviet Zone of Occupation in Austria, became, first *de facto* then *de jure*, a Soviet-controlled waterway. Only Yugoslavia's defection from the Soviet camp thwarted the monopolistic Soviet control. Eventually, a more co-operative system, also including neutral Austria, was developed. However, the Danube is open only to the navigation of riparians while others are excluded.

Professor Gorove provides a lucid, sober and well-documented presentation of both the historical-political and legal and economic questions surrounding the status of the Danube. This reviewer does not consider this medley of political, economic and legal discussions of one topic harmful or lacking in scholarliness. On the contrary, in his view the subject matter requires such a literary treatment. It would be rather unrealistic to ignore all these factors in their logical interrelations. However, the writer occasionally wanders off into areas such as the question of "German assets," a discussion of less than vital significance for an understanding of the status of the Danube. It should be remarked in this connection that the "German assets" had been a "tool of Soviet diplomacy" not only because Moscow wished to include among these assets property taken by the Germans through force or duress, but also because the Soviets claimed only the active assets without concerning themselves with the liabilities attached to the property thus expropriated. In such vein the Soviet authorities have taken possession of German-owned plants, etc., in all the Soviet-controlled countries or areas of East-Central Europe, but have refused to pay their debts while collecting all outstanding assets.

Mr. Gorove's study certainly fills a gap in the legal and political appraisal of European waterways. For this reason, as well as for its intrinsic value and unbiased judgments, his book deserves favorable consideration.

FERENC A. VÁLI

BRIEFER NOTICES

The Sources and Evidences of International Law. By Clive Parry. (Manchester, England: Manchester University Press; Dobbs Ferry, N. Y.: Oceana Publications, 1965. pp. viii, 122. Index. 25 s.; \$5.00.) In these Schill Lectures, delivered at the University of Manchester, Dr. Clive Parry shares with the reader some of the rich experience he has gained from an exhaustive study of the British archives in preparation of the *British Digest of International Law*. The treatment is more discursive than systematic,

more challenging than conclusive, but the book is well worth reading. With refreshing skepticism, Dr. Parry asks whether Article 38 of the Statute of the International Court of Justice really refers to the "sources" of international law; whether treaties or international custom or the general principles of law or judicial decisions are properly to be designated "sources"; whether, if so, Article 38 exhausts the formal sources of international law. In discussing these questions, he examines, in passing, the legal effect of General Assembly resolutions, of the drafts of the International Law Commission, and of the internal law of international organizations. Not the least interesting part of the book is the indication (pp. 46 ff., 78 ff.) of the sheer magnitude of British documentary materials which have influenced the formulation and development of rules of international law. After all, doctrinal disputes as to what is "source" and what is "evidence" of international law are less important than "making the evidence of customary international law more readily available" (Statute, International Law Commission, Article 24). In this task, Dr. Parry is making a major contribution.

HERBERT W. BRIGGS

British International Law Cases. Vol. 2: *States as International Persons; State Territory*; Vol. 3: *Jurisdiction*. Edited by Clive Parry. (London: Stevens and Sons; Dobbs Ferry, N. Y.: Oceana Publications, 1965. Vol. 2: pp. xx, 959. Index. \$27.00; Vol. 3: pp. xxii, 892. Index. \$26.00.) These two volumes continue the series published as *British Institute Studies in International and Comparative Law, No. 1*, Volume 1 of which was earlier reviewed in this JOURNAL.¹ The first two hundred pages of Volume 2 cover decisions of British courts on *Recognition* of new states or governments, starting with *City of Berne v. The Bank of England* (1804), and running through *Republic of Peru v. Dreyfus*, *Luther v. Sagor*, the *Haile Selassie* cases, and other well-known cases to *The Arantzazu Mendi* (1939). There follow 130 pages of cases on succession of states and governments. The section on *State Territory* covers 600 pages of British decisions on acquisition of title to territory, boundaries, rivers, territorial waters, bays and lakes.

Volume 3, devoted to *Jurisdiction*, contains some 850 pages of British cases on territorial jurisdiction; criminal jurisdiction over foreigners; jurisdiction over ports and national waters, and at the maritime frontier; immunities of foreign states, public vessels and other foreign public property; personal and extraterritorial jurisdiction; and jurisdiction on the high seas.

The almost surprising conclusion of one who has worked for many years in the field of international law that so few of the cases here reprinted are not well-known is testimony to the influence of decisions of British courts in weaving the fabric of international law. The collection of these scattered decisions, with scholarly care and with intercalation to the pagination of the official law reports, is an inestimable boon to practitioners and to scholars.

HERBERT W. BRIGGS

The British Year Book of International Law, 1963. Vol. 39. Edited by Sir Humphrey Waldock and R. Y. Jennings. (London, New York, Toronto: Oxford University Press, 1965. pp. viii, 557. Index. £5 10 s.; \$17.60.) The temptation which always arises in reviewing the solid monographic studies appearing in *The British Year Book of International Law* to ap-

¹ 59 A.J.I.L. 410 (1965).

praise each contribution in detail cannot be indulged in the limited space of a book review. In his study "On the Non-Use of the Advisory Competence of the International Court of Justice," Shabtai Rosenne perceptively discusses political factors which have led to a decline in the submission to the present Court, as compared with the Permanent Court of International Justice, of requests for advisory opinions. D. P. O'Connell adds to his invaluable studies of state practice in the field of State Succession an article on "State Succession and the Effect upon Treaties of Entry into a Composite Relationship" (such as Federation). Sir Gerald Fitzmaurice, in Part III of his series on "Hersch Lauterpacht—The Scholar as Judge," deals with Lauterpacht's judicial writings on the Law of Treaties, and promises a concluding article on Lauterpacht's views on so-called automatic reservations of matters of domestic jurisdiction. Nathan Feinberg discusses "Unilateral Withdrawal from an International Organization"; L. F. E. Goldie, "Recognition and Dual Nationality—A Problem of Flags of Convenience"; A. R. Carnegie, "Jurisdiction over Violations of the Laws and Customs of War." In a comprehensive review of "The Relations of Nationality in Public International Law," Ian Brownlie refreshingly emphasizes the importance of rules of international law, as opposed to national law, in the field of nationality; however, in his uncritical enthusiasm for the *Nottebohm* decision, Dr. Brownlie permits himself to say that "The Court decided that the effective nationality was that of Guatemala" (p. 355)—a point neither claimed by Guatemala nor decided by the Court. The *Year Book* concludes with notes, judicial decisions, and book reviews of a high level of excellence.

HERBERT W. BRIGGS

International Law: Indian Courts and Legislature. By S. K. Agrawala. (Bombay: N. M. Tripathi Private Ltd.; New York: Oceana Publications, 1965. pp. x, 289. Appendices. Index. \$10.00.) Dr. Agrawala's *International Law* breaks new ground insofar as Indian writing on the subject is concerned. It is the first attempt to deal with international law as evidenced by Indian practice, and the author chooses for the purpose succession, nationality and extradition.

The emphasis on succession is perhaps not surprising. The creation of independent India presented not only the normal type of succession arising from the disappearance of a ruling Power. Problems also arose from the absorption of the Native States. India's judiciary has followed the "age-old principle" of international law that the law survives until changed, with the law of a particular state continuing until the adoption of a uniform system. With some deviations, the Indian courts have recognized, as have other successors of the former British *raj* like Israel and Malaya, that suits, appeals, execution of judgments and the like, pending at the date of succession, should be honored. This practice is in accord with the Indian Constitution as well as general tradition. The Constitution provides for the continuation of the law in force prior to its enactment, thus leaving the way open for the courts to apply at least those principles of international law which had been adopted into the common law during the British period. However, in each of the fields considered by Dr. Agrawala the *Lok Sabha* has adopted statutes which prevail over the former law, and which do not always conform to that law. Thus, by the Extradition Act of 1962, departing from Commonwealth practice, signature of extradition agreements with Commonwealth countries is necessary, while the principle of inter-Commonwealth rendition of political offenders under the Fugitive Offenders Act is abandoned.

In the light of his study of the legislature and the interpretation of such legislation by the courts in his chosen fields, Dr. Agrawala is somewhat critical of the Indian judiciary. He feels that they have too literal an approach to the statutes and would prefer them to adopt the "broad and engulfing interpretation" of Lauterpacht and Alvarez. He points out that many of the established rules were developed by European states, and are "contrary to the interests of the newly emerging Afro-Asian states today, hence are unacceptable to them. It is for countries like India to enunciate the equitable rule for future international law." *International Law: Indian Courts and Legislature* is a useful contribution to the growing literature on state practice. From it, it would seem that the "old" international law is not so out of touch with the interests of the "new" states as they sometimes suggest.

L. C. GREEN

Uchwały Prawotwórcze Organizacji Międzynarodowych. Przegląd Zagadnień i Analiza Wstępna [Law-Making Resolutions of International Organizations. Survey of Problems and Preliminary Analysis]. By Krzysztof Skubiszewski. (Poznań: Praca Wydana z Zasiłku Polskiej Akademii Nauk, 1965. pp. 201. Index. Zł.45.) One of the characteristic features of the contemporary world community is an enormous proliferation of international organizations which provide institutionalized channels in practically all areas of international co-operation. International relations have become too complicated not to call for the assistance of experts, permanent planning and experimenting with new methods of co-ordination. These organizations play an important rôle in the expansion and development of the rules of international law, and the book under review deals with this aspect, which may be called legislative functions entrusted to international bodies. In addition to other forms of co-operation in the development of the law of nations, international organizations create new law by means of their own acts. As our author states it, they enact either their own internal laws or rules directly addressed to states. This last category is comparable to, and in effect is a substitute for, international treaties, and is the subject of the book.

The interesting aspect of Mr. Skubiszewski's book is its almost total orientation towards the legal problems of the West. The author made a gallant effort to encompass the Council for Mutual Economic Aid into the framework of his book but found practically no material useful for the analysis of the problem at hand.

It is a highly sophisticated study, characterized by a broad approach to the problem, important not only for the central issue of development of international law through the action of international organizations, but of considerable significance for the general study of international law. There is nothing of comparable scope in the world literature on international organizations, and in the reviewer's opinion its translation into one of the more accessible languages would be a contribution to the literature of international law.

KAZIMIERZ GRZYBOWSKI

Index to Multilateral Treaties. A chronological list of multi-party international agreements from the sixteenth century through 1963, with citations to their text. Edited by Vaclav Mostecký; Francis R. Doyle, assistant editor. (Cambridge: Harvard Law School Library, 1965; distributed by Oceana Publications. pp. x, 301. Supplement 1: Treaties of 1964, pp. A 1-141. \$13.00.) This compilation records 3859 multilateral

agreements from 1596 through 1963, the General Act of Vienna of June 9, 1815, being No. 146. The Covenant of the League of Nations, June 28, 1919, is No. 956 and the Charter of the United Nations, June 26, 1945, No. 1881. Half of the items are the product of the last 18 years of the period, which suggests that the institutional machinery which creates them was either overdue or is being overworked.

This index is not a work of scholarship. It is apparently the working list of reference librarians put into print. If one has the date of a document and a key word or two and the cited work, he can learn what the document is; sometimes the key wording is more or less useful. The Declaration of Bogotá, August 10, 1958, if you have Ecuador's *Registro Oficial*, No. 610, at hand, is a statement of principles by the Bolivarian trio, Colombia, Ecuador and Venezuela. That gives "index" service, as the book title says, if you have the source.

But this sort of compilation is intended to be more than the index in the back of a book referring to the foregoing text. One expects items to be self-identifying. No entry contains a place of signature as such; the Punta del Este Charter and the Brussels Treaty (Western European Union) as formal titles are occasional exceptions. The Peace Treaties of February 10, 1947, with Bulgaria, Hungary, Italy, Rumania, but not Finland, are identified as signed at Paris in the index only. The editors have included rules of procedure, final acts of conferences, resolutions of the Unions, and other material not really treaties, but pertinent to multilateral studies. Some of the infelicity of the main text is overcome by the 50-page index which accurately records names of organizations and other bodies. The editors have diligently cited everything in sight at the Law School in all the languages available, which gives a dozen to 20 citations to many treaties.

DENYS P. MYERS

Disarmament and International Law: A Study of the Role of Law in the Disarmament Process. By Allan Gotlieb. (Toronto: Canadian Institute of International Affairs, 1965. pp. x, 232. Index. \$3.50.) In the United States, of making books on disarmament and peacekeeping there is no end. Mr. Gotlieb's book is, it would seem, the first Canadian book reflecting a Canadian perspective on these subjects, and a very good book it is. What Mr. Gotlieb, now the Head of the Legal Division of the Department of External Affairs in Ottawa, has set out to do is "to examine the legal questions that may arise in the execution of this vast undertaking [general and complete disarmament], to describe their close connection with the key political questions that must be resolved and to suggest what role the lawyer can play in the achievement of the goal of a totally disarmed world" (pp. 4-5). He contrasts the heavy participation by a number of American lawyers in the formulation and discussion of disarmament proposals with the "little, if any, attention" given to these matters by the generality of lawyers in Canada and the United States (p. 5).

With an eclectic range of citation, Mr. Gotlieb takes the reader through the principles of disarmament, the negotiations (principally in the Eighteen Nation Disarmament Committee, in which the author has sat), certain procedural matters, peacekeeping, verification, and sanctions for violation of an agreement. For the specialist the ground may be familiar, but the ordinary lawyer or intelligent layman will find the book a lucid and balanced introduction to the subject. Even the specialist may derive profit, however, from the author's consideration of such points as the legal effect of a violation of a disarmament agreement on the duties of other parties to a multilateral disarmament agreement (pp. 153-163).

The inclusion of references to events and authorities antedating the publication of the volume by only a few months gives the book a lively contemporary flavor. If there is to be this commendable speed in production, a few typographical errors may be pardoned.

R. R. BAXTER

A Handbook on the European Economic Community. Edited by Gordon L. Weil. (Praeger Special Studies in International Economics. New York, Washington, London: Frederick A. Praeger, 1965. Published in co-operation with the European Community Information Service, Washington, D. C. pp. xiv, 479. \$7.50.) This work is a compendium of institutional and policy information concerning the evolution of the European Common Market intended to answer the questions of students, teachers, lawyers, businessmen and officials. It consists of excerpts from Community documents, most often from the annual reports of the Commission, introduced by the editor's remarks. Since the work was compiled by a member of the Community's Official Spokesman Group and published co-operatively by Praeger and the E.E.C., it may itself be considered a Community document. All the major aspects of Common Market policy are treated in self-contained chapters dealing with external relations, association with European states, economic and financial affairs, the internal market, fair competition, social affairs, agriculture, transport, energy and overseas development. Institutional material is covered in chapters dealing with the E.E.C. Treaty, internal administration and—of great utility to the lawyer—a case-by-case summary of the work of the Community's Court.

The trouble with this work lies in its format rather than in its purpose. The reader, to profit fully from the editor's efforts, must already possess some familiarity with the principles of common markets—institutional, legal and economic. By relying exclusively on Community documents the editor is forced to present his material in the "insider's" language and style of the E.E.C. Further, he is unable clearly to distinguish between steps and texts which elucidate the *process* through which policy emerged and those which explain what present and future policy *is*. Reliance on texts involves unnecessary repetition and complexity without producing clarity. Commission pronouncements and diplomatic steps seemingly important in the spring of 1964 (the terminal date of the coverage) may appear less vital to the lay student in 1965. More satisfactory handbooks on the E.E.C. are available for the lawyer, while the lay student is better served by some of the excellent paperbacks on the Community now in print.

ERNST B. HAAS

Mexico y el Arbitraje Internacional: El Fondo Píadoso de las Californias; La Isla de la Pasión; El Chamizal. By Antonio Gomez Robledo. (Mexico, D. F.: Editorial Porrúa, 1965. pp. xii, 412. Index.) The distinguished Mexican diplomat and jurist gives us here an exhaustive study of the two outstanding arbitrations between Mexico and the United States, the *Pious Fund* and the *Chamizal* cases, with a shorter study of the arbitration between Mexico and France over Clipperton Island. Both of the more important cases have left their mark upon international law. The *Pious Fund* case involved the subtle distinction between public and private institutions, and the claim of succession of the United States to a semi-public trust fund established for mission work among the "savages" of Upper and Lower California. The criticism of the author is directed both against the decision of Sir Edward Thornton in 1875 and against that of the Permanent Court of Arbitration in 1902, accepting the Thornton decision as *res judicata*; and

his detailed analysis of the two decisions reopens the issue of their doubtfully equitable character. The author's criticism of the *Clipperton Island* arbitration, in which the King of Italy was the sole arbiter, is that the award was the result of the "worst possible form of arbitration." Happily the decision in the *Chamizal* case, to which the American Commissioner dissented in 1911, has now been set right by the treaty of 1963 between the two countries, an encouraging example of the constructive rectification of legal conflicts.

The scholarship of the author not only in the field of international law but in that of philosophy and political science leads one to wish that two of his recent works, *Idea y Experiencia de America* and *La Seguridad Colectiva en el Continente Americano*, might be translated into English as part of the United States Information Series. The scope of regional collective security is a problem of first order between our two countries, and it is important for American students to understand the Mexican interpretation of the Rio Treaty in relation to the strong stand taken by its government on the issue of non-intervention.

C. G. FENWICK

Estudios de Historia y Doctrina del Derecho Internacional. By Luis Garcia Arias. (Madrid: Instituto de Estudios Politicos, 1964. pp. 736. Ptas. 350.) The old and the new are here, history and the basic international law concepts of the present day—a scholar's privilege, a gathering together of essays in honor of jurist friends and a classification of them so as to show the continuity between the past and the present. The leading essay of the volume deals with "The Conceptions of the Foundation of International Law by the Natural Law Jurists," presenting a careful study of the different interpretations of the natural law, listing the schools of international law and their outstanding members. A chapter, "Moral Standards and International Morality," pursues a subject which it is well to emphasize at a time when the old classic international law is being challenged by some of the states recently acquiring independence. The problem, as the author sees it, is to effect a reconciliation between the fundamental principles of the natural law and the practical needs of modern international intercourse. *Pacta sunt servanda*; but do the *pacta* measure up to the principle of good faith?

With Vitoria as the exponent of the application of the moral law to international relations, Professor Arias gives an interesting study of classic writers of the 17th century who cited Vitoria as an authority, with special emphasis upon items with which Grotius agreed or disagreed, as in respect to sovereignty over the Indians of the New World and the conditions of a just war. Other essays deal with specific problems of the freedom of the seas, the free transit of warships, piracy, and the right of diplomatic protection. Two closing essays deal with the system of private international law in the Soviet Union and the new civil code of the Ukraine.

Recognition is due to the series of volumes coming from the Institute of Political Studies—a collection of texts and of monographs that represent the scientific work being done in international law in the universities of Spain or under the inspiration of its professors.

C. G. FENWICK

Restitution in International Law. By István Vásárhelyi. (Budapest: Publishing House of the Hungarian Academy of Sciences, 1964. pp. 178. \$6.00; DM. 24.) The rôle of restitution as a remedy for the wrongful taking of alien property has remained, thus far, a largely unexplored subject in the area of state responsibility. The author of the present work, a

former Secretary of State of Hungary, examines restitution as reparation for the violation of property rights in time of war, with particular reference to the restoration of property wrongfully removed during belligerent occupation.

The author, after analyzing the Hague Regulations of 1907 and the Treaties of Peace at the close of World War I, concludes that international law enjoins respect for enemy alien property and requires restitution in kind as the remedy for the violation of such property rights. Monetary compensation may be substituted if restitution is impossible.

Dr. Vásárhelyi then considers the restoration of property after World War II. Beginning with the statement of policy in the London Declaration of January 5, 1943, he outlines the restitution program based upon the Paris Peace Treaties of 1947, the decrees of the Allied Powers occupying Germany and Austria, the joint American-British-French agreements with such neutral states as Switzerland, Sweden and Spain, and the Bonn Treaties of 1952 and 1954. In detailing the restitution of property in favor of Hungary, the author states that the United States was guilty of an international delinquency when it suspended the Hungarian restitution operation in its occupation zone in Germany. The Soviet Union, on the contrary, was meticulously observant of its restoration duty. These statements are among the relatively few in the book which might seem to project a pro-Soviet bias.

Meager documentation and an inept English translation mar the book as a scholarly work. If the reader prescinds from these shortcomings, however, it does represent an adequate treatment of some of the principal features in the development of the international law of restitution in time of war.

FRANCIS J. NICHOLSON, S.J.

Foreign Enterprise in Colombia: Laws and Policies. By Seymour W. Wurfel. (Chapel Hill: University of North Carolina Press, 1965. pp. xvi, 563. Index. \$10.00.) Professor Wurfel's book is one of several studies carried out by the American Society of International Law in its research program on legal aspects of foreign investment.¹ This book is alive with interest and conviction because the author began his studies of all aspects of the economy and laws of Colombia almost four decades ago and really knows his subject. Ever since he has manifestly grown more enthusiastic about this "developing" country of over 15,000,000 inhabitants with 440,000 square miles (bigger than even Texas and California combined) on the northwest corner of South America. After tracing its indigenous population back to the Incas, Aztecs or Mayans and its Spanish elements back to the Conquistadores who came from the medieval Spain of Ferdinand and Isabella, the book describes thoroughly Colombia's drawbacks and also economic factors that should conduce to its prosperity.

In summing up the programs to promote foreign private investment, Professor Wurfel declares it is literally true that never before in history have emerging countries had such extensive and co-ordinated international support, focused on the objectives of creating in them a favorable infrastructure for foreign private investment.

Even the lawyer who has frequently visited Colombia many times, such as this reviewer, will find something new in Professor Wurfel's careful treatment of its legal system, going back to Roman law; of its governmental regulation of business—incidentally warning about the uncertainties in con-

¹ See review at p. 608 above.

stitutional provisions on expropriation of property and in the regulations on price controls; and of problems in labor law and taxation.

Accordingly, he concludes that "there is no pat answer to the question of whether one should invest in Colombia." Nevertheless, he emphasizes that it is the "climate in which, historically, discriminating and energetic private enterprise has prospered."

MITCHELL B. CARROLL

Comparative Survey of Central Bank Law. By Hans Aufricht. (Published under the auspices of the London Institute of World Affairs. New York and Washington: Frederick A. Praeger, 1965. pp. xvi, 228. Index. \$6.00.) This is the original volume of which the Spanish version was reviewed earlier.¹ Its self-description is accurate: "The present study contains a comparative analysis of the laws governing the central banks of twenty-one selected countries and in particular of the principles which govern their relations with governments and with the rest of the banking system; moreover, it summarises the impact of major provisions of the Articles of Agreement of the International Monetary Fund on traditional central bank law." Its limitation inheres in the fact that it covers the statutory rules governing central bank action, not experience under the rules; this limitation is serious to the extent that experience is in truth the life of the law.

THEODORE A. SUMBERG

BOOKS RECEIVED *

- Adler, Selig. *The Uncertain Giant: 1921-1941. American Foreign Policy between the Wars.* (American Diplomatic History Series.) New York: Macmillan Co., 1966. pp. xi, 340. Index. \$6.95.
- Ahrens, Dieter. *Der Karibische Raum als Interessensphäre der Vereinigten Staaten.* Berlin, Cologne, Stuttgart: W. Kohlhammer Verlag, 1965. pp. 116. DM. 18.
- Annuaire Suisse de Droit International, 1964.* Vol. 21. Zürich: Polygraphischer Verlag AG, 1966. pp. 316. Index. Sw.Fr.38.
- Baade, Hans W. (ed.) *The Soviet Impact on International Law.* Dobbs Ferry, N. Y.: Oceana Publications, 1966. pp. xi, 174. \$6.00.
- Berman, Harold J., and James W. Spindler (translators). *Soviet Criminal Law and Procedure.* Cambridge: Harvard University Press, 1966. pp. xii, 501. Index. \$5.95.
- Bette, A., J. M. Didier, R. Fornasier, and R. M. Stein. *Compensation of Nuclear Damage in Europe. System Created by the Brussels Convention of 31st January 1963 Supplementary to the Paris Convention of 29th July 1960 on Third Party Liability in the Field of Nuclear Energy.* Brussels: European Atomic Energy Community, 1965. pp. ii, 95.
- Billyou, De Forest. *Air Law.* 2nd ed. New York: Ad Press, Ltd., 1964. pp. vii, 674. Index. \$16.00.
- Blum, Yehuda Z. *Historic Titles in International Law.* The Hague: Martinus Nijhoff, 1965. pp. xxiv, 360. Indexes. Gld. 40.50.
- Canadian Yearbook of International Law, 1965.* Vol. III. Edited by C. B. Bourne. Vancouver: University of British Columbia, 1965. pp. x, 383. Index. \$12.00.
- Castanos de Médicis, Stélieos. *Principes et Problèmes de Relations Internationales Européennes.* Paris: Editions A. Pedone, 1965. pp. iv, 78.

¹ 59 A.J.I.L. 427 (1965).

* Mention here neither assures nor precludes later review.

- Centre des Hautes Etudes Administratives sur l'Afrique et l'Asie Modernes; Centre d'Etude des Relations Internationales de la Fondation Nationale des Sciences Politiques; Centre d'Etude d'Afrique Noire de l'Université de Bordeaux (joint presentation). *Année Africaine*, 1963. Paris: Éditions A. Pedone, 1965. pp. x, 515.
- Colliard, Claude-Albert. *Institutions Internationales*. 3rd ed. Paris: Librairie Dalloz, 1966. pp. xix, 747. Index.
- Dahl, Robert A. (ed.) *Political Oppositions in Western Democracies*. New Haven and London: Yale University Press, 1966. pp. xix, 458. Index. \$10.00.
- Dando, Shigemitsu. *Japanese Criminal Procedure*. Translated by B. J. George, Jr. (Publications of the Comparative Criminal Law Project of New York University, Vol. 4.) South Hackensack, N. J.: Fred B. Rothman & Co., 1966. pp. xxiii, 613. Index. \$20.00.
- De Visscher, Charles. *Aspects Récents du Droit Procédural de la Cour Internationale de Justice*. Paris: Éditions A. Pedone, 1966. pp. 219.
- Douma, J. *Bibliography on the International Court of Justice including the Permanent Court, 1918-1964*. (Vol. IV-C of the series of *The Case Law of the International Court* by Edvard Hambro.) Leyden: A. W. Sythoff, 1966. pp. xxi, 337. Indexes. Fl.35.
- Drost, Pieter N. *Human Rights as Legal Rights. The Realization of Individual Human Rights in Positive International Law*. Leyden: A. W. Sythoff, 1965. pp. 272. Fl.22.50.
- Dutoit, Bernard. *Coeexistence et Droit International à la Lumière de la Doctrine Soviétique*. Paris: Éditions A. Pedone, 1966. pp. 182.
- Eek, Hilding. *The Hydrological Cycle and the Law of Nations*. (Scandinavian Studies in Law, 1965.) Göteborg, Stockholm, Uppsala: Almqvist & Wiksell, 1965. pp. ii, 51-91. Sw.Cr.8.
- . *The Swedish Conflict of Laws*. The Hague: Martinus Nijhoff, 1965. pp. xv, 304. Index. Gld.29.
- European Communities Court of Justice. *Recueil de la Jurisprudence de la Cour*. Vol. XI, No. 9, 1965. Luxembourg: Services des Publications des Communautés Européennes, 1965. pp. 774-1029.
- Falk, Richard A., and Saul H. Mendlovitz (eds.). *Toward A Theory of War Prevention*. (Vol. 1, The Strategy of World Order.) pp. xx, 394. \$2.50; *International Law*. (Vol. 2, The Strategy of World Order.) pp. xiv, 382. \$2.50; *The United Nations*. (Vol. 3, The Strategy of World Order.) pp. xv, 848. \$3.50; *Disarmament and Economic Development*. (Vol. 4, The Strategy of World Order.) pp. xv, 672. \$3.50. New York: World Law Fund, 1966. Complete 4-vol. set, \$10.00.
- Gendrel, Michel, and Philippe Lafarge. *Éléments d'une Bibliographie Mondiale du Droit Pénal Militaire. Des Crimes et Délits contre la Sécurité de l'État et du Droit Pénal International (Crimes de guerre—Genocide—Crimes contre l'Humanité) arrêtée au 31 Décembre 1961*. Paris: Librairie Générale de Droit et de Jurisprudence, 1965. pp. 216. Fr.29.30.
- Ginsburg, Ruth Bader, and Anders Bruzelius. *Civil Procedure in Sweden*. (Project on International Procedure, Columbia University School of Law.) The Hague: Martinus Nijhoff, 1965. lxxxiv, 491. Index. Gld.63.
- Gluckman, Max. *The Ideas in Barotse Jurisprudence*. (Storrs Lectures on Jurisprudence, Yale Law School, 1963.) New Haven and London: Yale University Press, 1965. pp. xx, 299. Index. \$7.50; 56 s.
- Gold, Joseph. *Maintenance of the Gold Value of the Fund's Assets*. Washington, D. C.: International Monetary Fund, 1965. pp. vii, 51.
- Goodhart, Arthur L. *Law of the Land*. (No. 9, Magna Carta Essays Series.) Charlottesville: University Press of Virginia, 1966. pp. v, 68. \$.75.
- Grzybowski, Kazimierz. *Soviet Private International Law*. Leyden: A. W. Sythoff, 1965. pp. 180. Fl.24.

- Hambro, Edvard. *The Case Law of the International Court, 1959-1963*. Vol. IV-A and Vol. IV-B. Leyden: A. W. Sythoff, 1966. Vol. IV-A: pp. xxi, 511; Vol. IV-B: pp. 512-1081. Index. Fl.95.
- Hayton, Robert D. *Jurisdiction of the Littoral State in the "Air Frontier."* Reprinted from *Philippine International Law Journal*, Vol. 3, pp. 369-398 (1964).
- Hsu, Immanuel C. Y. *The Ill Crisis. A Study of Sino-Russian Diplomacy 1878-1881*. New York: Oxford University Press, 1965. pp. xv, 230. Index. \$7.20.
- Huet, André. *Les Conflits de Lois en Matière de Preuve*. (Vol. VI, Bibliothèque de Droit International Privé.) Paris: Librairie Daloz, 1965. pp. x, 395. Index.
- Huter, Franz (ed.). *Südtirol. Eine Frage des Europäischen Gewissens*. Vienna: Verlag für Geschichte und Politik, 1965. pp. xx, 616. Index. S.320.
- Imishue, R. W. *South West Africa: An International Problem*. London: Pall Mall Press, 1966 (under the auspices of the Institute of Race Relations). pp. viii, 80. 22 s. 6 d., cloth; 9 s. 6 d., paper.
- International Bar Association. *Tenth Conference of the International Bar Association, Mexico City, Mexico, July 27-31, 1964*. The Hague: Martinus Nijhoff, 1965. pp. xlii, 502. Gld.28.50.
- Internationale Gesellschaft für Urheberrecht E. V. *Yearbook, 1964*. German, English, French, Spanish and Italian translations.) Berlin and Frankfurt: Verlag Franz Vahlen, GMBH, 1965. pp. 428. DM.18.
- Kirdar, Üner. *The Structure of United Nations Economic Aid to Underdeveloped Countries*. The Hague: Martinus Nijhoff, 1966. pp. xxiv, 361. Index. Gld.43.50.
- Kocot, Kazimierz. *Nauka Prawa Narodów w Ateneum Gdańskim [Studies and Courses in the Law of Nations in Gdańsk Athenaeum 1530-1793]*. (Summary in English.) Wrocław: Wrocławskie Towarzystwo Naukowe, 1965. pp. 256. Zł.45.
- König, Klaus. *Die Anerkennung Ausländischer Verwaltungsakte*. Cologne, Berlin, Bonn and Munich: Carl Heymanns Verlag KG, 1965. pp. 120.
- Lang, Gerhard. *Bolivians Streben nach freiem Zugang zum Meer [Bolivia's Aspirations for Free Access to the Sea]*. Hamburg: Hamburger Gesellschaft für Völkerrecht und Auswärtige Politik, 1966. pp. 94.
- Larson, Don R., and Arthur Larson. *Vietnam and Beyond. A New American Foreign Policy and Program*. Durham, N. C.: Duke University, Rule of Law Research Center, 1965. pp. vi, 42. \$.50.
- Lumb, R. D. *The Constitutions of the Australian States*. 2nd ed. St. Lucia, Queensland: University of Queensland Press 1965. pp. xviii, 133. Index. 35 s.
- Magarašević, A. *Osnovi Međunarodnog Prava*. Novi Sad: Univerzitet u Novom Sadu, 1965. pp. xiv, 237.
- Monconduit, François. *La Commission Européenne des Droits de l'Homme*. Leyden: A. W. Sythoff, 1965. pp. 559. Fl.52.
- Morgenthau, Hans J. *Vietnam and the United States*. Washington, D. C.: Public Affairs Press, 1965. pp. 112. \$2.00.
- Palmer, Norman D. *South Asia and United States Policy*. Boston: Houghton Mifflin Co., 1966. pp. x, 332. Index. \$4.25.
- Papadopoulos, Théodore. *Le Droit International dans un Contexte Ethnohistorique*. Wetteren, Belgium: Editions Cultura, 1965. pp. 60.
- Peaslee, Amos J. *Constitutions of Nations*. Rev. 3rd ed. in four volumes. Prepared by Dorothy Peaslee Xydis. Vol. I: *Africa*. The Hague: Martinus Nijhoff, 1965. pp. xiv, 1108. Gld.90.
- Ransom, Harry Howe (ed.). *An American Foreign Policy Reader*. New York: Thomas Y. Crowell Co., 1965. pp. xiv, 690. Index. \$4.95.
- Rao, T. S. Rama (ed.). *The Indian Year Book of International Affairs 1964*. Vol. 13, Parts I and II. Madras: University of Madras, Indian Study Group of International Law and Affairs, 1965. Part I: pp. x, 526. Index; Part II: *Studies in the History of the Law of Nations (Grotian Society Papers)*. pp. viii, 261. Index. Rs.15.

- Rosenne, Shabtai. *The Law and Practice of the International Court*. 2 vols. Leyden: A. W. Sythoff, 1965. Vol. 1: pp. xxiii, 1-596; Vol. 2: pp. xi, 597-998. Indexes. Fl.80.
- Sareen, C. L. *Bid for Freedom: U.S.S.R. vs. Tarasov*. Englewood Cliffs, N. J.: Prentice-Hall, 1966. pp. vii, 199.
- Sewell, James Patrick. *Functionalism and World Politics. A Study Based on United Nations Programs Financing Economic Development*. Princeton: Princeton University Press, 1966. pp. xvi, 359. Index. \$6.50.
- Spain. Minister of Foreign Affairs. *The Spanish Red Book on Gibraltar*. Documents on Gibraltar Presented to the Spanish Cortes by the Minister of Foreign Affairs. (Non-official translation.) Madrid: 1965. pp. 601.
- Thompson, Dennis (ed.). *The Expansion of World Trade. Legal Problems and Techniques*. (A Report of a Conference held under the auspices of the British Institute of International and Comparative Law, July 10-July 12, 1964, at Dichey Park, Enstone, Oxfordshire.) London: The British Institute of International and Comparative Law, 1965. pp. vi, 81. 17 s. 6 d.
- Tucker, Robert C., and Stephen F. Cohen (eds.). *The Great Purge Trial. 1938 Moscow Trial*. New York: Grosset & Dunlap, 1965. pp. lii, 725. \$5.95, cloth; \$2.95, paper.
- Ustor, Endre. *A Diplomáciai Kapcsolatok Joga*. Budapest: Közgazdasági és Jogi Könyvkiadó, 1965. pp. 567. Ft.72.
- Wadsworth, James J. *The Glass House. The United Nations in Action*. New York, Washington, and London: Frederick A. Praeger, 1966. pp. xv, 224. \$4.95.
- Wainhouse, David W., and Associates (Bernhard G. Bechhoefer, John C. Dreier, Benjamin Gerig, and Harry R. Turkel). *International Peace Observation. A History and Forecast*. Baltimore: The Johns Hopkins Press, 1966 (in co-operation with the Washington Center of Foreign Policy Research, School of Advanced International Studies, The Johns Hopkins University). pp. xviii, 663. Index. \$10.00; 80 s.
- Wybo, Michel. *Discrimination et Marche Commun*. (Bibliothèque de Droit International, Vol. 33.) Paris: R. Pichon et R. Durand-Auzias, 1966. pp. iii, 153. Index. Fr.23.30.
- Zdziechowski, Georges. *Le Problème Clef de la Construction Européenne: La Pologne sur l'Oder*. Paris: Éditions A. Pedone, 1965. pp. 224. Index.

OFFICIAL DOCUMENTS *

AGREEMENTS RELATING TO THE SITUATION IN VIET-NAM ¹

AGREEMENT BETWEEN THE COMMANDER-IN-CHIEF OF THE FRENCH UNION
FORCES IN INDO-CHINA AND THE COMMANDER-IN-CHIEF OF THE
PEOPLE'S ARMY OF VIET-NAM ON THE CESSATION OF
HOSTILITIES IN VIET-NAM ²

Signed at Geneva, July 20, 1954

CHAPTER I

Provisional Military Demarcation Line and Demilitarised Zone

ARTICLE 1

A PROVISIONAL military demarcation line shall be fixed, on either side of which the forces of the two parties shall be regrouped after their withdrawal, the forces of the People's Army of Viet Nam to the north of the line and the forces of the French Union to the south.

The provisional military demarcation line is fixed as shown on the map attached (see Map No. 1).³

It is also agreed that a demilitarised zone shall be established on either side of the demarcation line, to a width of not more than 5 kms. from it, to act as a buffer zone and avoid any incidents which might result in the resumption of hostilities.

ARTICLE 2

The period within which the movement of all forces of either party into its regrouping zone on either side of the provisional military demarcation line shall be completed shall not exceed three hundred (300) days from the date of the present Agreement's entry into force.

ARTICLE 3

When the provisional military demarcation line coincides with a waterway, the waters of such waterway shall be open to civil navigation by both parties wherever one bank is controlled by one party and the other bank by the other party. The Joint Commission shall establish rules of navigation for the stretch of waterway in question. The merchant shipping and other

* Obtained and prepared by R. R. Baxter of the Board of Editors.

¹ These documents are reproduced at this time because of the interest currently being taken in the legality of the activities of the United States in Viet-Nam. See p. 565 above.

² Great Britain, Misc. No. 20 (1954) (Cmd. 9239) at 27; 161 Brit. and For. State

³ Not reproduced. Papers 818 (1954).

civilian craft of each party shall have unrestricted access to the land under its military control.

ARTICLE 4

The provisional military demarcation line between the two final regrouping zones is extended into the territorial waters by a line perpendicular to the general line of the coast.

All coastal islands north of this boundary shall be evacuated by the armed forces of the French Union, and all islands south of it shall be evacuated by the forces of the People's Army of Viet Nam.

ARTICLE 5

To avoid any incidents which might result in the resumption of hostilities, all military forces, supplies and equipment shall be withdrawn from the demilitarised zone within twenty-five (25) days of the present Agreement's entry into force.

ARTICLE 6

No person, military or civilian, shall be permitted to cross the provisional military demarcation line unless specifically authorised to do so by the Joint Commission.

ARTICLE 7

No person, military or civilian, shall be permitted to enter the demilitarised zone except persons concerned with the conduct of civil administration and relief and persons specifically authorised to enter by the Joint Commission.

ARTICLE 8

Civil administration and relief in the demilitarised zone on either side of the provisional military demarcation line shall be the responsibility of the Commanders-in-Chief of the two parties in their respective zones. The number of persons, military or civilian, from each side who are permitted to enter the demilitarised zone for the conduct of civil administration and relief shall be determined by the respective Commanders, but in no case shall the total number authorised by either side exceed at any one time a figure to be determined by the Trung Gia Military Commission or by the Joint Commission. The number of civil police and the arms to be carried by them shall be determined by the Joint Commission. No one else shall carry arms unless specifically authorised to do so by the Joint Commission.

ARTICLE 9

Nothing contained in this chapter shall be construed as limiting the complete freedom of movement, into, out of or within the demilitarised zone, of the Joint Commission, its joint groups, the International Commission to be set up as indicated below, its inspection teams and any other persons,

supplies or equipment specifically authorised to enter the demilitarised zone by the Joint Commission. Freedom of movement shall be permitted across the territory under the military control of either side over any road or waterway which has to be taken between points within the demilitarised zone when such points are not connected by roads or waterways lying completely within the demilitarised zone.

CHAPTER II

Principles and procedure governing implementation of the present Agreement

ARTICLE 10

The Commanders of the Forces on each side, on the one side the Commander-in-Chief of the French Union forces in Indo-China and on the other side the Commander-in-Chief of the People's Army of Viet Nam, shall order and enforce the complete cessation of all hostilities in Viet Nam by all armed forces under their control, including all units and personnel of the ground, naval and air forces.

ARTICLE 11

In accordance with the principle of a simultaneous cease-fire throughout Indo-China, the cessation of hostilities shall be simultaneous throughout all parts of Viet Nam, in all areas of hostilities and for all the forces of the two parties.

Taking into account the time effectively required to transmit the cease-fire order down to the lowest echelons of the combatant forces on both sides, the two parties are agreed that the cease-fire shall take effect completely and simultaneously for the different sectors of the country as follows:

Northern Viet Nam at 8:00 a.m. (local time) on 27th July, 1954.

Central Viet Nam at 8:00 a.m. (local time) on 1st August, 1954.

Southern Viet Nam at 8:00 a.m. (local time) on 11th August, 1954.

It is agreed that Peking mean time shall be taken as local time.

From such time as the cease-fire becomes effective in Northern Viet Nam, both parties undertake not to engage in any large-scale offensive action in any part of the Indo-Chinese theatre of operations and not to commit the air forces based on Northern Viet Nam outside that sector. The two parties also undertake to inform each other of their plans for movement from one regrouping zone to another within twenty-five (25) days of the present Agreement's entry into force.

ARTICLE 12

All the operations and movements entailed in the cessation of hostilities and regrouping must proceed in a safe and orderly fashion:

(a) Within a certain number of days after the cease-fire Agreement shall have become effective, the number to be determined on the spot by the Trung

Gia Military Commission, each party shall be responsible for removing and neutralising mines (including river and sea mines), booby traps, explosives and any other dangerous substances placed by it. In the event of its being impossible to complete the work of removal and neutralisation in time, the party concerned shall mark the spot by placing visible signs there. All demolitions, mine fields, wire entanglements and other hazards to the free movement of the personnel of the Joint Commission and its joint groups, known to be present after the withdrawal of the military forces, shall be reported to the Joint Commission by the Commanders of the opposing forces;

(b) From the time of the cease-fire until regrouping is completed on either side of the demarcation line:

(1) The forces of either party shall be provisionally withdrawn from the provisional assembly areas assigned to the other party.

(2) When one party's forces withdraw by a route (road, rail, waterway, sea route) which passes through the territory of the other party (see Article 24), the latter party's forces must provisionally withdraw three kilometres on each side of such route, but in such a manner as to avoid interfering with the movements of the civil population.

ARTICLE 13

From the time of the cease-fire until the completion of the movements from one regrouping zone into the other, civil and military transport aircraft shall follow air corridors between the provisional assembly areas assigned to the French Union forces north of the demarcation line on the one hand and the Laotian frontier and the regrouping zone assigned to the French Union forces on the other hand.

The position of the air corridors, their width, the safety route for single-engined military aircraft transferred to the south and the search and rescue procedure for aircraft in distress shall be determined on the spot by the Trung Gia Military Commission.

ARTICLE 14

Political and administrative measures in the two regrouping zones, on either side of the provisional military demarcation line:

(a) Pending the general elections which will bring about the unification of Viet Nam, the conduct of civil administration in each regrouping zone shall be in the hands of the party whose forces are to be regrouped there in virtue of the present Agreement.

(b) Any territory controlled by one party which is transferred to the other party by the regrouping plan shall continue to be administered by the former party until such date as all the troops who are to be transferred have completely left that territory so as to free the zone assigned to the party in question. From then on, such territory shall be regarded as transferred to the other party, who shall assume responsibility for it.

Steps shall be taken to ensure that there is no break in the transfer of responsibilities. For this purpose, adequate notice shall be given by the withdrawing party to the other party, which shall make the necessary ar-

rangements, in particular by sending administrative and police detachments to prepare for the assumption of administrative responsibility. The length of such notice shall be determined by the Trung Gia Military Commission. The transfer shall be effected in successive stages for the various territorial sectors.

The transfer of the civil administration of Hanoi and Haiphong to the authorities of the Democratic Republic of Viet Nam shall be completed within the respective time-limits laid down in Article 15 for military movements.

(c) Each party undertakes to refrain from any reprisals or discrimination against persons or organisations on account of their activities during the hostilities and to guarantee their democratic liberties.

(d) From the date of entry into force of the present Agreement until the movement of troops is completed, any civilians residing in a district controlled by one party who wish to go and live in the zone assigned to the other party shall be permitted and helped to do so by the authorities in that district.

ARTICLE 15

The disengagement of the combatants, and the withdrawals and transfers of military forces, equipment and supplies shall take place in accordance with the following principles:

(a) The withdrawals and transfers of the military forces, equipment and supplies of the two parties shall be completed within three hundred (300) days, as laid down in Article 2 of the present Agreement;

(b) Within either territory successive withdrawals shall be made by sectors, portions of sectors or provinces. Transfers from one regrouping zone to another shall be made in successive monthly instalments proportionate to the number of troops to be transferred;

(c) The two parties shall undertake to carry out all troop withdrawals and transfers in accordance with the aims of the present Agreement, shall permit no hostile act and shall take no step whatsoever which might hamper such withdrawals and transfers. They shall assist one another as far as this is possible;

(d) The two parties shall permit no destruction or sabotage of any public property and no injury to the life and property of the civil population. They shall permit no interference in local civil administration;

(e) The Joint Commission and the International Commission shall ensure that steps are taken to safeguard the forces in the course of withdrawal and transfer;

(f) The Trung Gia Military Commission, and later the Joint Commission, shall determine by common agreement the exact procedure for the disengagement of the combatants and for troop withdrawals and transfers, on the basis of the principles mentioned above and within the framework laid down below:

1. The disengagement of the combatants, including the concentration of the armed forces of all kinds and also each party's movements into the pro-

visional assembly areas assigned to it and the other party's provisional withdrawal from it, shall be completed within a period not exceeding fifteen (15) days after the date when the cease-fire becomes effective.

The general delineation of the provisional assembly areas is set out in the maps⁴ annexed to the present Agreement.

In order to avoid any incidents, no troops shall be stationed less than 1,500 metres from the lines delimiting the provisional assembly areas.

During the period until the transfers are concluded, all the coastal islands west of the following lines shall be included in the Haiphong perimeter:

meridian of the southern point of Kebao Island,
northern coast of Ile Rousse (excluding the island), extended as far as
the meridian of Campha-Mines,
meridian of Campha-Mines.

2. The withdrawals and transfers shall be effected in the following order and within the following periods (from the date of the entry into force of the present Agreement):

Forces of the French Union

Hanoi perimeter	80 days
Haiduong perimeter	100 days
Haiphong perimeter	300 days

Forces of the People's Army of Viet Nam

Ham Tan and Xuyenmoc provisional assembly area	80 days
Central Viet Nam provisional assembly area—first instalment	80 days
Plaine des Jones provisional assembly area	100 days
Central Viet Nam provisional assembly area—second instalment	100 days
Pointe Camau provisional assembly area	200 days
Central Viet Nam provisional assembly area—last instalment	300 days

CHAPTER III

Ban on the introduction of fresh troops, military personnel, arms and munitions. Military bases

ARTICLE 16

With effect from the date of entry into force of the present Agreement, the introduction into Viet Nam of any troop reinforcements and additional military personnel is prohibited.

It is understood, however, that the rotation of units and groups of personnel, the arrival in Viet Nam of individual personnel on a temporary duty basis and the return to Viet Nam of the individual personnel after short

⁴ Not reproduced.

periods of leave or temporary duty outside Viet Nam shall be permitted under the conditions laid down below:

(a) Rotation of units defined in paragraph (c) of this article) and groups of personnel shall not be permitted for French Union troops stationed north of the provisional military demarcation line laid down in Article 1 of the present Agreement during the withdrawal period provided for in Article 2.

However, under the heading of individual personnel not more than fifty (50) men, including officers, shall during any one month be permitted to enter that part of the country north of the provisional military demarcation line on a temporary duty basis or to return there after short periods of leave or temporary duty outside Viet Nam.

(b) "Rotation" is defined as the replacement of units or groups of personnel by other units of the same echelon or by personnel who are arriving in Viet Nam territory to do their overseas service there;

(c) The units rotated shall never be larger than a battalion—or the corresponding echelon for air and naval forces;

(d) Rotation shall be conducted on a man-for-man basis, provided, however, that in any one quarter neither party shall introduce more than fifteen thousand five hundred (15,500) members of its armed forces into Viet Nam under the rotation policy.

(e) Rotation units (defined in paragraph (c) of this article) and groups of personnel, and the individual personnel mentioned in this article, shall enter and leave Viet Nam only through the entry points enumerated in Article 20 below;

(f) Each party shall notify the Joint Commission and the International Commission at least two days in advance of any arrivals or departures of units, groups of personnel and individual personnel in or from Viet Nam. Reports on the arrivals or departures of units, groups of personnel and individual personnel in or from Viet Nam shall be submitted daily to the Joint Commission and the International Commission.

All the above-mentioned notifications and reports shall indicate the places and dates of arrival or departure and the number of persons arriving or departing;

(g) The International Commission, through its Inspection Teams, shall supervise and inspect the rotation of units and groups of personnel and the arrival and departure of individual personnel as authorised above, at the points of entry enumerated in Article 20 below.

ARTICLE 17

(a) With effect from the date of entry into force of the present Agreement, the introduction into Viet Nam of any reinforcements in the form of all types of arms, munitions and other war material, such as combat aircraft, naval craft, pieces of ordnance, jet engines and jet weapons and armoured vehicles, is prohibited.

(b) It is understood, however, that war material, arms and munitions which have been destroyed, damaged, worn out or used up after the cessa-

tion of hostilities may be replaced on the basis of piece-for-piece of the same type and with similar characteristics. Such replacements of war material, arms and ammunitions shall not be permitted for French Union troops stationed north of the provisional military demarcation line laid down in Article 1 of the present Agreement, during the withdrawal period provided for in Article 2.

Naval craft may perform transport operations between the regrouping zones.

(c) The war material, arms and munitions for replacement purposes provided for in paragraph (b) of this article, shall be introduced into Viet Nam only through the points of entry enumerated in Article 20 below. War material, arms and munitions to be replaced shall be shipped from Viet Nam only through the points of entry enumerated in Article 20 below.

(d) Apart from the replacements permitted within the limits laid down in paragraph (b) of this article, the introduction of war material, arms and munitions of all types in the form of unassembled parts for subsequent assembly is prohibited.

(e) Each party shall notify the Joint Commission and the International Commission at least two days in advance of any arrivals or departures which may take place of war material, arms and munitions of all types.

In order to justify the requests for the introduction into Viet Nam of arms, munitions and other war material (as defined in paragraph (a) of this article) for replacement purposes, a report concerning each incoming shipment shall be submitted to the Joint Commission and the International Commission. Such reports shall indicate the use made of the items so replaced.

(f) The International Commission, through its Inspection Teams, shall supervise and inspect the replacements permitted in the circumstances laid down in this article, at the points of entry enumerated in Article 20 below.

ARTICLE 18

With effect from the date of entry into force of the present Agreement, the establishment of new military bases is prohibited throughout Viet Nam territory.

ARTICLE 19

With effect from the date of entry into force of the present Agreement, no military base under the control of a foreign state may be established in the regrouping zone of either party; the two parties shall ensure that the zones assigned to them do not adhere to any military alliance and are not used for the resumption of hostilities or to further an aggressive policy.

ARTICLE 20

The points of entry into Viet Nam for rotation personnel and replacements of material are fixed as follows:

Zones to the north of the provisional military demarcation line: Laokay, Langson, Tien-Yen, Haiphong, Vinh, Dong-Hoi, Muong-Sen;
Zone to the south of the provisional military demarcation line: Tourane, Quinhon, Nhatrang, Bangoi, Saigon, Cap St. Jacques, Tanchau.

CHAPTER IV

Prisoners of War and Civilian Internees

ARTICLE 21

The liberation and repatriation of all prisoners of war and civilian internees detained by each of the two parties at the coming into force of the present Agreement shall be carried out under the following conditions:

(a) All prisoners of war and civilian internees of Viet Nam, French and other nationalities captured since the beginning of hostilities in Viet Nam during military operations or in any other circumstances of war and in any part of the territory of Viet Nam shall be liberated within a period of thirty (30) days after the date when the cease-fire becomes effective in each theatre.

(b) The term "civilian internees" is understood to mean all persons who, having in any way contributed to the political and armed struggle between the two parties, have been arrested for that reason and have been kept in detention by either party during the period of hostilities.

(c) All prisoners of war and civilian internees held by either party shall be surrendered to the appropriate authorities of the other party, who shall give them all possible assistance in proceeding to their country of origin, place of habitual residence or the zone of their choice.

CHAPTER V

Miscellaneous

ARTICLE 22

The Commanders of the Forces of the two parties shall ensure that persons under their respective commands who violate any of the provisions of the present Agreement are suitably punished.

ARTICLE 23

In cases in which the place of burial is known and the existence of graves has been established, the Commander of the Forces of either party shall, within a specific period after the entry into force of the Armistice Agreement, permit the graves service personnel of the other party to enter the part of Viet Nam territory under their military control for the purpose of finding and removing the bodies of deceased military personnel of that party, including the bodies of deceased prisoners of war. The Joint Commission shall determine the procedures and the time limit for the performance of this task. The Commanders of the Forces of the two parties shall

communicate to each other all information in their possession as to the place of burial of military personnel of the other party.

ARTICLE 24

The present Agreement shall apply to all the armed forces of either party. The armed forces of each party shall respect the demilitarised zone and the territory under the military control of the other party, and shall commit no act and undertake no operation against the other party and shall not engage in blockade of any kind in Viet Nam.

For the purposes of the present article, the word "territory" includes territorial waters and air space.

ARTICLE 25

The Commanders of the Forces of the two parties shall afford full protection and all possible assistance and co-operation to the Joint Commission and its joint groups and to the International Commission and its Inspection Teams in the performance of the functions and tasks assigned to them by the present Agreement.

ARTICLE 26

The costs involved in the operations of the Joint Commission and joint groups and of the International Commission and its Inspection Teams shall be shared equally between the two parties.

ARTICLE 27

The signatories of the present Agreement and their successors in their functions shall be responsible for ensuring the observance and enforcement of the terms and provisions thereof. The Commanders of the Forces of the two parties shall, within their respective commands, take all steps and make all arrangements necessary to ensure full compliance with all the provisions of the present Agreement by all elements and military personnel under their command.

The procedures laid down in the present Agreement shall, whenever necessary, be studied by the Commanders of the two parties and, if necessary, defined more specifically by the Joint Commission.

CHAPTER VI

Joint Commission and International Commission for Supervision and Control in Viet Nam

ARTICLE 28

Responsibility for the execution of the Agreement on the cessation of hostilities shall rest with the parties.

ARTICLE 29

An International Commission shall ensure the control and supervision of this execution.

ARTICLE 30

In order to facilitate, under the conditions shown below, the execution of provisions concerning joint actions by the two parties, a Joint Commission shall be set up in Viet Nam.

ARTICLE 31

The Joint Commission shall be composed of an equal number of representatives of the Commanders of the two parties.

ARTICLE 32

The Presidents of the delegations to the Joint Commission shall hold the rank of General.

The Joint Commission shall set up joint groups, the number of which shall be determined by mutual agreement between the parties. The joint groups shall be composed of an equal number of officers from both parties. Their location on the demarcation line between the regrouping zones shall be determined by the parties whilst taking into account the powers of the Joint Commission.

ARTICLE 33

The Joint Commission shall ensure the execution of the following provisions of the Agreement on the cessation of hostilities:

- (a) A simultaneous and general cease-fire in Viet Nam for all regular and irregular armed forces of the two parties.
- (b) A regroupment of the armed forces of the two parties.
- (c) Observance of the demarcation lines between the regrouping zones and of the demilitarised sectors.

Within the limits of its competence it shall help the parties to execute the said provisions, shall ensure liaison between them for the purpose of preparing and carrying out plans for the application of these provisions, and shall endeavour to solve such disputed questions as may arise between the parties in the course of executing these provisions.

ARTICLE 34

An International Commission shall be set up for the control and supervision over the application of the provisions of the agreement on the cessation of hostilities in Viet Nam. It shall be composed of representatives of the following states: Canada, India and Poland.

It shall be presided over by the Representative of India.

ARTICLE 35

The International Commission shall set up fixed and mobile inspection teams, composed of an equal number of officers appointed by each of the above-mentioned states. The mixed teams shall be located at the following points: Laokay, Langson, Tien-Yen, Haiphong, Vinh, Dong-Hoi, Muong-Sen, Tourane, Quinhon, Nhatrang, Bangoi, Saigon, Cap St. Jacques, Tranchau. These points of location may, at a later date, be altered at the request of the Joint Commission, or of one of the parties, or of the International Commission itself, by agreement between the International Commission and the command of the party concerned. The zones of action of the mobile teams shall be the regions bordering the land and sea frontiers of Viet Nam, the demarcation lines between the regrouping zones and the demilitarised zones. Within the limits of these zones they shall have the right to move freely and shall receive from the local civil and military authorities all facilities they may require for the fulfilment of their tasks (provision of personnel, placing at their disposal documents needed for supervision, summoning witnesses necessary for holding enquiries, ensuring the security and freedom of movement of the inspection teams, &c . . .). They shall have at their disposal such modern means of transport, observation and communication as they may require. Beyond the zones of action as defined above, the mobile teams may, by agreement with the command of the party concerned, carry out other movements within the limits of the tasks given them by the present Agreement.

ARTICLE 36

The International Commission shall be responsible for supervising the proper execution by the parties of the provisions of the Agreement. For this purpose it shall fulfil the tasks of control, observation, inspection and investigation connected with the application of the provisions of the Agreement on the cessation of hostilities, and it shall in particular:

(a) Control the movement of the armed forces of the two parties, effected within the framework of the regroupment plan.

(b) Supervise the demarcation lines between the regrouping areas, and also the demilitarised zones.

(c) Control the operations of releasing prisoners of war and civilian internees.

(d) Supervise at ports and airfields as well as along all frontiers of Viet Nam the execution of the provisions of the agreement on the cessation of hostilities, regulating the introduction into the country of armed forces, military personnel and of all kinds of arms, munitions and war material.

ARTICLE 37

The International Commission shall, through the medium of the inspection teams mentioned above, and as soon as possible either on its own initiative, or at the request of the Joint Commission, or of one of the

parties, undertake the necessary investigations both documentary and on the ground.

ARTICLE 38

The inspection teams shall submit to the International Commission the results of their supervision, their investigation and their observations; furthermore they shall draw up such special reports as they may consider necessary or as may be requested from them by the Commission. In the case of a disagreement within the teams, the conclusions of each member shall be submitted to the Commission.

ARTICLE 39

If any one inspection team is unable to settle an incident or considers that there is a violation or a threat of a serious violation, the International Commission shall be informed; the latter shall study the reports and the conclusions of the inspection teams and shall inform the parties of the measures which should be taken for the settlement of the incident, ending of the violation or removal of the threat of violation.

ARTICLE 40

When the Joint Commission is unable to reach an agreement on the interpretation to be given to some provision or on the appraisal of a fact, the International Commission shall be informed of the disputed question. Its recommendations shall be sent directly to the parties and shall be notified to the Joint Commission.

ARTICLE 41

The recommendations of the International Commission shall be adopted by majority vote, subject to the provisions contained in Article 42. If the votes are divided, the chairman's vote shall be decisive.

The International Commission may formulate recommendations concerning amendments and additions which should be made to the provisions of the Agreement on the cessation of hostilities in Viet Nam, in order to ensure a more effective execution of that Agreement. These recommendations shall be adopted unanimously.

ARTICLE 42

When dealing with questions concerning violations, or threats of violations, which might lead to a resumption of hostilities, namely:

- (a) Refusal by the armed forces of one party to effect the movements provided for in the regroupment plan;
- (b) Violation by the armed forces of one of the parties of the regrouping zones, territorial waters, or air space of the other party;

the decisions of the International Commission must be unanimous.

ARTICLE 43

If one of the parties refuses to put into effect a recommendation of the International Commission, the parties concerned or the Commission itself shall inform the members of the Geneva Conference.

If the International Commission does not reach unanimity in the cases provided for in Article 42, it shall submit a majority report and one or more minority reports to the members of the Conference.

The International Commission shall inform the members of the Conference in all cases where its activity is being hindered.

ARTICLE 44

The International Commission shall be set up at the time of the cessation of hostilities in Indo-China in order that it should be able to fulfil the tasks provided for in Article 36.

ARTICLE 45

The International Commission for Supervision and Control in Viet Nam shall act in close co-operation with the International Commissions for Supervision and Control in Cambodia and Laos.

The Secretaries-General of these three Commissions shall be responsible for co-ordinating their work and for relations between them.

ARTICLE 46

The International Commission for Supervision and Control in Viet Nam may, after consultation with the International Commissions for Supervision and Control in Cambodia and Laos and having regard to the development of the situation in Cambodia and Laos, progressively reduce its activities. Such a decision must be adopted unanimously.

ARTICLE 47

All the provisions of the present Agreement, save the second sub-paragraph of Article 11, shall enter into force at 2400 hours (Geneva time) on 22nd July, 1954.

Done in Geneva at 2400 hours on the 20th of July, 1954, in French and in Vietnamese, both texts being equally authentic.

For the Commander-in-Chief of the French Union Forces in Indo-China:

DELTIEL,
Brigadier-General.

For the Commander-in-Chief of the People's Army of Viet Nam:

TA-QUANG-BUU,
*Vice-Minister of National Defence
of the Democratic Republic of Viet Nam.*⁵

⁵ The annexes to the agreement are not reproduced.

FINAL DECLARATION OF THE GENEVA CONFERENCE ON THE PROBLEM
OF RESTORING PEACE IN INDO-CHINA ^a

Geneva, July 21, 1954

1. The Conference takes note of the Agreements ending hostilities in Cambodia, Laos and Viet Nam and organising international control and the supervision of the execution of the provisions of these Agreements.

2. The Conference expresses satisfaction at the ending of hostilities in Cambodia, Laos and Viet Nam; the Conference expresses its conviction that the execution of the provisions set out in the present declaration and in the Agreements on the cessation of hostilities will permit Cambodia, Laos and Viet Nam henceforth to play their part, in full independence and sovereignty, in the peaceful community of nations.

3. The Conference takes note of the declarations made by the Governments of Cambodia and of Laos of their intention to adopt measures permitting all citizens to take their place in the national community, in particular by participating in the next general elections, which, in conformity with the constitution of each of these countries, shall take place in the course of the year 1955, by secret ballot and in conditions of respect for fundamental freedoms.

4. The Conference takes note of the clauses in the Agreement on the cessation of hostilities in Viet Nam prohibiting the introduction into Viet Nam of foreign troops and military personnel as well as of all kinds of arms and munitions. The Conference also takes note of the declarations made by the Governments of Cambodia and Laos of their resolution not to request foreign aid, whether in war material, in personnel or in instructors except for the purpose of the effective defence of their territory and, in the case of Laos, to the extent defined by the agreements on the cessation of hostilities in Laos.

5. The Conference takes note of the clauses in the Agreement on the cessation of hostilities in Viet Nam to the effect that no military base under the control of a foreign state may be established in the regrouping zones of the two parties, the latter having the obligation to see that the zones allotted to them shall not constitute part of any military alliance and shall not be utilised for the resumption of hostilities or in the service of an aggressive policy. The Conference also takes note of the declarations of the Governments of Cambodia and Laos to the effect that they will not join in any agreement with other states if this agreement includes the obligation to participate in a military alliance not in conformity with the principles of the Charter of the United Nations or, in the case of Laos, with the principles of the Agreement on the cessation of hostilities in Laos or, so long as their security is not threatened, the obligation to establish bases on Cambodian or Laotian territory for the military forces of foreign Powers.

^a Great Britain, Misc. No. 20 (1954) (Cmd. 9239) at 9; 161 Brit. and For. State Papers 359 (1954).

6. The Conference recognises that the essential purpose of the Agreement relating to Viet Nam is to settle military questions with a view to ending hostilities and that the military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary. The Conference expresses its conviction that the execution of the provisions set out in the present declaration and in the Agreement on the cessation of hostilities creates the necessary basis for the achievement in the near future of a political settlement in Viet Nam.

7. The Conference declares that, so far as Viet Nam is concerned, the settlement of political problems, effected on the basis of respect for the principles of independence, unity and territorial integrity, shall permit the Vietnamese people to enjoy the fundamental freedoms, guaranteed by democratic institutions established as a result of free general elections by secret ballot. In order to ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will, general elections shall be held in July 1956, under the supervision of an international commission composed of representatives of the member states of the International Supervisory Commission, referred to in the Agreement on the cessation of hostilities. Consultations will be held on this subject between the competent representative authorities of the two zones from 20th July, 1955, onwards.

8. The provisions of the Agreement on the cessation of hostilities intended to ensure the protection of individuals and of property must be most strictly applied and must, in particular, allow everyone in Viet Nam to decide freely in which zone he wishes to live.

9. The competent representative authorities of the Northern and Southern zones of Viet Nam, as well as the authorities of Laos and Cambodia, must not permit any individual or collective reprisals against persons who have collaborated in any way with one of the parties during the war, or against members of such persons' families.

10. The Conference takes note of the declaration of the Government of the French Republic to the effect that it is ready to withdraw its troops from the territory of Cambodia, Laos and Viet Nam, at the request of the governments concerned and within periods which shall be fixed by agreement between the parties except in the cases where, by agreement between the two parties, a certain number of French troops shall remain at specified points and for a specified time.

11. The Conference takes note of the declaration of the French Government to the effect that for the settlement of all the problems connected with the re-establishment and consolidation of peace in Cambodia, Laos and Viet Nam, the French Government will proceed from the principle of respect for the independence and sovereignty, unity and territorial integrity of Cambodia, Laos and Viet Nam.

12. In their relations with Cambodia, Laos and Viet Nam, each member of the Geneva Conference undertakes to respect the sovereignty, the independence, the unity and the territorial integrity of the above-mentioned states, and to refrain from any interference in their internal affairs.

13. The members of the Conference agree to consult one another on any question which may be referred to them by the International Supervisory Commission, in order to study such measures as may prove necessary to ensure that the Agreements on the cessation of hostilities in Cambodia, Laos and Viet Nam are respected.

UNITED STATES DECLARATION ON INDOCHINA ⁷

Statement made by Under Secretary of State Walter B. Smith at the concluding Indochina plenary session at Geneva, July 21, 1954

As I stated on July 18, my Government is not prepared to join in a declaration by the Conference such as is submitted. However, the United States makes this unilateral declaration of its position in these matters:

Declaration

The Government of the United States being resolved to devote its effort to the strengthening of peace in accordance with the principles and purposes of the United Nations takes note of the agreements concluded at Geneva on July 20 and 21, 1954 between (a) the Franco-Laotian Command and the Command of the Peoples Army of Viet-Nam; (b) the Royal Khmer Army Command and the Command of the Peoples Army of Viet-Nam; (c) Franco-Vietnamese Command and the Command of the Peoples Army of Viet-Nam and of paragraphs 1 to 12 inclusive of the declaration presented to the Geneva Conference on July 21, 1954 declares with regard to the aforesaid agreements and paragraphs that (i) it will refrain from the threat or the use of force to disturb them, in accordance with Article 2 (4) of the Charter of the United Nations dealing with the obligation of members to refrain in their international relations from the threat or use of force; and (ii) it would view any renewal of the aggression in violation of the aforesaid agreements with grave concern and as seriously threatening international peace and security.

In connection with the statement in the declaration concerning free elections in Viet-Nam my Government wishes to make clear its position which it has expressed in a declaration made in Washington on June 29, 1954, as follows:

In the case of nations now divided against their will, we shall continue to seek to achieve unity through free elections supervised by the United Nations to insure that they are conducted fairly.

With respect to the statement made by the representative of the State of Viet-Nam, the United States reiterates its traditional position that peoples are entitled to determine their own future and that it will not join in an arrangement which would hinder this. Nothing in its declaration just made is intended to or does indicate any departure from this traditional position.

⁷ 31 Dept. of State Bulletin 162 (1954).

We share the hope that the agreements will permit Cambodia, Laos and Viet-Nam to play their part, in full independence and sovereignty, in the peaceful community of nations, and will enable the peoples of that area to determine their own future.

SOUTHEAST ASIA COLLECTIVE DEFENSE TREATY ⁸

Signed at Manila, September 8, 1954; entered into force as to the United States, February 19, 1955

The parties to this Treaty,

Recognizing the sovereign equality of all the parties,

Reiterating their faith in the purposes and principles set forth in the Charter of the United Nations and their desire to live in peace with all peoples and all governments,

Reaffirming that, in accordance with the Charter of the United Nations, they uphold the principle of equal rights and self-determination of peoples, and declaring that they will earnestly strive by every peaceful means to promote self-government and to secure the independence of all countries whose peoples desire it and are able to undertake its responsibilities,

Desiring to strengthen the fabric of peace and freedom and to uphold the principles of democracy, individual liberty and the rule of law, and to promote the economic well-being and development of all peoples in the treaty area,

Intending to declare publicly and formally their sense of unity, so that any potential aggressor will appreciate that the parties stand together in the area, and

Desiring further to coordinate their efforts for collective defense for the preservation of peace and security,

Therefore agree as follows:

ARTICLE I

The parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

ARTICLE II

In order more effectively to achieve the objectives of this Treaty, the parties, separately and jointly, by means of continuous and effective self-

⁸ 6 U.S. Treaties 81, T.I.A.S., No. 3170, 209 U.N. Treaty Series 28. The parties to the treaty are Australia, France, New Zealand, Pakistan, Philippines, Thailand, the United Kingdom, and the United States.

help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack and to prevent and counter subversive activities directed from without against their territorial integrity and political stability.

ARTICLE III

The parties undertake to strengthen their free institutions and to cooperate with one another in the further development of economic measures, including technical assistance, designed both to promote economic progress and social well-being and to further the individual and collective efforts of governments toward these ends.

ARTICLE IV

1. Each party recognizes that aggression by means of armed attack in the treaty area against any of the parties or against any state or territory which the parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.

2. If, in the opinion of any of the parties, the inviolability or the integrity of the territory or the sovereignty or political independence of any party in the treaty area or of any other state or territory to which the provisions of paragraph 1 of this article from time to time apply is threatened in any way other than by armed attack or is affected or threatened by any fact or situation which might endanger the peace of the area, the Parties shall consult immediately in order to agree on the measures which should be taken for the common defense.

3. It is understood that no action on the territory of any state designated by unanimous agreement under paragraph 1 of this article or on any territory so designated shall be taken except at the invitation or with the consent of the government concerned.

ARTICLE V

The parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The Council shall provide for consultation with regard to military and any other planning as the situation obtaining in the treaty area may from time to time require. The Council shall be so organized as to be able to meet at any time.

ARTICLE VI

This Treaty does not affect and shall not be interpreted as affecting in any way the rights and obligations of any of the parties under the Charter

of the United Nations or the responsibility of the United Nations for the maintenance of international peace and security. Each party declares that none of the international engagements now in force between it and any other of the parties or any third party is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty.

ARTICLE VII

Any other state in a position to further the objectives of this Treaty and to contribute to the security of the area may, by unanimous agreement of the parties, be invited to accede to this Treaty. Any state so invited may become a party to the Treaty by depositing its instrument of accession with the Government of the Republic of the Philippines. The Government of the Republic of the Philippines shall inform each of the parties of the deposit of each such instrument of accession.

ARTICLE VIII

As used in this Treaty, the "treaty area" is the general area of Southeast Asia, including also the entire territories of the Asian parties, and the general area of the Southwest Pacific not including the Pacific area north of 21 degrees 30 minutes north latitude. The parties may, by unanimous agreement, amend this article to include within the treaty area the territory of any state acceding to this Treaty in accordance with Article VII or otherwise to change the treaty area.

ARTICLE IX

1. This Treaty shall be deposited in the archives of the Government of the Republic of the Philippines. Duly certified copies thereof shall be transmitted by that government to the other signatories.

2. The Treaty shall be ratified and its provisions carried out by the parties in accordance with their respective constitutional processes. The instruments of ratification shall be deposited as soon as possible with the Government of the Republic of the Philippines, which shall notify all of the other signatories of such deposit.

3. The Treaty shall enter into force between the states which have ratified it as soon as the instruments of ratification of a majority of the signatories shall have been deposited, and shall come into effect with respect to each other state on the date of the deposit of its instrument of ratification.

ARTICLE X

This Treaty shall remain in force indefinitely, but any party may cease to be a party one year after its notice of denunciation has been given to the Government of the Republic of the Philippines, which shall inform the

governments of the other parties of the deposit of each notice of denunciation.

ARTICLE XI

The English text of this Treaty is binding on the parties, but when the parties have agreed to the French text thereof and have so notified the Government of the Republic of the Philippines, the French text shall be equally authentic and binding on the Parties.

UNDERSTANDING OF THE UNITED STATES OF AMERICA

The United States of America in executing the present Treaty does so with the understanding that its recognition of the effect of aggression and armed attack and its agreement with reference thereto in Article IV, paragraph 1 apply only to communist aggression but affirms that in the event of other aggression or armed attack it will consult under the provisions of Article IV, paragraph 2.

In witness whereof, the undersigned Plenipotentiaries have signed this Treaty.⁹

Done at Manila, this eighth day of September, 1954.

PROTOCOL TO THE SOUTHEAST ASIA COLLECTIVE DEFENSE TREATY ¹⁰

*Signed at Manila, September 8, 1954; entered into force
as to the United States, February 19, 1955*

Designation of States and Territory as to which Provisions of Article IV and Article III Are To Be Applicable

The parties to the Southeast Asia Collective Defense Treaty unanimously designate for the purposes of Article IV of the Treaty the states of Cambodia and Laos and the free territory under the jurisdiction of the state of Vietnam.

The parties further agree that the above mentioned states and territory shall be eligible in respect of the economic measures contemplated by Article III.

This Protocol shall enter into force simultaneously with the coming into force of the Treaty.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries have signed this Protocol to the Southeast Asia Collective Defense Treaty.¹¹

Done at Manila, this eighth day of September, 1954.

⁹ Signatures not reproduced.

¹⁰ 6 U.S. Treaties 87, T.I.A.S., No. 3170, 209 U.N. Treaty Series 36.

¹¹ Signatures not reproduced.

UNITED NATIONS

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS
OF RACIAL DISCRIMINATION

*Adopted by the United Nations General Assembly at its 1406th Plenary Meeting, December 21, 1965; opened for signature at New York, March 7, 1966; not yet in force*¹

The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Grant-

¹ Annexed to Res. 2106 (XX), U.N. Doc. A/RES/2106 (XX) (1966); General Assembly, 20th Sess., Official Records, Supp. No. 14 (A/6014), p. 47. Adopted on the report of the Third Committee (U.N. Doc. A/6181, A/L.479) (1965). The Convention was adopted by a vote of 104 in favor to none against, with one abstention (Mexico), later changed to an affirmative vote.

In explanation of the vote of the United States in favor of the Convention, the representative of the United States stated in the General Assembly:

"For the record, however, here in this Assembly I wish to state that the United States understands article 4 of the convention as imposing no obligation on any party to take measures which are not fully consistent with its constitutional guarantees of freedom, including freedom of speech and association. This interpretation is entirely consistent with the opening paragraph of article 4 of the convention itself, which provides that in carrying out certain obligations of the convention, states parties shall have 'due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention.' Article 5 in turn lists among its rights to be guaranteed without distinction as to race, color, or national or ethnic origin the right of freedom of opinion and of expression." (54 Dept. of State Bulletin 216 (1966)).

The statements of Mr. Goldberg in Committee III on Dec. 14, 1965, and of Miss Willis in the Plenary Session on Dec. 21, 1965, are reproduced *ibid.* 212.

A United Nations Declaration on the Elimination of All Forms of Racial Discrimination had been adopted by the General Assembly on Nov. 20, 1963 (U.N. Doc. A/RES/1904 (XVIII) (1963); 58 A.J.I.L. 1081 (1964); 3 Int. Legal Materials 164 (1963)).

ing of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly Resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly Resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same state,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of *apartheid*, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organization in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960,

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end,

Have agreed as follows:

PART I

ARTICLE 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal

footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a state party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of states parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

ARTICLE 2

1. States parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each state party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each state party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each state party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each state party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each state party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

ARTICLE 3

States parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

ARTICLE 4

States parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

ARTICLE 5

In compliance with the fundamental obligations laid down in Article 2 of this Convention, states parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;

(c) Political rights, in particular the rights to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

- (i) The right to freedom of movement and residence within the border of the state;
- (ii) The right to leave any country, including one's own, and to return to one's country;
- (iii) The right to nationality;
- (iv) The right to marriage and choice of spouse;
- (v) The right to own property alone as well as in association with others;
- (vi) The right to inherit;
- (vii) The right to freedom of thought, conscience and religion;
- (viii) The right to freedom of opinion and expression;
- (ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

- (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
- (ii) The right to form and join trade unions;
- (iii) The right to housing;
- (iv) The right to public health, medical care, social security and social services;
- (v) The right to education and training;
- (vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.

ARTICLE 6

States parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other state institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

ARTICLE 7

States parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and prin-

ciples of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

PART II

ARTICLE 8

1. There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by states parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the states parties. Each state party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of this Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the states parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the states parties which have nominated them, and shall submit it to the states parties.

4. Elections of the members of the Committee shall be held at a meeting of states parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two-thirds of the states parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of states parties present and voting.

5. (a) The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

(b) For the filling of casual vacancies, the state party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

6. States parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

ARTICLE 9

1. States parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have

adopted and which give effect to the provisions of this Convention: (a) within one year after the entry into force of the Convention for the state concerned; and (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the states parties.

2. The Committee shall report annually, through the Secretary-General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the states parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from states parties.

ARTICLE 10

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.
3. The secretariat of the Committee shall be provided by the Secretary-General of the United Nations.
4. The meetings of the Committee shall normally be held at United Nations Headquarters.

ARTICLE 11

1. If a state party considers that another state party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the state party concerned. Within three months, the receiving state shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that state.

2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving state of the initial communication, either state shall have the right to refer the matter again to the Committee by notifying the Committee and also the other state.

3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

4. In any matter referred to it, the Committee may call upon the states parties concerned to supply any other relevant information.

5. When any matter arising out of this article is being considered by the Committee, the states parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

ARTICLE 12

1. (a) After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the states concerned with a view to an amicable solution of the matter on the basis of respect for this Convention.

(b) If the states parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the states parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the states parties to the dispute or of a state not party to this Convention.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Commission.

5. The secretariat provided in accordance with article 10, paragraph 3, of this Convention shall also service the Commission whenever a dispute among states parties brings the Commission into being.

6. The states parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the states parties to the dispute in accordance with paragraph 6 of this article.

8. The information obtained and collated by the Committee shall be made available to the Commission, and the Commission may call upon the states concerned to supply any other relevant information.

ARTICLE 13

1. When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute.

2. The Chairman of the Committee shall communicate the report of the Commission to each of the states parties to the dispute. These states shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission.

3. After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the states parties concerned to the other states parties to this Convention.

ARTICLE 14

1. A state party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that state party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a state party which has not made such a declaration.

2. Any state party which makes a declaration as provided for in paragraph 1 of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.

3. A declaration made in accordance with paragraph 1 of this article and the name of any body established or indicated in accordance with paragraph 2 of this article shall be deposited by the state party concerned with the Secretary-General of the United Nations, who shall transmit copies thereof to the other states parties. A declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect communications pending before the Committee.

4. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certified copies of the register shall be filed annually through appropriate channels with the Secretary-General on the understanding that the contents shall not be publicly disclosed.

5. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months.

6. (a) The Committee shall confidentially bring any communication referred to it to the attention of the state party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent. The Committee shall not receive anonymous communications.

(b) Within three months, the receiving state shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that state.

7. (a) The Committee shall consider communications in the light of all information made available to it by the state party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all

available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged.

(b) The Committee shall forward its suggestions and recommendations, if any, to the state party concerned and to the petitioner.

8. The Committee shall include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the states parties concerned and of its own suggestions and recommendations.

9. The Committee shall be competent to exercise the functions provided for in this article only when at least ten states parties to this Convention are bound by declarations in accordance with paragraph 1 of this article.

ARTICLE 15

1. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly Resolution 1514 (XV) of 14 December 1960, the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialized agencies.

2. (a) The Committee established under Article 8, paragraph 1, of this Convention shall receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly Resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies.

(b) The Committee shall receive from the competent bodies of the United Nations copies of the reports concerning the legislative, judicial, administrative or other measures directly related to the principles and objectives of this Convention applied by the administering Powers within the Territories mentioned in sub-paragraph (a) of this paragraph, and shall express opinions and make recommendations to these bodies.

3. The Committee shall include in its report to the General Assembly a summary of the petitions and reports it has received from United Nations bodies, and the expressions of opinion and recommendations of the Committee relating to the said petitions and reports.

4. The Committee shall request from the Secretary-General of the United Nations all information relevant to the objectives of this Convention and available to him regarding the Territories mentioned in paragraph 2 (a) of this article.

ARTICLE 16

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for

settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or in conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the states parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

PART III

ARTICLE 17

1. This Convention is open for signature by any state Member of the United Nations or member of any of its specialized agencies, by any state party to the Statute of the International Court of Justice, and by any other state which has been invited by the General Assembly of the United Nations to become a party to this Convention.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE 18

1. This Convention shall be open to accession by any state referred to in Article 17, paragraph 1 of the Convention.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE 19

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession.

2. For each state ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

ARTICLE 20

1. The Secretary-General of the United Nations shall receive and circulate to all states which are or may become parties to this Convention reservations made by states at the time of ratification or accession. Any state which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.

2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible

or inhibitive if at least two-thirds of the states parties to this Convention object to it.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.

ARTICLE 21

A state party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

ARTICLE 22

Any dispute between two or more states parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

ARTICLE 23

1. A request for the revision of this Convention may be made at any time by any state party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

ARTICLE 24

The Secretary-General of the United Nations shall inform all states referred to in Article 17, paragraph 1, of this Convention of the following particulars:

- (a) Signatures, ratifications and accessions under Articles 17 and 18;
- (b) The date of entry into force of this Convention under Article 19;
- (c) Communications and declarations received under Articles 14, 20 and 23;
- (d) Denunciations under Article 21.

ARTICLE 25

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all states belonging to any of the categories mentioned in Article 17, paragraph 1, of the Convention.

DECLARATION ON THE INADMISSIBILITY OF INTERVENTION IN THE DOMESTIC
AFFAIRS OF STATES AND THE PROTECTION OF THEIR
INDEPENDENCE AND SOVEREIGNTY ¹

*Resolution Adopted by the United Nations General Assembly at its
1408th Plenary Meeting, December 21, 1965*

The General Assembly,

Deeply concerned at the gravity of the international situation and the increasing threat to universal peace due to armed intervention and other direct or indirect forms of interference threatening the sovereign personality and the political independence of states,

Considering that the United Nations, in accordance with their aim to eliminate war, threats to the peace and acts of aggression, created an Organization, based on the sovereign equality of states, whose friendly relations would be based on respect for the principle of equal rights and self-determination of peoples and on the obligation of its Members to refrain from the threat or use of force against the territorial integrity or political independence of any state,

Recognizing that, in fulfilment of the principle of self-determination, the General Assembly, in the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in Resolution 1514 (XV) of 14 December 1960, stated its conviction that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory, and that, by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development,

Recalling that in the Universal Declaration of Human Rights the General Assembly proclaimed that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, without distinction of any kind,

Reaffirming the principle of non-intervention, proclaimed in the charters of the Organization of American States, the League of Arab States and the Organization of African Unity and affirmed at the conferences held at Montevideo, Buenos Aires, Chapultepec and Bogotá, as well as in the decisions of the Asian-African Conference at Bandung, the First Conference of Heads of State or Government of Non-Aligned Countries at Belgrade, in the Programme for Peace and International Co-operation adopted at the end of the Second Conference of Heads of State or Government of Non-Aligned Countries at Cairo, and in the declaration on subversion adopted at Accra by the Heads of State and Government of the African States,

¹ Res. 2131 (XX), U.N. Doc. A/RES/2131 (XX)/Rev. 1 (1966); adopted on the report of the First Committee (U.N. Doc. A/6220) (1953); General Assembly, 20th Sess., Official Records, Supp. No. 14 (A/6014), p. 11. The Declaration was adopted by a roll-call vote of 109 in favor to none against, with one abstention (United Kingdom).

Recognizing that full observance of the principle of the non-intervention of states in the internal and external affairs of other states is essential to the fulfilment of the purposes and principles of the United Nations,

Considering that armed intervention is synonymous with aggression and, as such, is contrary to the basic principles on which peaceful international co-operation between states should be built,

Considering further that direct intervention, subversion and all forms of indirect intervention are contrary to these principles and, consequently, constitute a violation of the Charter of the United Nations,

Mindful that violation of the principle of non-intervention poses a threat to the independence, freedom and normal political, economic, social and cultural development of countries, particularly those which have freed themselves from colonialism, and can pose a serious threat to the maintenance of peace,

Fully aware of the imperative need to create appropriate conditions which would enable all states, and in particular the developing countries, to choose without duress or coercion their own political, economic and social institutions,

In the light of the foregoing considerations, solemnly declares:

1. No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are condemned.

2. No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another state, or interfere in civil strife in another state.

3. The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

4. The strict observance of these obligations is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter of the United Nations but also leads to the creation of situations which threaten international peace and security.

5. Every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

6. All states shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any

foreign pressure, and with absolute respect to human rights and fundamental freedoms. Consequently, all states shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.

7. For the purpose of the present Declaration, the term "state" covers both individual states and groups of states.

8. Nothing in this Declaration shall be construed as affecting in any manner the relevant provisions of the Charter of the United Nations relating to the maintenance of international peace and security, in particular those contained in Chapters VI, VII and VIII.

TECHNICAL ASSISTANCE TO PROMOTE THE TEACHING, STUDY, DISSEMINATION
AND WIDER APPRECIATION OF INTERNATIONAL LAW

RESOLUTION 2099 (XX) *

Adopted December 20, 1965

The General Assembly,

Recalling its resolutions 1816 (XVII) of 18 December 1962 and 1968 (XVIII) of 16 December 1963,

Having considered the report of the Special Committee on Technical Assistance to Promote the Teaching, Study, Dissemination and Wider Appreciation of International Law,¹

Having also considered the relevant paragraphs of the report of the Technical Assistance Committee,² the report of the Economic and Social Council,³ the reports of the Secretary-General,⁴ the communication by the United Nations Educational, Scientific and Cultural Organization,⁵ as well as the replies received from Governments of Member States and from interested international organizations and institutions,⁶

Recognizing the need for the strengthening of the role of international law in international relations,

Having noted the valuable work which is being undertaken by some institutions and other bodies in the promotion of the teaching, study, dissemination and wider appreciation of international law,

Considering nevertheless that much remains to be done in this field,

Noting that a large number of Member States have expressed the view that a programme of assistance and exchange should be established and administered by the United Nations and the United Nations Educational, Scientific and Cultural Organization for the purpose of furthering the objectives of the United Nations and of assisting Member States, in par-

* U.N. General Assembly, 20th Sess., Official Records, Supp. No. 14 (A/6014), p. 89.

¹ A/5887.

² A/5791.

³ Official Records of the General Assembly, Nineteenth Session, Supplement No. 3 (A/5803), chapter VII, section III, para. 346.

⁴ A/5585, A/5790.

⁵ A/C.6/L.565.

⁶ A/5455 and Add. 1-6, A/5744 and Add. 1-4.

tiular developing countries, in the training of specialists in the field of international law and in the promotion of the teaching, study, dissemination and wider appreciation of international law,

Bearing in mind the limited financial means available for this purpose and the desirability of avoiding any duplication of programmes established and carried out by states and by other international and national organizations,

Considering that even a limited programme will contribute towards meeting some of the most pressing needs for a better knowledge of international law as a means of strengthening international peace and security and of promoting friendly relations and co-operation among states,

1. *Expresses its appreciation* to the Special Committee on Technical Assistance to Promote the Teaching, Study, Dissemination and Wider Appreciation of International Law and to the United Nations Educational, Scientific and Cultural Organization for the work accomplished in the preparation of the programme of assistance and exchange in the field of international law;

2. *Decides* to establish a programme of assistance and exchange in the field of international law consisting of:

(a) Steps to encourage and co-ordinate existing international law programmes carried out by states and by organizations and institutions, such as those proposed by the Special Committee in Part I, section A, of its report to the General Assembly;

(b) Forms of direct assistance and exchange, such as seminars, training and refresher courses, fellowships, advisory services of experts, the provision of legal publications and libraries, and translations of major legal works;

3. *Authorizes* the Secretary-General to initiate the preparatory work for this programme in 1966 within the total level of appropriations approved for that year;

4. *Requests* the Secretary-General to publicize the above-mentioned programme and invite Member States, interested national and international institutions and organizations, and individuals to make voluntary contributions towards the financing of this programme or otherwise towards assisting in its implementation and possible expansion, in accordance with the report of the Special Committee;

5. *Requests* the Secretary-General, taking into consideration the voluntary contributions which may have been received in terms of paragraph 4 above and in consultation with the Advisory Committee on Administrative and Budgetary Questions, to make in the budget estimates for 1967 and 1968 such provisions as may be necessary to carry out the activities specified in the annex to the present resolution;

6. *Invites* the United Nations Educational, Scientific and Cultural Organization to participate in the implementation of the programme established in paragraph 2 above and requests the Secretary-General to reach

agreement with the Director-General of that organization, subject to any necessary approval by the competent authorities of the two organizations, as to which parts of the programme are to be financed and administered by each organization;

7. *Requests* the Board of Trustees of the United Nations Institute for Training and Research to consider the ways in which international law is to be given its proper place among the activities of the Institute in the light of the report of the Special Committee and of the views expressed on the subject in the Sixth Committee;

8. *Decides* to establish an Advisory Committee on Technical Assistance to Promote the Teaching, Study, Dissemination and Wider Appreciation of International Law—composed of ten Member States to be appointed every three years by the General Assembly—which shall meet at the request either of the Secretary-General or of a majority of its members, shall advise the Secretary-General on the substantive aspects of the programmes contained in the report of the Special Committee and on the implementation of the present resolution and shall report, as appropriate, to the General Assembly*; a representative of the United Nations Educational, Scientific and Cultural Organization and of the United Nations Institute for Training and Research shall be invited, whenever necessary, to the meetings of the Advisory Committee;

9. *Reiterates* the appeal to Member States made in its resolution 1968 C (XVIII) of 16 December 1963 inviting them to offer foreign students fellowships in the field of international law at their universities and institutions of higher education and to consider the inclusion, in their programmes of cultural exchange, of provision for the exchange of teachers, students and experts, as well as books and other publications in that field;

10. *Calls* the attention of Member States to the existing arrangements whereby, apart from the programme mentioned in paragraph 2 above, requests may be made:

(a) Under part V of the regular budget for assistance with respect to any international legal aspects involved in development projects, and under the human rights advisory services programme for assistance relating to the field of international law;

(b) Under the Expanded Programme of Technical Assistance for assistance in specific fields of international law related to economic, social or administrative development, provided such requests are included in country programmes in accordance with the relevant rules and procedures;

11. *Requests* the Secretary-General to report on the implementation of the present resolution and decides to include in the provisional agenda of its twenty-first session an item entitled "Technical assistance to promote

* On December 20, the General Assembly approved without objection the following membership for the Advisory Committee on Technical Assistance to Promote the Teaching, Study, Dissemination and Wider Appreciation of International Law: Afghanistan, Belgium, Ecuador, France, Ghana, Hungary, Union of Soviet Socialist Republics, United Kingdom, United Republic of Tanzania and United States.

the teaching, study, dissemination and wider appreciation of international law'';

12. *Requests* the Secretary-General to explore the possibility of including the topic "The teaching, study, dissemination and wider appreciation of international law" among the subjects of technical assistance programmes and to report thereon to the General Assembly at its twenty-first session.

ANNEX

Programme for 1967

(a) A regional training and refresher course of four weeks' duration, which will be given in Africa and which will be the first of a series of such courses to be held every two years, in rotation, in Africa, Asia and Latin America;

(b) Award of ten fellowships at the request of Governments of developing countries;

(c) Advisory services of up to three experts, if requested by developing countries;

(d) Provision of a set of United Nations legal publications to up to fifteen institutions in developing countries;

(e) Preparation of a survey of certain of the principal examples of the codification and progressive development of international law within the framework of the United Nations.

Programme for 1968

(a) A regional seminar of three weeks' duration, which will be held in Latin America and which will be the first of a series of such seminars to be held every two years, in rotation, in Latin America, Africa and Asia;

(b) Award of fifteen fellowships at the request of Governments of developing countries;

(c) Advisory services of up to five experts, if requested by developing countries;

(d) Provision of a set of United Nations legal publications to up to twenty institutions in developing countries;

(e) Publication of a survey of certain of the principal examples of the codification and progressive development of international law within the framework of the United Nations.

INTERNATIONAL LEGAL MATERIALS

The following documents are reproduced in Volume V, No. 3 (May, 1966) of *International Legal Materials: Current Documents*.¹

	PAGE
TREATIES AND AGREEMENTS	
Hague Conference on Private International Law:	
Draft Convention on Recognition of Foreign Divorces	389
Provisional Report of the Special Commission on Divorce	393
Iran and U.S.S.R.: Steel Mill and Gas Pipeline Agreement	419
North Atlantic Treaty Organization:	
Exchanges of Notes on Withdrawal of French Forces	425
French Denunciation of Protocol on Status of N.A.T.O. Military Headquarters	440
LEGISLATION AND REGULATIONS	
Libya: Petroleum Law Amendment (revision of existing concession agreements)	442
United States:	
Regulation on Exports to Southern Rhodesia	462
Federal Reserve System Change in Guidelines for Controlling U. S Investment Abroad	464
S.E.C. Exemption of Foreign Companies from Disclosure Re- quirements	467
JUDICIAL AND SIMILAR PROCEEDINGS	
France:	
Court of Appeals Decision in <i>Banque Nationale pour le Commerce et l'Industrie Afrique v. Narbonne</i> (Algerian nationalizations; compensation for nationalized enterprises; French public policy)	473
Note on Court of Appeals Decision in <i>Fruehauf Corporation v. Massardy</i> (jurisdiction over subsidiaries of foreign companies; East-West trade)	476
Netherlands: District Court decision in <i>N. V. Cabolent v. National Iranian Oil Company</i> (sovereign immunity; enforcement of arbi- tration award)	477
United States:	
U. S. District Court decision in <i>Lutcher, S.A. v. Inter-American Development Bank</i> (immunities of international organizations)	480
Note on U. S. District Court decision in <i>Tupman Thurlow Co., Inc. v. Motts</i> (state regulation of foreign commerce)	483
Excerpts from Memorandum for the United States	483

¹ The annual subscription for six numbers of International Legal Materials is \$24.00; there is a concessionary rate of \$18.00 for members of the American Society of International Law. Inquiries and orders should be directed to International Legal Materials, American Society of International Law, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

OTHER DOCUMENTS

PAGE

International Civil Aviation Organization: Letter to United Nations on Conflict of U.N. Resolution with Chicago Convention on Civil Aviation	486
Organization of American States: Preliminary Draft Proposal on Amendments to O.A.S. Charter	488
Organization of the Petroleum Exporting Countries: Resolution on Libyan Petroleum Law	532
United Nations:	
Security Council Resolution Authorizing United Kingdom to Use Force to Prevent Oil Deliveries to Southern Rhodesia	534
Application of German Democratic Republic for Admission to U.N.	535
France, United Kingdom, and United States: Statement on German Democratic Republic	545
Resolutions of E.C.A.F.E. Conference on Commercial Arbitration	547
United States: Department of State Legal Memorandum on Actions in Viet-Nam	565

The World Law Fund is pleased to announce the publication of

THE STRATEGY OF WORLD ORDER

A Set of Materials edited by

RICHARD A. FALK and SAUL H. MENDLOVITZ

**1: Toward a Theory
of War Prevention**

2: International Law

Foreword by Wolfgang Friedmann

3: The United Nations

Foreword by Oscar Schachter

**4: Disarmament and
Economic Development**

Foreword by J. David Singer

"Professors Falk and Mendlovitz have planned and executed a program designed to shape an academic discipline oriented toward the principal policy question of the epoch. It is entirely appropriate that such a program should spread among professional and graduate schools, and ultimately permeate college and pre-college years.

The tone is sternly professional. It is responsible, scholarly, scientific, predictive, inventive, and critical."

*From the Foreword to Volume I
by Harold D. Lasswell*

Volumes 1 and 2, \$2.50 each; Volumes 3 and 4, \$3.50 each

Paperbound 4-volume set, \$10.00; Hardcover edition, \$14.00

WORLD LAW FUND 11 West 42nd Street, New York, N. Y. 10036

FOREIGN RELATIONS LAW OF THE UNITED STATES

Now Available—

The Official Draft of the Restatement of the Foreign Relations Law of the United States presented by the AMERICAN LAW INSTITUTE.

This Restatement clarifies existing international and domestic law and divides the stated rules into four parts; Jurisdiction; Recognition; International Agreements; Responsibility of States for Injuries to Aliens. It also contains Comments and Reporters' Notes that list references to the original materials from which international law is derived—source materials which may not be readily available to Bar members who do not specialize in the field of international law.

679 Pages

Introductory Price \$17.50

Further information may be obtained from the

American Law Institute Publishers

50 West Kellogg Boulevard

St. Paul, Minnesota 55102

or your local law book dealer



NEW YORK UNIVERSITY LAW REVIEW

announces a

Symposium

on the

RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES

Articles by leading authorities:

Adrian Fisher, Stanley Metzger, Richard Pugh, Joseph McLaughlin,
Albert Garretson, Leonard Meeker, Oliver Lissitzyn, Cornelius
Murphy, Jr.

This Symposium in Volume 41, Number 1, of the New York University
Law Review discusses and criticizes the various sections of the Restate-
ment.

Individual copies may be purchased for \$2.25 per issue.

Address inquiries and orders to:

**NEW YORK UNIVERSITY LAW REVIEW
40 Washington Square South
New York, N. Y. 10003**

THE ISLAMIC LAW OF NATIONS

Shaybānī's Siyar

by Majid Khadduri

*Director of The Center for Middle East Studies at The Johns Hopkins University
School of Advanced International Studies*

It is the purpose of this work to present an annotated text in translation as well as a study of the jurisprudence of an original writer on the public law of Islam — a nation that played an important role in the past and produced a system of law that was no less significant than the Roman.

International, interracial, interreligious, political, and personal laws for Muslims are dealt with in this study and Islam's law of nations regarding the relationship with non-Muslims, including slavery and polygamy in intercommunal disputes, is described. **\$8.00**

CONTENTS

Foreword by Philip C. Jessup, Judge, the
International Court of Justice

Translator's Introduction

Islamic Law and the Law of Nations

Theory of the Islamic Law of Nations

Shaybānī's Life and Writings

Shaybānī and the Islamic Law of Nations

Changes in the Concepts of the Siyar
after Shaybānī

The Text of the Siyar

Translation of Shaybānī's Siyar

I. Traditions Relating to the Conduct
of War

II. On the Conduct of the Army in
Enemy Territory

III. On the Spoil of War

IV. On the Intercourse between the
Territory of Islam (Dār al-Islam)
and the Territory of War (Dār
al-Harb)

V. On Peace Treaties

VI. On Aman (Safe-Conduct)

VII. On Apostasy

VIII. On Dissension and Highway Robbery

IX. Supplement to the Kitāb al-Siyar

X. Kitāb al-Kharāj (The Book of Taxa-
tion)

XI. Book on 'Ushr (Tithe) According to
Dāwūd b. Rushayd

Transmitters of Traditions and Narratives

Other books by Majid Khadduri include *Islamic Jurisprudence: Shāfi 'T's
Risāla* and *War and Peace in the Law of Islam*

THE JOHNS HOPKINS PRESS

BALTIMORE

THE JOURNAL OF JURISTIC PAPYROLOGY

First published in 1964

Issued irregularly

Scientific articles on juristic papyrology and ancient law discoveries. Contributions in English, French and German. Contents listed in the languages of the papers.

\$15.00 per volume



DROIT POLONAIS CONTEMPORAIN

Issued irregularly from 1963

Dealing with Poland's juridical problems.

Published in two versions, Russian and English/French.

Price varies.

Available from

Stechert—Hafner, Inc.

The World's Leading International Booksellers

31 East 10th Street • New York, N. Y. 10003

Offices in England, France, Germany, Colombia

INSTITUTE FOR THE STUDY OF THE USSR

The Institute for the Study of the USSR

is located in Munich, Germany, and has been engaged since 1950 in continuous research and publication on the Soviet Union. Its purpose is to study developments in the Soviet Union and to make the results of its studies available to persons and institutions everywhere.

Its Library

of more than 55,000 volumes is one of the richest specialized collections on the Soviet Union in Europe and is widely used by visiting researchers from all parts of the world.

Its Publications

include books, based on the results of research by staff members and by outside contributors, and periodicals, such as the monthly *Bulletin*, the quarterly *Studies on the Soviet Union* and the weekly *Analysis of Current Developments in the Soviet Union*. Periodicals are also published in Turkish, Arabic, Spanish, German and French and are mailed to more than 25,000 serious students of Soviet affairs throughout the world.

Its Activities

include an accredited summer school, international symposiums, conferences, study seminars and lectures by émigré scholars and other specialists on Soviet affairs.

Its Services

include furnishing information in response to requests from individuals and organizations and providing facilities for advanced resident research.

FOR INFORMATION AND SUBSCRIPTIONS:

New York Office • 30 E. 42nd St. • New York, N. Y. 10017

AMERICAN SOCIETY OF INTERNATIONAL LAW

ANNOUNCEMENT OF NEW PUBLICATIONS

Legal Advisers and Foreign Affairs

A report of a conference, sponsored by the Society, on the rôle of legal advisers in the conduct of foreign affairs, with descriptions of the organization of their offices in eleven governments. Edited by H. C. L. Merillat. Published for the Society by Oceana Publications, Inc., 40 Cedar Street, Dobbs Ferry, New York. 162 pp. \$4.00.

Three Books on the Legal Context for Foreign Investment in Selected Countries

A series of volumes analyzing the legal aspects of foreign private investment in selected countries, in the context of official policies and economic, political, and social trends. Written on research fellowships from the Society for studies in investment and economic development. All published by the University of North Carolina Press, Chapel Hill, North Carolina.

FOREIGN ENTERPRISE IN INDIA: LAWS AND POLICIES. By Matthew J. Kust. 488 pp. and Index. \$10.00.

FOREIGN ENTERPRISE IN COLOMBIA: LAWS AND POLICIES. By Seymour W. Wurfel. 552 pp. and Index. \$10.00.

FOREIGN ENTERPRISE IN NIGERIA: LAWS AND POLICIES. By Paul O. Proehl. 238 pp. and Index. \$7.50.

Studies of Regional Groupings and Federations

The Socialist Commonwealth of Nations: Organizations and Institutions: A study of arrangements among Soviet-bloc countries for coordinating policies and settling disputes. Prepared under the Society's research program on movements toward federation and other forms of regional association. By Kazimierz Grzybowski. Published by the Yale University Press, New Haven, Connecticut. 287 pp. and Index. \$7.50.

East African Unity Through Law: A study of efforts by former British territories in East Africa to establish regional institutions to provide common services and to advance common interests. Another in the Society's series of studies in federalism. By Thomas M. Franck. Published by the Yale University Press, New Haven, Connecticut. 173 pp. and Index. \$5.50.

Federal Constitution-Making for a Multi-National World: A comparative study of federal movements—some that have succeeded, some that have failed, some that are under consideration—and of the integrative and disruptive factors in each. By Edward McWhinney. To be published May 15 by A. W. Sijthoff, Leyden, The Netherlands. \$5.20.

Aden and the Federation of South Arabia—The Constitution of the Congo: Two separate papers written by J. Y. Brinton in the program on federalism. The first is a review of the development of the Federation of South Arabia and the accession of Aden; the second a translation into English, with Commentary, of the Congolese Constitution of August 1, 1964. Both published by the Society. \$2 each.

Other Occasional Publications

The Society has published the following reports; single copies are available upon request, without charge:

A Survey of the Teaching of International Law in Political Science Departments. Report of a survey carried out by the Society with the cooperation of the American Political Science Association. 115 pp.

Teaching of International Law and Related Courses in American Law Schools. Report of a conference organized by the Society in 1964. 28 pp.

International Legal Studies: A Survey of Teaching in American Law Schools, 1963-64. Report of a survey carried out by the Society with the cooperation of the Association of American Law Schools. By Richard W. Edwards, Jr. 292 pp.



AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 60

October, 1966

NO. 4

CONTENTS

	PAGE
CHINESE PARTICIPATION IN THE UNITED NATIONS. <i>Myres S. McDugall and Richard M. Goodman</i>	671
A FRAMEWORK FOR THE LEGAL ANALYSIS OF WAR-PEACE ISSUES. <i>Kenneth S. Carlston</i>	728
THE PARTITION OF THE NEUTRAL ZONE. <i>Sayed M. Hosni</i>	735
LEGAL ASPECTS OF THE VIET-NAM SITUATION. <i>Quincy Wright</i>	750
EDITORIAL COMMENT:	
International Law and the Commonwealth, 1907-1967. <i>Robert E. Wilson</i>	770
On the Quasi-Legislative Competence of the General Assembly. <i>Richard A. Falk</i>	782
NOTES AND COMMENTS:	
The United Nations' Double Standard on Human Rights Complaints. <i>John Carey</i>	792
The Extraordinary Session of the Hague Conference on Private International Law. <i>Kurt H. Nadelmann and Arthur T. von Mehren</i>	803
The New ODEGA. <i>Salo Engel</i>	806
The Dominican Case: Unilateral Intervention. <i>R. T. Bohan</i>	809
Tibet's Declarations of Independence? <i>Alfred P. Rubin</i>	812
Freedom of the Sea. <i>Edward W. Allen</i>	814
Scott Prizes in International Law. <i>E.H.F.</i>	816
Procedural Aspects of International Law Institute. <i>E.H.F.</i>	816
East-West Trade Conference, Stanford University. <i>John I. Laun</i>	817
Inter-American Bar Association. <i>Eleanor H. Finch</i>	819
First Annual Summer Conference of the Law of the Sea Institute. <i>Eleanor H. Finch</i>	820
On <i>Festschriften</i> and Book Reviews. <i>Salo Engel</i>	822
U. S. CONTEMPORARY PRACTICE RELATING TO INTERNATIONAL LAW	824
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW. <i>John R. Stevenson</i>	838
BOOK REVIEWS AND NOTES. <i>Leo Gross</i> :	
Tunkin (ed.), <i>Soviet Year-Book of International Law, 1962, 1963</i> , 868; Barros, <i>The Corfu Incident of 1923</i> , 870; Ross, <i>The United Nations: Peace and Progress</i> , 873; Castel, <i>International Law: Chiefly as Interpreted and Applied in Canada</i> , 874; Ronning, <i>Diplomatic Asylum</i> , 876; Bandilla, <i>Das Klagerecht der Mitgliedstaaten der Europäischen Gemeinschaften gegen Durchgriffsakte</i> , 878; International Law Association, <i>The Effect of Independence on Treaties</i> , 880; Wildeboer, <i>The Brussels Salvage Convention</i> , 881; Gál, <i>Világjog</i> , 882. Briefer Notices: Orfield and Re, 884; Ermacora, 885; Fernández-Shaw, 885; Johnson, 886; Lombard, 887; Meier, 887; Sandifer and Scheman, 888; Touscoz, 888.	
Books Received	889
OFFICIAL DOCUMENTS	
CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES. <i>Washington, March 18, 1965</i>	892
AGREEMENT BETWEEN THE INTERNATIONAL ATOMIC ENERGY AGENCY, THE GOVERNMENT OF THE KINGDOM OF THAILAND AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA FOR THE APPLICATION OF SAFEGUARDS. <i>Vienna, September 30, 1964</i>	912
SITUATION IN SOUTHERN RHODESIA:	
United Nations General Assembly:	
Resolution 2012 (XX). <i>October 12, 1965</i>	921
Resolution 2022 (XX). <i>November 5, 1965</i>	922
Resolution 2024 (XX). <i>November 11, 1965</i>	924
United Nations Security Council:	
Resolution 216. <i>November 12, 1965</i>	924
Resolution 217. <i>November 20, 1965</i>	924
Resolution 221. <i>April 9, 1966</i>	925
INTERNATIONAL LEGAL MATERIALS. Contents, Vol. V, No. 4 (July), and No. 5 (September), 1966	926
INDEX	929

BOARD OF EDITORS

Editor-in-Chief

WILLIAM W. BISHOP, JR., University of Michigan Law School

RICHARD R. BAXTER
Harvard Law School

HARDY C. DILLARD
University of Virginia Law School

RICHARD A. FALK
Princeton University

ALWYN V. FREEMAN
Detroit, Michigan

LEO GROSS
Fletcher School of Law and Diplomacy

JOHN N. HAZARD
Columbia University

JAMES NEVINS HYDE
New York, N. Y.

OLIVER J. LISSITZYN
Columbia University

BRUNSON MACCHESNEY
Northwestern University Law School

MYRES S. McDOUGAL
Yale Law School

H. C. L. MERILLAT
Washington, D. C.

STANLEY D. METZGER
Georgetown University Law Center

STEFAN A. RIESENFELD
University of California Law School

OSCAR SCHACHTER
New York, N. Y.

LOUIS B. SOHN
Harvard Law School

ERIC STEIN
University of Michigan Law School

JOHN R. STEVENSON
New York, N. Y.

RICHARD YOUNG
Van Hornesville, N. Y.

Honorary Editors

HERBERT W. BRIGGS
Cornell University

CHARLES G. FENWICK
Washington, D. C.

HANS Kelsen
University of California

JOSEF L. KUNZ
University of Toledo

PITMAN B. POTTER
American University

JOHN B. WHITTON
Princeton University

ROBERT R. WILSON
Duke University

QUINCY WRIGHT
University of Virginia

Secretary of the Board of Editors

ELEANOR H. FINCH

The object of The American Society of International Law is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. For this purpose it co-operates with similar societies in this and other countries.

Membership in the Society is open to all persons of good moral character interested in the objectives of the Society. Membership dues are: Regular, \$15.00 for residents of the United States, \$10.00 for non-residents; professional, \$25.00; intermediate, \$10.00; student, \$5.00. Application forms and further information may be obtained from the Membership Secretary of the Society at the address given below.

The JOURNAL is published quarterly and is supplied to all members of The American Society of International Law without extra charge. The annual subscription to non-members of the Society is \$15.00 and includes subscription to the *Proceedings* of the Society. Available single numbers of the current volume of the JOURNAL will be supplied at \$3.50 per copy; other available back numbers at \$4.50 per copy.

The views expressed in the articles, editorial comments, book reviews and notes, and other contributions which appear in the JOURNAL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

Subscriptions, orders for back numbers, correspondence with reference to the JOURNAL, manuscripts, and books for review should be sent to the Secretary of the Board of Editors, 2223 Massachusetts Avenue, N.W., Washington, D. C. 20008.

CHINESE PARTICIPATION IN THE UNITED NATIONS:
THE LEGAL IMPERATIVES OF A NEGOTIATED
SOLUTION

BY MYRES S. McDOUGAL
Of the Board of Editors

AND

RICHARD M. GOODMAN
*Of the New York Bar **

For almost a decade and one-half the Chinese participation question has challenged the United Nations.¹ In its coming session the General Assembly will doubtlessly once again grapple with the question, but past debates do not promise rational solution.² In brief summary, two claimants seek, or are proffered by others, to participate as the "State of China" in the General Assembly, the Security Council, and the Specialized Agencies. The Government of the Republic of China (Nationalist China) has held the seat since the founding of the United Nations. The People's Republic of China (Communist China), however, commands resources of considerable magnitude, and events of recent years have enhanced its claim to participation.³

* We thank W. Michael Reisman both for critical suggestions and invaluable assistance in the final preparation of this article.

¹ For histories of the question, see Appleton, *The Eternal Triangle* (1961), and Higgins, *The Development of International Law Through the Political Organs of the United Nations* 131-166 (1963). See also the text below, at notes 16-47.

² Past "representation" resolutions have invariably forced a choice between (1) seating the Communist Chinese and excluding the Nationalist Chinese, and (2) retaining the Nationalist Chinese and excluding the Communist Chinese. Proposals for compromise have been rare, and seldom formally put before the General Assembly. Delegates have, nevertheless, suggested that a special study committee be created, that provisional arrangements be worked out if the "representation" resolution is passed in principle, that the interested parties hold negotiations, that the two claimants be seated in different organs, and that the solution of the participation question be tied in with a general political settlement. See, e.g., remarks of Colombia, U.N. General Assembly, 16th Sess., Official Records, Plenary Meeting 952 (A/P.V. 1073) (1961); Sweden, *ibid.*, Plenary Meeting 913 (A/P.V. 1070) (1961); Ireland, *ibid.*, Plenary Meeting 974 (A/P.V. 1075) (1961); Sierra Leone, *ibid.*, Plenary Meeting 998 (A/P.V. 1076) (1961); Spain, *ibid.*, Plenary Meeting 1009 (A/P.V. 1076) (1961).

Scholars have generally taken somewhat limited views of the problem. The sources are collected in the bibliography of Appleton, note 1 above, at 274-275. See also Boyer and Akra, "The United Nations and the Admission of Communist China," 76 *Pol. Sci. Q.* 332 (1961); Brohl, "Five Lectures on Asia and the United Nations," 102 *Hague Academy Recueil des Cours* 125, 194 (1961); Petrov, *What China Policy?* Part II (1961); Schick, "The Question of China in the United Nations," 12 *Int. and Comp. Law Q.* 1232 (1963); Singh, *Termination of Membership in International Organizations* (1958).

³ E.g., French recognition of the People's Republic of China (see Erasmus, "General de Gaulle's Recognition of Peking," 18 *China Quarterly* 195 (1964) and the Communist Chinese atomic test (see Halperin, *China and the Bomb* (1965)).

Any decision on the Chinese participation question will have extraordinary value impacts. Immense power is at stake. A participation decision will determine whether and how one quarter of the world's population will share in world community processes of authority, and it will affect the resource-base—material, institutional, and strategic—of international organizations. It will influence the range and type of decisions which world organizations can make in implementing and clarifying the common interest. A participation decision will allocate seats on the Security Council, the General Assembly and the Specialized Agencies. The Security Council seat is permanent, and the veto permits its occupant to influence virtually all Council decisions bearing on international peace and security.⁴ The General Assembly seat carries the rights to vote and debate, the privilege to negotiate in the corridors of the United Nations, and the prestige of U.N. membership. Membership itself promises participation in the U.N. Secretariat, an organ of increasing importance.

Immense power is at stake even outside the institutions of the United Nations. A permanent Security Council seat is a symbol of Great-Power status, with trappings of legitimacy, authority and control over extensive resources. A transfer of the seat, with its attendant symbols, could work important changes in the world power configuration. Some Western countries, and certainly many non-aligned countries, might revise their economic, military and political alliances. Southeast Asian political leaders would certainly face disturbing policy choices. Communist governments and parties may reorient themselves in the Sino-Soviet dispute.

Power, further, is not the only value at stake. A transfer of China's United Nations seats could affect the advancement of human rights, the development of international law, the distribution of wealth by international agencies, the allocation of capital between the developed and lesser-developed countries, the evolution of labor standards, and the dissemination of knowledge bearing on health, meteorology, food production and peaceful uses of atomic energy. The transfer would have impacts on the United Nations space programs. It certainly would influence the rule-promulgating activities of such Specialized Agencies as the International Telecommunications Union, the Universal Postal Union, and the International Civil Aviation Organization.

With the impacts of a decision on the participation question so pervasive, it is not surprising to find elaborate, complex, and sophisticated legal justifications for preferring the delegations of either "China." Three different schools dominate so-called "juridical" analysis of the question. Although these schools make their arguments and state their preferences in the familiar terms of "membership," "representation," and "credentials," they do not give these terms the clear and simple factual referents which clear communication demands. A "membership" school

⁴ A Security Council member may also strikingly influence Council decisions on the "procedural" or "substantive" quality of a particular issue. See, generally, Gross, "The Question of Laos and the Double Veto in the Security Council," 54 A.J.I.L. 118 (1960).

would require the People's Republic of China to apply for "admission" to the United Nations as a "new" state.⁵ A "credentials" school argues that the United Nations need only approve the "credentials" submitted by the Communist Chinese delegation.⁶ A "representation" school purports to distinguish itself from both the "membership" and "credentials" schools, and invokes general Charter norms and seemingly *ad hoc* procedures.⁷

Each of the schools has fashioned its own elaborate supporting argumentation. The "membership" school invokes Article 4⁸ of the U.N. Charter, which establishes procedural and substantive criteria for the admission of a state to membership in the United Nations. Communist China meets none of the substantive requirements of Article 4, the argument goes, because it neither "represents" the Chinese people, nor is "peace-loving," nor is "willing and able to fulfill its international obligations." Almost in passing, the membership school notes that the procedures of Article 4 permit a permanent member of the Security Council (and thus certainly the United States) to veto an application for membership.

The membership school also looks to Articles 5⁹ and 6¹⁰ of the Charter, which, it argues, prevent United Nations organs from excluding the Nationalist delegations. The first article specifies criteria and procedures for suspending a Member; the second, criteria and procedures for expelling a Member. Neither article, it is claimed, is applicable to the Nationalist

⁵ Cf., e.g., the remarks of the delegate from Costa Rica, U.N. General Assembly, 17th Sess., Official Records, Plenary Meeting 630 (A/P.V. 1161) (1962), and the speech of Mr. Cazet (Congo, Brazzaville) who believed it necessary for the Peking Government to evince a desire for admission to membership in the United Nations, and to comply with the Organization's rules. *Ibid.*, Plenary Meeting 597 (A/P.V. 1161) (1962).

⁶ The "credentials school" has for many years been headed by the Soviet Union. With the increasing deterioration in Sino-Soviet relations, Albania has become a principal advocate of Communist Chinese participation in the United Nations.

⁷ The United States, until 1961 a member of the "membership" school, has in past years been an articulate spokesman of the "representation" school.

⁸ Article 4:

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

⁹ Article 5:

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

¹⁰ Article 6:

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

Delegation, because the Security Council has not taken "preventive or enforcement action" against Nationalist China, and Nationalist China has not "persistently violated" the principles of the Charter. Again, the membership school notes, the procedures established in both articles would permit a permanent member of the Security Council (and thus the United States) to veto attempts to suspend or expel the Nationalist Government. It is argued, in refutation, that these articles are not applicable to the case of Chinese participation; it would make no difference that the Nationalist Delegations might depart the Organization, for they are simply not the "lawful" representatives of China.

The "credentials" school looks to allegedly pertinent Rules of Procedure, which establish mechanisms for approving the "credentials" of the delegations of Members.¹¹ The principal issue, as this school sees it in a confusion of terms, is to decide which government "represents" China; this decision, in turn, is made to rest on a "factual" appraisal of a

¹¹ The relevant Rules of Procedure for the Assembly read as follows:

Rule 27. The credentials of representatives and the names of members of a delegation shall be submitted to the Secretary-General if possible not less than one week before the date fixed for the opening of the session. The credentials shall be issued either by the Head of the State or Government or by the Minister for Foreign Affairs.

Rule 28. A Credentials Committee shall be appointed at the beginning of each session. It shall consist of nine members, who shall be appointed by the General Assembly on the proposal of the President. The Committee shall elect its own officers. It shall examine the credentials of representatives and report without delay.

Rule 29. Any representative to whose admission a Member has made objection shall be seated provisionally with the same rights as other representatives, until the Credentials Committee has reported and the General Assembly has given its decision. (Rules of Procedure of the General Assembly. U.N. Doc. A/520/Rev. 7 (1964).)

The comparable rules for the Security Council follow:

Rule 13. Each member of the Security Council shall be represented at the meetings of the Security Council by an accredited representative. The credentials of a representative on the Security Council shall be communicated to the Secretary-General not less than twenty-four hours before he takes his seat on the Security Council.

The credentials shall be issued either by the Head of the State or Government concerned or by its Minister of Foreign Affairs. The Head of Government or Minister of Foreign Affairs of each member of the Security Council shall be entitled to sit on the Security Council without submitting credentials.

Rule 14. Any member of the United Nations not a member of the Security Council and any State not a member of the United Nations, if invited to participate in a meeting or meetings of the Security Council, shall submit credentials for the representative appointed by it for this purpose. The credentials of such a representative shall be communicated to the Security Council not less than twenty-four hours before the first meeting which he is invited to attend.

Rule 15. The credentials of representatives on the Security Council and of any representatives appointed in accordance with Rule 14 shall be examined by the Secretary-General who shall submit a report to the Security Council for approval.

Rule 16. Pending the approval of the credentials of a representative on the Security Council in accordance with Rule 15, such representative shall be seated provisionally with the same rights as other representatives.

Rule 17. Any representative on the Security Council, to whose credentials objection has been made within the Security Council, shall continue to sit with the same rights as other representatives until the Security Council has decided the matter. (Sohn, Editor, Basic Documents of the United Nations 70 (1956).)

claimant's effective control over territory and population. Since the People's Republic controls mainland China, the argument continues, it is enough that each U.N. organ approve the "credentials" of the Communist Chinese delegation. This kind of decision, under the invoked Rules of Procedure, is invariably made by majority vote.

The "representation" school, without clearly indicating the meaning of the term, rests its arguments on two United Nations resolutions. The first resolution requires "representation" decisions to be settled "in the light of the Purposes and Principles of the Charter and the circumstances of each case";¹² the second labels the Chinese participation question "important" for voting purposes,¹³ i.e., a decision to seat the Communist Chinese delegation requires a two-thirds majority of the General Assembly. In evaluating the Chinese Communist claim to participation, this school

¹² General Assembly Resolution 396 (V) reads thus:

The General Assembly,

Considering that difficulties may arise regarding the representation of a Member State in the United Nations and that there is a risk that conflicting decisions may be reached by its various organs,

Considering that it is in the interest of the proper functioning of the Organization that there should be uniformity in the procedure applicable whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations, and this question becomes the subject of controversy in the United Nations,

Considering that, in virtue of its composition, the General Assembly is the organ of the United Nations in which consideration can best be given to the views of all Member States in matters affecting the functioning of the Organization as a whole,

1. Recommends that, whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes a subject of controversy in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case;

.

3. Recommends that the attitude adopted by the General Assembly or its Interim Committee concerning any such question should be taken into account in other organs of the United Nations and in the Specialized Agencies . . .

¹³ General Assembly Resolution 1668 (XVI) reads as follows:

The General Assembly,

Noting that a serious divergence of views exists among Member States concerning the representation of a founder Member who is named in the Charter of the United Nations,

Recalling that this matter has been described repeatedly in the General Assembly by all segments of opinion as vital and crucial and that on numerous occasions its inclusion in the agenda has been requested under rule 15 of the Assembly's rules of procedure as an item of an important and urgent character,

Recalling further the recommendation contained in its resolution 396 (V) of 14 December 1950 that, whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the purposes and principles of the Charter and the circumstances of each case,

Decides, in accordance with Article 18 of the Charter of the United Nations, that any proposal to change the representation of China is an important question.

looks to general standards of international behavior, and more often than not, finds the Communist regime sadly lacking.¹⁴ Its criteria, however, cut two ways, and delegations have, for example, voted to seat Communist China in hopes of including it in disarmament negotiations.¹⁵

Thus do the various legal arguments array themselves in opposing phalanxes. Each has blurred the distinction between fact and legal consequence. Each has kept well concealed the policies basic to decision. Each has failed systematically to investigate past trends, to apply the policies communicated by past trends to the peculiar facts of the Chinese participation question, and to make creative recommendations for solving this perplexing issue.

In this article we shall attempt to suggest at least a framework of inquiry for less confused thinking about the problem.¹⁶ At the outset, we shall briefly review the history of the Chinese participation question, and then sketch the factual context in which general participation questions arise. Next, we shall articulate the more fundamental policies—universality and responsibility—which underlie all participation questions in the United Nations, and the more specific policies which are peculiar to each form of participation controversy. Third, we shall survey past trends for each type of participation decision. Fourth, we shall apply these past trends to the Chinese participation question. Finally, we shall make recommendations for a negotiated settlement.¹⁷

¹⁴ *E.g.*, Ambassador Stevenson's argument before the 17th Assembly rested on three propositions:

- ✓ 1. The government of the People's Republic of China does not represent the Chinese people.
- ✓ 2. The Communist Chinese are both past and present aggressors.
- ✓ 3. The Communist Chinese have purposes antithetical to those of the United Nations, *e.g.*, they seek liberation of Taiwan by force. (U.N. General Assembly, 17th Sess., Official Records, Plenary Meetings 552-554 (A/P.V. 1156) (1962).)

¹⁵ One notable example is India which, when "a raw and naked war, premeditated in plan, (was) being committed by the Peoples Republic of China against (India)," paid tribute to the principle of universality, mentioned the need to bring Communist China into disarmament negotiations, and supported in 1962 a Soviet proposal which would exclude the Nationalist Chinese and seat the Communist Chinese. U.N. General Assembly, 17th Sess., Official Records, Plenary Meeting 597 (A/P.V. 1159) (1962).

¹⁶ It does not escape us that the problem with which we deal could be formulated in much more comprehensive terms. The problem could be formulated as one of how the organized general community can best deal with renegade states which challenge its policies of minimum and optimum order, and effect the changes in the predispositions of the élites in such states in a way necessary to bring them to responsible participation in a common public order. The important question, we would emphasize, extends beyond that of whether Communist China "should" be seated in the United Nations to that of what are the probable constitutive and public order consequences of choice, whether of seating or denial of seat. The basic difficulties might not, further, be resolved by either choice. An inquiry designed to be more effective might include, in addition to appraisal of strategies about granting or denying access to arenas of authority, a comprehensive review of all the potential sanctioning devices available to the general community.

¹⁷ It may be emphasized that the position we take is not incompatible with the many demands recently expressed in the United States for a fundamental rethinking of

I. THE HISTORY OF THE CHINESE PARTICIPATION QUESTION

On October 1, 1949, more than twenty-eight years after the official founding of the Chinese Communist Party, Chairman Mao Tse-tung proclaimed the establishment of the Central People's Government of the People's Republic of China. Within approximately a month and a half, Mao's Foreign Minister had cabled the President of the General Assembly to repudiate the legal status of the delegate of the Government of the Republic of China.¹⁸ Slightly more than a month later the Soviet delegate to the Security Council, Jacob Malik, initiated official debate on the Chinese participation question.¹⁹ Arguing before the Council, Malik proposed that the Council decide not to recognize the credentials of the Nationalist Chinese delegate, and to expel him from the United Nations. His draft resolution was decisively defeated,²⁰ and, ostensibly to protest the decision, Malik walked out of the Security Council—to begin a general boycott of United Nations organs by the Soviet bloc.

This Security Council decision did not end United Nations activity on the participation question that winter. Secretary General Lie feared the dissolution of the United Nations, and the formation of a Communist counterpart to it.²¹ Believing himself obligated to "seek a solution in the best interests of the organization,"²² he actively sought to seat the Communist Chinese.²³ To this end²⁴ he requested that the Legal Department

attitudes toward Communist China. Our purpose is merely to outline, as comprehensively and realistically as possible, the legal bases—the contemporary expectations about the requirements of future decision—upon which any successful negotiations for a different future must depend.

For a broad spectrum of the more important recent demands for a new approach to the problems of Chinese participation, see U. S. Policy with Respect to Mainland China, Hearings before the Committee on Foreign Relations, 89th Cong., 2nd Sess. (1966).

A measured response to some of these demands is offered by Secretary of State Rusk in his statement before the Far East Subcommittee of the House Foreign Affairs Committee, the text of which may be found in *The New York Times*, April 17, 1966, p. 34, cols. 1-8.

¹⁸ U.N. General Assembly, Official Records, Doc. A/1123 (Nov. 18, 1949).

¹⁹ U.N. Security Council, 6th Year, Official Records, 458th Meeting (S/P.V. 458) (1949).

²⁰ U.N. Security Council, 6th Year, Official Records, 459th Meeting, S/1443 (1950); three in favor (India, Yugoslavia, U.S.S.R.); six against (China, Cuba, Ecuador, Egypt, France, United States); two abstaining (Norway, United Kingdom). U.N. Security Council, 6th Year, Official Records, 461st Meeting 3 (S/P.V. 461) (1950).

²¹ See Lie, *In the Cause of Peace* 252-273 (1952).

²² *Ibid.* at 261.

²³ Secretary General Lie spoke with diplomats on both sides of the Iron Curtain, urged the committed delegates to pressure those yet undecided, and even suggested to the Chinese Ambassador in Moscow that the Communist Chinese send delegations to UNESCO and WHO conferences of 1950, which the Nationalist Chinese were not planning to attend. *Ibid.* at 252-273.

²⁴ "Armed with this memorandum" Secretary General Lie "proceeded to discuss (the Chinese participation question) with all the members of the Council." "On the basis of the above, an immediate and practical conclusion was that France, Egypt, Ecuador and Cuba—members of the Council who did not recognize the Communist

of the United Nations Secretariat prepare a Memorandum on recognition and representation.²⁵ The Memorandum initially analyzed issues of recognition and representation; but it went on to state purported criteria for solving representation questions. It proceeded by derivation from Article 4 of the Charter, and concluded that a representation decision should focus on whether "the new government exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population."²⁶

When the Communist Chinese intervened in the Korean conflict, the Secretary General seemed to change his public position. After this event, he thought that "permanent members just as much as new members are bound by the stipulations of Article 4"²⁷—an article that requires an applicant for membership to be "peace-loving" and "willing to carry out (the) obligations (of the Charter)."

The Korean crisis, and a turn as Council President, brought Malik back to the United Nations, but only to declare, as President of the Security Council, that the Nationalist Chinese Delegation did not represent China, and therefore could not participate in Council meetings.²⁸ Although his ruling was overturned,²⁹ he still persisted in raising the participation issue, and attempted to tie it to the agenda item which dealt with the Korean problem.³⁰ In this attempt, too, he failed.³¹ The General Assembly promised, however, to be a more receptive forum. Two Communist Chinese cables³² had challenged the Nationalist Chinese Delegation even before the Assembly opened, and at its first meeting the Assembly was confronted

regime in China—might vote for the representation of the Peking government in the Security Council, while still withholding recognition. Five members of the Council already recognized Peking. . . ." *Ibid.* at 257. The memorandum, we note, distinguished sharply between recognition and representation, and concluded that a Member state could legally vote to seat the delegation of a government which it did not recognize.

²⁵ Doc. S/1466, "Legal Aspects of Problems of Representation in the United Nations," in U.N. Security Council, Official Records, Supp., 1950, at 18.

²⁶ In its entirety the argument was as follows:

"Article 4 requires that an applicant for membership must be able and willing to carry out the obligations of membership. The obligations of membership can be carried out only by governments which in fact possess the power to do so. Where a revolutionary government presents itself as representing a State, in rivalry to an existing government, the question at issue should be which of these two governments in fact is in a position to employ the resources and direct the people of the State in fulfillment of the obligations of membership. In essence, this means an inquiry as to whether the new government exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population.

"If so, it would seem to be appropriate for the United Nations organs, through their collective action, to accord it the right to represent the State in the Organization, even though individual Members of the Organization refuse, and may continue to refuse, to accord it recognition. . . ." *Ibid.* at 22.

²⁷ Lie, *op. cit.* note 21 above, at 274. ²⁸ Cf. 1950 U.N. Yearbook 425 (1951).

²⁹ The vote was eight to three (India, U.S.S.R., Yugoslavia).

³⁰ *Ibid.* at 425.

³¹ By a vote of five to five (China, Cuba, Ecuador, France, United States) with one abstention (Egypt).

³² Doc. A/1364; cf. 1950 U.N. Yearbook 428 (1951).

with four draft resolutions. An Indian resolution³³ required the General Assembly to decide that Communist China "should be entitled to represent the Republic of China in the General Assembly," and to recommend that the other organs of the United Nations adopt similar resolutions. Two Soviet resolutions³⁴ sought to expel the Nationalist Chinese Delegations from the General Assembly and its organs and to seat Communist Chinese delegations in their places. A Canadian resolution³⁵ proposed to establish a special committee to study the participation problem. It was this latter resolution (as amended) that was finally adopted,³⁶ and on December 15, 1950, the Special Committee held its first meeting. A day later, however, the Committee voted to authorize its President to report to the Assembly that the Committee was unable to make any recommendation on the matter.³⁷

That fall the *Ad Hoc* Political Committee debated the topic "Recognition by the United Nations of the Representation of a Member State."³⁸ Often confused, the argument revolved around two proposals. A Cuban resolution,³⁹ alleged to be "subjective," recommended that representation decisions focus on a claimant's "ability and willingness to achieve the purposes of the Charter, to observe its principles and to fulfill the international obligations of the State" and the claimant's "respect for human rights and fundamental freedoms." A British draft,⁴⁰ in claimed contrast, was supposedly "objective." It would seat, as the representative of a Member, the delegation of a government which "exercises effective control and authority over all or *nearly all* the national territory, and has the obedience of the bulk of the population of that territory, in such a way that this control, authority and obedience appear to be of a permanent character. . . ."

Debate was sharp but inconclusive,⁴¹ and the question was sent to a subcommittee for compromise. The subcommittee's recommendation eventually became General Assembly Resolution 396(V):

The General Assembly . . .

1. Recommends that, whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case; . . .

3. Recommends that the attitude adopted by the General Assembly or its Interim Committee concerning any such question should be

³³ U.N. General Assembly, 5th Sess., Official Records, Doc. A/1365 (1950).

³⁴ *Ibid.*, Docs. A/1369, A/1370 (1950). ³⁵ *Ibid.*, Doc. A/1386 (1950).

³⁶ *Ibid.*, Plenary Meeting 16 (A/P.V. 277) (1950).

³⁷ *Ibid.*, Doc. A/1923 (1950).

³⁸ *Ibid.*, Ad Hoc Political Committee (Docs. A/AC. 38/SR. 18-24, 57-60) (1950).

³⁹ *Ibid.*, 38th Meeting (Doc. A/AC. 38/L.6) (1950).

⁴⁰ *Ibid.*, 38th Meeting (Doc. A/AC. 38/L.21) (1950).

⁴¹ See the summary in Higgins, *op. cit.* note 1 above, at 148-149.

taken into account in other organs of the United Nations and in the Specialized Agencies; . . .

At the opening of the Sixth General Assembly in 1951, the Soviet representative renewed his demand that the question of Chinese participation be included in the agenda.⁴² Opposing him, the Thai delegate offered the first of the yearly postponement resolutions,⁴³ which, in the form of a General Committee Report, was adopted 37:11:4. From this year through 1960, similar resolutions prevented debate on the merits of the participation issue. Postponement, however, became a less effective strategy as the majorities supporting these resolutions gradually diminished.⁴⁴

To meet the Chinese participation question head on, in 1961 the United States and the United Kingdom backed a New Zealand proposal⁴⁵ to place the problem on the agenda; no longer was a discussion on the merits to be postponed. The United States then joined with Australia, Colombia, Italy and Japan to sponsor a five-Power draft⁴⁶ which would declare the issue of Chinese participation an "important question" within Article 18 of the U.N. Charter. A simple majority would be sufficient to pass this proposal, and, if it were adopted, a two-thirds majority would be required to pass a Soviet resolution⁴⁷ which would replace the Nationalist Delegation with one from the People's Republic of China. An overwhelming majority⁴⁸ approved the five-Power draft and, by a larger margin than the year before, the General Assembly rejected the Soviet draft resolution.⁴⁹ In subsequent years the Assembly has taken similar action, declaring the Chinese participation question "important" under Article 18,⁵⁰ and rejecting resolutions which would replace the Nationalist representatives with a Communist Chinese delegation.⁵¹

II. GENERAL PARTICIPATION QUESTIONS—THE FACTUAL CONTEXT

Participation questions grow out of an extraordinarily complex factual context. A territorial community may change its internal policies, its

⁴² U.N. General Assembly, 6th Sess., Official Records (Doc. A/1941) (1951).

⁴³ This was an oral proposal to the Assembly's General Committee. *Of.* 1951 U.N. Yearbook 265 (1952).

⁴⁴ Detailed statistics on U.N. voting on this question may be found in Halpern, *Policies Toward China: Views from Six Continents*, Appendix B, pp. 503-507 (1965), with charts indicating both aggregate annual votes as well as specific state behavior through time.

⁴⁵ U.N. General Assembly, 16th Sess., Official Records (Doc. A/4873) (1961).

⁴⁶ *Ibid.*, Doc. A/L. 372.

⁴⁷ *Ibid.*, Doc. A/L. 360; *cf.* Doc. A/4874.

⁴⁸ General Assembly Res. 1668 (XVI) was adopted by a vote of 61:34:7.

⁴⁹ The vote was 48:36:20.

⁵⁰ See, generally, Liang, "Conditions of Admission of a State to Membership in the United Nations," 43 A.J.I.L. 288 (1949); *idem*, "Recognition by the United Nations of the Representation of a Member State: Criteria and Procedure," 45 *ibid.* 689 (1951); Bowett, *The Law of International Institutions* at 311-323 (1963); and Cohen, "The Concept of Statehood in United Nations Practice," 109 U. Pa. Law Rev. 1127 (1961).

⁵¹ For a statistical record, see Halpern, *op. cit.* note 44 above, at 503-508.

external alliances, and its short-term and long-range objectives. It may alter in its cultural orientation—its identification with a particular system of values—and in its dedication to world public order. It may turn from a search for optimum order to the subversion of minimum order. It may increase or decrease its territory or population and change or completely reorganize its resource base. It may abandon diplomatic strategies to make more frequent use of the military instrument. As a participant in the United Nations, it may recommend and execute policies totally different from those of its predecessors and of varying compatibility under the purposes of the organization.

The leadership of a territorial community may also change in varied ways. A “new” government may mean “new” leaders with “new” demands, expectations and objectives. Modes of governmental change range from the persuasive techniques of free election to the coercive methods of violent revolution; the period of change may be short-lived or it may extend for decades as competing élites unsuccessfully struggle for power. The outcomes of change may range along an exceedingly complex factual continuum, from changes in the identity of leaders without change in governmental policy, to major changes in the institutional structure and policies of the territorial community.

As the leadership of a territorial community changes, so may its delegations to international organizations. Here, change may be in the identity, number, personality and identifications of individuals chosen to represent a territorial community at the United Nations. The consequence may be continuity in policy or a sharp turn in a Member’s objectives and strategies at the United Nations.

These changes—of territorial community, leadership, and U.N. delegation—occur in varying degrees and innumerable combinations. Minor changes in all relevant variables may leave a territorial community virtually as it was before. Major changes may give birth to an essentially “new” territorial community, *i.e.*, a territorial community whose leadership, governmental institutions, internal policies, external alignments, objectives, resources and strategies are largely different from its predecessor’s.⁵² For participation in the United Nations, as for other problems in “state” and “governmental” succession, change and continuity in effective control over people and resources are but some of many variables relevant to policy and must take their significance for any particular problem from the whole constellation of variables in a larger context.

Each of these changes—in territorial community, in internal leadership, and in U.N. delegation—may indeed give rise to participation questions

⁵² See, in this regard, O’Connell, “State Succession and Problems of Treaty Interpretation,” 58 A.J.I.L. 41 (1964); Young, “The State of Syria: Old or New?” 56 A.J.I.L. 482 (1962); O’Connell “Independence and Succession to Treaties,” 38 Brit. Yr. Bk. Int. Law 84 (1962). Compare with the highly flexible procedures in GATT: Kunugi, “State Succession in the Framework of GATT,” 59 A.J.I.L. 268 (1965). Comprehensive treatment of earlier trends may be found in O’Connell, *The Law of State Succession* (1956).

for the United Nations. To simplify analysis, we distinguish between questions of "initial participation" and "subsequent participation." Questions of "initial participation" occur in two situations. First, a territorial community not previously in any way a participant in the United Nations may seek inclusion in the Organization. Second, a territorial community which has been regarded, in part or whole, as a Member may have changed so as to become a "new" entity for U.N. membership purposes. The "new" entity then may seek to participate as if it were the "old" territorial community, and the Organization may be called upon to decide on the "new" entity's rights to participation.

Questions of "subsequent participation" assume that a territorial community is a Member of the Organization, and that the territorial community has not changed so as to become a "new" entity for U.N. membership purposes. We divide questions of "subsequent participation" into two categories. "Representation questions" occur when competing *governments* within a territorial community claim to represent the territorial community at the United Nations. "Credentials questions" do not involve competing governments, but occur when questions are raised about the authority of *delegations* from a single government representing a Member at the United Nations.

III. THE RELEVANT POLICIES

Universality and responsibility are the two more fundamental policies that underlie all participation decisions in intergovernmental organizations. "Universal" participation⁵³ assumes that each member of the world community will have equal access to the organization, and that the organization itself will help prospective members to full participation in its structures of authority. It promises that the objectives of the organization will parallel those of the world community, and that the policies of the organization will reflect total political realities and rest on a broad consensus. Each member of the organization will become more aware of the demands, expectations, perspectives and identifications of the other members, and this awareness itself will reduce social and cultural barriers. The organization, it is assumed, would have access to the institutional structures of the entire world, and would acquire a resource-base of considerable magnitude and variety. Members of the organization would communicate with great ease, resort primarily to diplomatic strategies, and, when required, apply sanctions with great flexibility. Wide participation would minimize the opportunity for non-members to band together to thwart the purposes of the organization. By marshaling a greater resource-base, it would give the organization greater control over dissident members of the world community. A "universal" organization, it is further assumed, would be able to advance the production of all values, and promote their equitable distribution to the entire world community.

⁵³ See, generally, Green, "Membership in the United Nations," 2 *Current Legal Problems* 258 (1949); Higgins, note 1 above, at 55-57 (1963); Schwarzenberger, *The League of Nations and World Order* (1936).

The principle of responsibility⁵⁴ is complementary to that of universality, and grants participation rights only to those who are capable and willing to assume the responsibilities of membership. Irresponsible participants in the world community, *i.e.*, those whose perspectives and operations are inimical to the purposes of the organization, are simply denied membership. "Responsible" participation assumes that the members of the organization—with similar demands and expectations—will act quickly and effectively together to fulfill the objectives of the organization. Similar perspectives and identifications will diminish mutual distrust, enhance mutual tolerance, and reduce social and cultural barriers. Members will presumably be willing to grant the organization access to national institutions, and to entrust the organization with important resources. With these resources, the organization—it is assumed—will be able to apply extensive sanctions with great flexibility, even against non-members. The organization, further, will be able to produce values for each member of great magnitude and quality.

Policies unique to each type of participation question intertwine the two basic principles of universality and responsibility. Universality and responsibility will govern questions of "initial participation" when a territorial community, not previously a Member, seeks inclusion in the Organization. They are supplemented, however, by the principles of stability and flexibility when a territorial community which *has been regarded as a Member* undergoes change so as to become a "new" entity for membership purposes.

The principle of stability posits that the United Nations must have a relatively fixed membership if it is to act effectively. Repeated questioning of a Member's qualifications, the principle argues, could impede the speed with which the Organization responds to crises. The principle of flexibility, on the other hand, would permit the Organization to appraise changes in a Member. Changes in the constitutional structure of an entity may affect its willingness and capability to perform the obligations of membership; a Member may have changed so that its objectives and actions are antithetical to the purposes and operations of the United Nations. The principle of flexibility would require Members of the Organization to exclude such a territorial community from the United Nations. Including it would violate the Members' expectations about the constitution and operation of the Organization.

The principles of stability and flexibility link directly with the policies of universality and responsibility. A territorial community which has undergone minor changes could not seriously threaten the activities of the General Assembly, the "universal" body of the United Nations. If, on the other hand, it has become a "new" entity, and, in addition, rejected prevailing standards of minimum order, the "new" entity might turn to

⁵⁴ See, *e.g.*, Higgins, note 1 above, at 56: "... a mechanical addition of members does not always add to the strength of the association; differing ideologies within one family may accentuate mistrust, and frequent conflicts within an organization may weaken or paralyse its functions."

diplomatic and procedural devices to delay and disrupt the workings of the Organization. At this point the principle of flexibility joins with the policy of responsibility: both demand that the Assembly alter the participation rights of this "new" territorial community.

The same four policies, but in different degree and combination, govern participation of a "new" entity in the Security Council, an organ of limited membership and responsible functions. So small in size is the Council, and so great in potential impact are its decisions, that minor changes in a territorial community may affect its functioning. A territorial community that has undergone major changes, rejecting principles of minimum order, could seriously threaten the operations of the Council. Including it on the Council may violate the expectations of both the Council members and the other participants in the world community.

Quite different policies govern questions of "subsequent participation." Four policies peculiar to representation cases interlace the more general principles of universality and responsibility. The first assumes that a representation decision should not prejudicially affect the outcome of civil conflict, and would postpone a decision "approving" one of the claimants. The second policy equates incipient or actual revolution with a breach of order in the world community. It would favor the claim of the older and established government against the revolutionaries. A third policy would prevent a "watering down" of "membership rights" in the United Nations, and would prohibit a multiplication of a "Member's" "representatives." It would grant participation to only one government, namely, the government that would best fulfill the purposes of the Organization and that would best represent the inclusive and exclusive interests of the Member. The fourth policy would permit this multiplication and grant access to the representatives of both the established and the revolutionary government. Its purpose would be to insure a voice in community processes of decision to each individual living under the adversary governments.

Only one policy governs "credentials" questions. It would look to the validity of the documents presented by claimant delegations, and would award the claimed seat to the delegation which represents, and was in fact appointed by, the government of a Member.

These policies are at the heart of all participation decisions in the United Nations. As commonly stated, their terms are abstract and complementary, furnishing but the barest guidelines for decision. To give them operational meaning for purposes of choice, we must ground them in the facts of community change and the decision processes of the United Nations.

IV. PAST TRENDS IN THE APPLICATION OF POLICIES

The two more general policies—universality and responsibility—find substance in both the constitutional framework and the practice of the United Nations. Participation questions have not dealt solely with "in-

cluding" or "excluding" entities in the United Nations; the principles of universality and responsibility have affected the structure of the United Nations,⁵⁵ the voting rights of Members,⁵⁶ the staffing of the Secretariat,⁵⁷ and the apportionment of assessments.⁵⁸ The General Assembly, thus, is the "universal" organ of the United Nations. Yet to qualify for membership, an applicant must be willing and able to carry out Charter obligations;⁵⁹ and to remain a Member with full rights of participation, a Member must neither persistently violate Charter principles nor so act as to cause the Security Council to take preventive or enforcement action against it.⁶⁰ These last requirements clearly allude to the principle of "responsibility." Conversely, the Security Council, whose decisions under Chapter VI⁶¹ of the Charter have major impacts on international peace and security, is supposedly the more "responsible" organ of the United Nations. Its membership is limited, and certain of its members can cast decisive votes on particular issues.⁶² The two principles, however, find their most important meaning in the two types of specific participation questions we have indicated above.

A. QUESTIONS OF INITIAL PARTICIPATION

1. "Non-Member" Territorial Communities

United Nations decision-makers have invoked a great variety of criteria and procedures to solve questions of initial participation. When territorial communities, not previously Members of the United Nations, have sought participation in the Organization, these decision-makers have turned principally to the "membership" provisions of the United Nations Charter; yet they have also creatively revised membership procedures and criteria, and on occasion they have invented criteria and procedures unknown to the Charter-framers. The history of these criteria and procedures is a study in the competing policies of universality and responsibility.

(a) The Charter Provisions.—Delegates to the Dumbarton Oaks and San Francisco Conferences sought to create a "universal" world organization, but one whose Members had demonstrated and would assume a minimal degree of international responsibility.⁶³ The Dumbarton Oaks Proposals measured responsibility by requiring that an applicant to membership be "peace-loving."⁶⁴ Amendments to the Proposals suggested more comprehensive analysis of an applicant's internal policies and external

⁵⁵ See, generally, McDougal, Lasswell and Vlasic, *Law and Public Order in Space* 910-923 (1963).

⁵⁶ *Ibid.* at 923-929.

⁵⁷ *Ibid.* at 943-953.

⁵⁸ *Ibid.*, Arts. 5, 6.

⁵⁹ *Ibid.*, Art. 27.

⁶⁰ See, generally, Goodrich and Hambro, *The Charter of the United Nations* 6-9, 112-139 (1949); Russell and Muther, *A History of the United Nations Charter* 349-362, 843-851 (1958).

⁶¹ Dumbarton Oaks Proposals for the Establishment of a General International Organization, Chap. 3; 39 A.J.I.L. Supp. 47 (1945).

⁶² *Ibid.* at 929-934.

⁶³ U.N. Charter, Art. 4.

⁶⁴ *Ibid.*, Arts. 33-51.

ties,⁶⁵ but the Charter framers decided on only five criteria for subsequent membership in the United Nations:⁶⁶ an applicant had to (1) be a state, (2) be peace-loving, (3) accept the obligations of the Charter, (4) be able to carry out these obligations, and (5) be willing to do so. The framers noted, however, "that in passing upon the admission of a new member, considerations of all kinds (can) be brought into account."⁶⁷

(b) The Provisions in Practice.—In the Organization's first decade and a half, considerations of all kinds have in fact been brought into account.⁶⁸ Even in the early years, when Article 4 analyses were most juristic, the stated qualifications for admission proved so abstract and so broadly phrased that virtually all the characteristics of a prospective Member were examined.⁶⁹ The requirement that an applicant be a "state" expanded to permit inquiry into the size of its territory and the definiteness of its borders, the stability and effectiveness of its government, and its independence. To determine whether an applicant was "peace-loving," delegates looked to its conduct during World War II, and to its willingness to use peaceful methods to settle postwar disputes. They examined the degree of coercion an applicant employed in hostilities with its neighbors, in border incidents, and in interferences with shipping. Evidence of an applicant's ability to carry out its international obligations touched on diverse factors. In the United Nations' first year, the Committee on New Members thought it appropriate to investigate the composition of Jordan's and Outer Mongolia's budget;⁷⁰ it further asked Outer Mongolia for "detailed information regarding . . . (t)he Constitution of the Mongolian People's Republic and other pertinent facts relating to its system of government." An applicant's defense arrangements, its con-

⁶⁵ Proposed qualifications for membership included the following:

- (1) the applicant's political institutions must insure that the state is a servant of its citizens.
- (2) the applicant must observe the principle of *pacta sunt servanda* or the doctrine of the inviolability of obligations. Doc. No. 202 I-2-9, 7 U.N. Conf. Int. Org. Docs. 18 (1945), henceforth cited as "UNCIO."
- (3) the applicant must *not* be a neutral. *Ibid.* at 19.
- (4) the applicant must "love . . . the democratic system." 7 UNCIO 284 (1945).
- (5) the applicant must repudiate the use of force. 3 UNCIO 557-558 (1945).
- (6) the applicant must respect human rights. 1 UNCIO 304 (1945).
- (7) the applicant must be freedom-loving. *Ibid.*

⁶⁶ U.N. Charter, Art. 4.

⁶⁷ Report of the Rapporteur of Committee I/2 on Chapter III (Membership), 7 UNCIO 324, 326 (1945). This phrase was omitted from the report of the Rapporteur of Committee I. Cf. 6 *ibid.* 248 (1945).

⁶⁸ Some description and citation of factors deemed relevant for admission may be found in the text and footnotes at notes 63, 69-77. For general treatment, see Cohen, *loc. cit.*, and Liang, *loc. cit.*, note 50 above.

⁶⁹ These characteristics are exhaustively surveyed in Cohen, *loc. cit.* note 50 above, and in Prudente, Admission to the United Nations as a Diplomatic Instrument (June, 1959) (unpublished thesis in U.N. Library and Univ. of Southern Calif. Library).

⁷⁰ Telegram from the Acting Secretary General, in U.N. Security Council, Official Records, Supp. No. 4, at 123-124 (1946); Letter from the Chairman of the Committee on the Admission of New Members . . . , *ibid.* at 143.

stitutional authority to conduct foreign policy, and its dependency on foreign Powers have all been objects of scrutiny. In more recent years, it has been important that an applicant had a democratic constitution,⁷¹ was devoted to goals of human dignity,⁷² and possessed sufficient economic, intellectual, social and political resources.⁷³ Delegates have turned to equally varied sources to prove an applicant's willingness to carry out its international obligations. The history of an applicant's transition to statehood,⁷⁴ particularly if a ward of the United Nations,⁷⁵ its membership in international organizations,⁷⁶ the extent of its diplomatic relations,⁷⁷ the degree to which it has been recognized and accepted into the international community,⁷⁸ and its adherence to the principle *pacta sunt ser-*

⁷¹ Telegram from the Acting Secretary General. *Ibid.* at 124.

⁷² At both San Francisco (7 UNCIO 326) and Potsdam (13 Dept. of State Bulletin 159 (1945)), it was stated that states whose regimes had been established by the Axis were ineligible for membership. In the first three years of activity, nine of the eleven applicants who were rejected had either been under the control of, associated with or neutral to the Axis Powers during the war. Among the numerous examples of subsequent practice, see the remarks of Barnes of Liberia regarding Tanganyika's "deep consciousness of the importance of civil liberties and political rights": Security Council, 16th Year, Official Records, 986th Meeting 3 (1961); of Berard of France, *ibid.* at 6; of Stevenson of the United States, *ibid.* at 8-9. See remarks of Loutfi of the United Arab Republic on Kuwait: Security Council, 16th Year, Official Records, 984th Meeting, at 2-3 (1961).

⁷³ See remarks of Sir Patrick Dean in regard to Tanganyika, Security Council, 16th Year, Official Records, 986th Meeting 2 (1961; of Barnes of Liberia, *ibid.* at 3-4; of Malasekera of Ceylon, *ibid.* at 4; of Berard of France, *ibid.* at 6; but see remarks of Zorin, *ibid.* at 12-13. See remarks of Loutfi of U.A.R. on Kuwait, *ibid.*, 984th Meeting, at 2-3 (1961).

⁷⁴ This factor was of particular concern in the Mongolian application: see Security Council, 1st Year, Official Records, Supp. No. 4, at 65, for Russian contention that Mongolian independence was a result of a democratic plebiscite, and Security Council, 2nd Year, Official Records, Spec. Supp. No. 3, at 13, for "the Committee on Admissions" negative conclusion. In the case of the Jordanian application, Poland contended that unilateral action by the United Kingdom (the former Mandatory) was an inadequate mode of establishing independence: *ibid.*, Supp. No. 4, at 70. For an analysis of the modality of transition to statehood as a factor in admission, see Higgins, *op. cit.* note 1 above, at 27-31.

⁷⁵ See remarks of Sir Patrick Dean regarding Tanganyika, *loc. cit.* note 73 above, at 1-2.

⁷⁶ Thus, the representative of Ceylon noted, in the debate on Tanganyika's membership, that the applicant was a member of the Commonwealth. U.N. Security Council, 16th Year, Official Records, 986th Meeting 4 (1961).

In the debate on Kuwait's application, the U.A.R. noted that the applicant was a member of the Arab League, IMCO, UPU, ITU, ICAO, WHO, FAO, UNESCO, OPEC and the ILO, and that such participation indicated its recognition as a state. U.N. Security Council, 16th Year, Official Records, 984th Meeting, at 3 (1961).

⁷⁷ In 1946 the U.S.S.R. opposed the applications of Ireland, Portugal and Trans-Jordan, *inter alia*, because of the absence of diplomatic relations between the applicants and Russia. Security Council, 2nd Year, Official Records, Spec. Supp. No. 3, at 15. In the debate on Kuwait's application, the United Arab Republic noted that sixty-two states in Europe, Asia and Africa had recognized the applicant. Security Council, 16th Year, Official Records, 984th Meeting, at 3 (1961).

⁷⁸ Thus M. Berard of France in regard to Tanganyika's application noted that the application had been approved by the former mandatory government. Security Coun-

vanda,⁷⁹ have all been thought factors testifying to an applicant's adherence to Charter principles.

However admirable this multifactoral analysis, inconsistency has marred the actual application of Article 4. The eleven-member Security Council has denied membership to applicants thought qualified by the General Assembly.⁸⁰ It has excluded candidates in one year, only to recommend them in subsequent years, but without any apparent change in the applicant's ability to qualify under Article 4.⁸¹ Procedural abuses,⁸² inconsistent application of membership criteria,⁸³ pointed disregard of Article 4⁸⁴—all mar U.N. "membership" practice.

cil, 16th Year, Official Records, 986th Meeting 6 (1961); the U.A.R. in the debate on Kuwait noted that the applicant had been recognized by 62 states, the majority of the community. *Ibid.* 984th Meeting, at 3 (1961).

⁷⁹ The community's concern in application procedures with colorable compliance with the basic norms of international law is nowhere better demonstrated than in the rejection in 1947 of Albania's application. The Committee on Admission of New Members considered it significant, if not decisive, that Albania had refused to reaffirm prewar bilateral treaties, had conducted itself inappropriately in the Corfu Channel case, had not paid proper respect to the Security Council's recommendation and had not co-operated with the organization in the Greek case. *Cf.* Security Council, 2d Year, Official Records, Spec. Supp. No. 3, at 3-8 (1947).

⁸⁰ *E.g.*, General Assembly Resolutions 35 (I); 113 (II); 197 (III); 296 (IV); 450 (VI); 620 (VII).

⁸¹ *E.g.*, Albania, Austria, Bulgaria, Ceylon, Hungary, Iceland, Italy, Jordan, Libya, Nepal, Outer Mongolia, Portugal and Rumania were non-Members in 1954 and Members in 1955.

⁸² When Nepal applied for membership in the United Nations, the Security Council routed its application to the Committee on New Members. Initially the Soviet Union moved that the question of Nepalese admission be postponed for lack of information. In response, the delegates suggested either that Nepalese be brought before the Committee for questioning or that specific questions be asked of the Katmandu government. The Soviet delegate objected to this proposal, presumably because he thought information might be forthcoming even if the question of Nepalese admission were postponed.

Delegates then proposed a resolution that provided for special machinery to gather the information requested by the Soviet delegate. The Soviet Union, however, objected to this resolution. It also faulted an Argentine compromise amendment that would have postponed the consideration of the Nepalese application for two weeks to "enable the government of Nepal to submit the (necessary) information." The amendment allegedly would have impaired Nepalese sovereignty. Eventually the Chairman of the Committee wrote the Nepalese authorities for more specific information. When received, the data was distributed to the delegates on Aug. 10. The Committee met again on Aug. 16; yet the Ukrainian delegate still thought he needed additional time to study the documents. The committee postponed decision for one week, and when it met again the delegate from the Soviet Union had this to say:

"(The delegation of the USSR) while not opposed to acceptance of the application of Nepal, would not vote for it, as it would be unfair to accept Nepal while the applications of a number of other governments had been systematically rejected." U.N. Security Council, 4th Year, Official Records, Committee on New Members, Meetings 31-34 (Doc. S/C.2/SR. 34 at 2) (1949).

(The summary above is based on Meetings 31-34 of the Committee on New Members.)

⁸³ In 1946 the Soviet Union vetoed the application of Portugal and Ireland without mentioning their wartime affiliations. That same year the Soviet Union voted for the admission of Siam, which had signed a Treaty of Friendship and Co-operation with

There has been a pattern, however, to voting on membership applications, and it is this pattern that has been crucial in determining the "weights" particular criteria have had in the membership process. In the early years of the Organization, when the Cold War was at its height, only "neutral" candidates were certain of admission to the United Nations. "Pro-Western" applicants invariably met a Soviet veto: "pro-Communist" applicants lost to a primarily "Western" voting majority.⁸⁵ With the Cold-War thaw in the mid-fifties, both camps in the bi-polar world relaxed their standards for determining the "neutrality" of particular candidates,⁸⁶ and traded applications one against the other.⁸⁷ "Neutral" candidates, by definition, were "willing to carry out (their Charter) obligations" to all the blocs in the world community. "Committed" applicants, again by definition, were "willing to carry out (their Charter) obligations to only one (or two) of the camps in our bi- (or tri-) polar world." For admission to membership, "neutral" candidates had only to possess certain physical characteristics, namely, a sizeable territory and population and a Foreign Office.⁸⁸ For "committed" applicants (with

Japan and then had declared war on Great Britain and the United States. In 1947 the Soviet Union charged that Ireland and Portugal had been sympathetic to the Fascist Powers, and had not offered justification for their wartime behavior. It again vetoed the two applications.

In 1946 the Soviet Union vetoed the applications of Ireland and Portugal and Jordan on the sole ground that these nations had not established "diplomatic relations" with the Soviet Union. That same year the Soviet Union voted for the admission of Siam, though it is not at all clear that that nation had recognized the Soviet Union or had exchanged diplomatic representatives with it at that time. See, generally, U.N. Security Council, Official Records, 55th-58th Meetings (Docs. S/P.V. 55-58) (1946); *ibid.*, 186th, 190th Meetings (Docs. S/P.V. 186, 190) (1947).

⁸⁴ *E.g.*, in 1946 the Soviet Union vetoed three membership applications on grounds that the applicants did not have "diplomatic relations" with a permanent Member of the United Nations, although this is not a criterion mentioned in Art. 4. More importantly, the Soviet Union did not take the trouble to relate the absence of diplomatic relations to a state's ability or willingness to carry out its international obligations.

⁸⁵ "In fact, of course, though founder members (particularly permanent members of the Security Council) have invoked each set of (membership) arguments, without much regard to consistency, they have generally been guided in their voting by a cruder set of considerations—namely whether a given applicant, if admitted to membership, would strengthen their 'side' in the United Nations or not. In general, as might be guessed, this has meant that the West has supported new admissions and the Communist bloc has been suspicious of them. It has also meant in fact and contrary to the clear intentions of the Charter, that applications have seldom been considered on individual merits but rather as a part of a general bargain, like the celebrated 'package deal' in 1955." Nicholas, *The United Nations as a Political Institution* 73 (1959). Mr. Nicholas' conclusions are documented in Goodman, *Some Thoughts on Chinese Representation in the United Nations* 20-44 (1962) (unpublished divisional paper on file at the Yale University Law Library).

⁸⁶ In 1956 the Soviet Union supported Japan's application for admission, and both the United States and the Soviet Union have voted favorably on the applications of the non-committed countries.

⁸⁷ *E.g.*, the deal involving Outer Mongolia and Mauritania in 1961.

⁸⁸ Rosalyn Higgins makes a different case. See Higgins, note 1 above, at 11-57, and her earlier article; Cohen, note 50 above.

the same characteristics) it was necessary first to find counterparts for them in another of the world camps, and second, to strike a deal for their admission.

United Nations procedures, as conceived in the early years, later tended to give way to insistent demands for "universality." Prior to 1955 the Security Council and the General Assembly voted on separate and single vetoable membership applications.⁸⁹ That year the delegates created a new and flexible procedure—the package deal—which one representative has described thus:

... the draft resolution (recommending fifteen applications) was proposed on the basis of an understanding that there be an over-all or en bloc admission; that is to say, it seeks a solution as a result of prior negotiations rather than on the basis of the application of well-known principles.⁹⁰

Since 1955, delegates have held these "prior negotiations" even outside the Security Council, and they have traded Assembly votes on one participation question for Council votes on another.⁹¹

Other techniques have also eroded the apparent formalities of Article 4; on occasion the United Nations has processed "membership" applications with but the slightest concern for procedural technicality. In 1947 Pakis-

⁸⁹ Note that in 1946 the U. S. proposed that a group of applicants be admitted in a "package deal." The Soviet Union, however, thought each candidate should be considered on its merits. Compare the following quote from the opinion of the International Court of Justice in the "Conditions of Admission of a State to Membership in the United Nations":

"The second part of the question concerns a demand on the part of a Member making its consent to the admission of an applicant dependent on the admission of other applicants.

"Judged on the basis of the rule which the Court adopts in its interpretation of Article 4, such a demand clearly constitutes a new condition, since it is entirely unconnected with those prescribed in Article 4. It is also in an entirely different category from those conditions, since it makes admission dependent, not on the conditions required of applicants, qualifications which are supposed to be fulfilled, but on an extraneous consideration concerning States other than the applicant State.

"The provisions of Article 4 necessarily imply that every application for admission should be examined and voted on separately and on its own merits; otherwise it would be impossible to determine whether a particular applicant fulfils the necessary conditions. To subject an affirmative vote for the admission of an applicant State to the condition that other States be admitted with that State would prevent Members from exercising their judgment in each case with complete liberty, within the scope of the prescribed conditions. Such a demand is incompatible with the letter and spirit of Article 4 of the Charter." [1948] I.C.J. Rep. at 64-65.

⁹⁰ U.N. General Assembly, Official Records, Ad Hoc Political Committee, Plenary Meeting 3 (Doc. A/AC.80/P.V.31).

⁹¹ In 1961 a package deal set Mauritania (and the votes of the West African states against Nationalist China on the participation issue) against Outer Mongolia (and the Nationalist Chinese veto on the Mongolian membership application). If the Nationalist Chinese rejected the Outer Mongolian membership application, the Soviet Union would veto Mauritania's application and this would trigger the West African vote to swing against retaining Nationalist China in the United Nations. Mauritania was admitted.

tan split from India (a Member of the United Nations),⁹² and sought participation in the Organization.⁹³ After modest controversy, its membership application was routed through the United Nations on the basis of a Secretariat memorandum,⁹⁴ which held Article 4 procedures and criteria applicable because Pakistan was a "new" state.⁹⁵ Pakistani membership, however, was a "*fait accompli*."⁹⁶ Pakistan's application was handled with unusual speed and without significant objection—more on the basis of informal consensus than strict procedures.⁹⁷

Article 4, moreover, has not been the only route to U.N. participation for territorial communities that were not Members of the Organization. In 1958 the U.A.R. sought participation after the merger of Egypt and Syria; in 1961 Syria sought participation after the dissolution of the U.A.R.⁹⁸ Neither claimant, when seeking participation, was then, in its form as claimant, a Member of the United Nations. In both cases, U.N. decision-makers included the claimants within the Organization, but by remarkably informal and *ad hoc* procedures, and without attempting to articulate criteria for decision. In 1961, for example, the President of

⁹² Cf. The Indian Independence (International Arrangements) Order of 1947, U.N. Doc. A/C.6/161.

⁹³ See generally Higgins, note 1 above, at 321-322; Laing, "Admission of Indian States to the United Nations," 43 A.J.I.L. 144 (1949); and Schachter, "The Development of International Law Through the Legal Opinions of the United Nations Secretariat," 25 Brit. Yr. Bk. Int. Law 91, 101-109 (1949).

⁹⁴ U.N. Press Release PM/473.

⁹⁵ "In the view of Dr. Ivan Kerno, Assistant Secretary General for Legal Affairs, the problem was analogous, from the viewpoint of international law, to the situation which arises when part of an existing state breaks away and becomes a new state. According to that theory there would be no change in the international status of India which continued as a state with all treaty rights and obligations as well as the rights and obligations in the United Nations. Therefore, following that theory of state succession, Pakistan would be regarded as having broken off and become a new state and, as a new non-Member state, must seek admission to the United Nations pursuant to the provisions of Article 4 of the Charter. . . . While this legal opinion was only intended for the guidance of the Secretariat, its ultimate effect was to plot the course which the Security Council and the General Assembly subsequently followed." Laing, *loc. cit.* note 93 above, at 146.

⁹⁶ Laing, *loc. cit.*

⁹⁷ "Some support for (the contention that Pakistan should be admitted automatically) was to be found among other delegations but it was not pushed with . . . vigor, the feeling being that the question of membership in this case was of the order of a *fait accompli* and that it was more important to set up principles applicable in future cases. . . . Throughout the controversy, there was never any question as to the desirability of India and Pakistan as Members. . . . Following established procedure, (Pakistan's) membership having been favorably reported upon by the Security Council, it was referred to the First Committee and reported by that Committee to the General Assembly. In the subsequent balloting the admission of Pakistan was approved by a vote of fifty-three to one. The negative vote was cast by Afghanistan, with which Pakistan was having some border disagreement. However, in accordance with later instructions received from his government, the Afghanistan delegate withdrew his negative vote and the admission of Pakistan was unanimous." Laing, *loc. cit.* note 93 above, at 146-148.

⁹⁸ See Security Council, 16th Year, Official Records, Supp. at 59-60 (Docs. S/4957 and S/4958).

the General Assembly spoke privately to its Members, and found no objection to the seating of Syria. In a morning session of the Assembly he proposed that Syria be seated that afternoon, but only if there were no protests.⁹⁹ There were none, and Syria that day assumed full participation in the United Nations.¹⁰⁰

2. "New" Territorial Communities that Claim to be "Members"

The United Nations Charter provides for neither systematic nor continuous appraisal of fundamental changes in the composition of the territorial communities that are Members of the United Nations.¹⁰¹ At best, Articles 5 and 6 of the Charter specify procedures and criteria for suspending and expelling Members.¹⁰² The vote under these articles is vetoable, however, and decisions occur when a territorial community already is acting as a participant in the Organization, rather than when it claims participation. Perhaps to circumvent these obstacles both the General Assembly and the Security Council have created informal methods for appraising change in a Member territorial community.

(a) *The General Assembly*.—The Credentials Committee of the General Assembly has been primarily responsible for appraising change in a Member.¹⁰³ It has generally ignored drastic changes in a Member's external alignments, even when a revolution meant that a United Nations Member would switch allegiances in the bi-polar world. Hungary is the one important exception.¹⁰⁴ In 1956 and for several years thereafter the

⁹⁹ U.N. Doc. A/4914, cited in Higgins, *op. cit.* note 1 above, at 324.

¹⁰⁰ Syria could have been classified—under state and governmental succession doctrine—as a "new" state, much as Pakistan was, and could have been forced through the formalities of Art. 4 procedures. In both the Syrian and Pakistani cases, the claimants' responsibility was unquestioned, and formal procedures were sacrificed for "universality" in the Organization.

¹⁰¹ Cf. Charter of the Organization of American States, Art. 3. Delegates to the San Francisco Conference virtually overlooked the consequences for the Organization of division within a Member body politic. See, generally, 3 UNCIO at, *e.g.*, 31–32, 60–61, 454–455, etc., and 7 *ibid.* at 11–12, 18–19, 24–25 and 34.

Delegates were more concerned with Chap. VI of the Dumbarton Oaks Proposals, which designated by name the permanent members of the Security Council. Mexico, for example, proposed that the permanent seats on the Council be called "semi-permanent" and that the Assembly review at the end of 8-year periods the allocation of seats in this category. 11 UNCIO 289.

¹⁰² McDougal, Lasswell and Vlasie, note 55 above, at 908–910; Sohn, "Expulsion or Forced Withdrawal from an International Organization," 77 Harvard Law Rev. 1381 (1964).

¹⁰³ See U.N. General Assembly, Official Records, Credentials Committee Reports, as follows: 6th Sess. (A/1983); 7th Sess. (A/2234); 8th Sess. (A/2490) (A/2593); 9th Sess. (A/2752) (A/2880); 10th Sess. (A/3027) (A/3091); 11th Sess. (A/3536); 12th Sess. (A/3773); 13th Sess. (A/4074); 14th Sess. (A/4346); 15th Sess. (A/4578) (A/4743); 16th Sess. (A/5055); 17th Sess. (A/5395); 18th Sess. (A/5676/Rev. 1).

¹⁰⁴ Note that in the Credentials Committee meetings for the 18th Session, Algeria, the U.S.S.R., and Liberia thought "the time had come for the U.N. to undertake a review of the validity of the credentials submitted by (South Africa)." The South African Government, in their view, was not "representative of the people of South Africa and . . . persistently violated the principles of the U.N. Charter and continued

Credentials Committee of the General Assembly refused to pass on the credentials of the Hungarian Delegation, purportedly because Hungary had not obeyed certain Assembly resolutions.¹⁰⁵

(b) *The Security Council*.—Except for the 1958 Iraqi revolution, the Security Council has not addressed itself to participation questions relating to change in the body politic of a Member. Not one of the major post-World-War-II revolutions has occurred in a body politic when it was a non-permanent member of the Security Council. The Council has never had to decide that a particular nation-state was, or was not, a body politic whose "newness" promised rejection of Charter principles. At best the Iraqi case¹⁰⁶ sketches a few relevant criteria. Iraq, a non-permanent member of the Security Council, had participated in Council discussions of the Lebanese question in 1958, when Kassim led a successful revolution against the Iraqi authorities. Almost immediately the new government sought to issue credentials to a new Iraqi representative at the United Nations;¹⁰⁷ concurrently, the Soviet Union challenged the credentials of Mr. Abbas, the then Iraqi representative.¹⁰⁸ In Council discussion, certain members thought it relevant that the revolutionary government was unrecognized.¹⁰⁹ A few argued that it came to power by unconstitutional means,¹¹⁰ and some questioned the continuing validity of the Iraqi-Jordan Union.¹¹¹ The Security Council delayed seating Kassim's delegation for some seven meetings. Here the principles of responsibility and flexibility seem to have influenced decision. Whether the same two principles will guide decision when the credentials of a permanent Council member are challenged is a question yet to be answered.

B. QUESTIONS OF SUBSEQUENT PARTICIPATION

1. Representation Cases

The United Nations Charter offers no explicit provisions for solving representation questions. United Nations practice, however, demands a

to defy numerous resolutions adopted by the U.N. organs . . ." U.N. General Assembly, 18th Sess., Official Records, Report of the Credentials Committee (Doc. A/5676/Rev. 1) at 2.

In the Credentials Committee meetings for each of the sessions cited at note 103, the Soviet Union has invariably challenged the credentials of the Government of the Republic of China.

¹⁰⁵ Cf. U.N. documents cited above, note 103, from the 11th Sess. through the 18th Sess. See also Higgins, *op. cit.* note 1 above, at 158-159.

¹⁰⁶ See, generally, Higgins, note 1 above, at 159-161.

¹⁰⁷ See the statement of the Secretary General to the Security Council, U.N. Security Council, Official Records, 827th Meeting, at 2 (Doc. S/P.V. 827) (1958). The letter was cited by the Russian delegate, Mr. Sobolev, at 3 and, according to him, had "been sent" to all the members of the Council.

¹⁰⁸ Per Sobolev, *ibid.* at 1, 2 and 3.

¹⁰⁹ I.e., Panama, U.N. Security Council, Official Records, 827th Meeting, at 3, 5 (Doc. S/P.V. 827) (1958); United Kingdom, *ibid.* at 2-3.

¹¹⁰ *Ibid.* at 5.

¹¹¹ *Ibid.* at 2, 3-4; U.N. Security Council, Official Records, 834th Meeting, at 3 (Doc. S/P.V. 834) (July 18, 1958).

full contextual analysis before decision: representation questions are to be decided "in the light of the Purposes and Principles of the Charter and the circumstances of each case."¹¹² Past United Nations and League decisions¹¹³ have looked openly to the authority of the claimants (measured by their adherence to constitutional forms and principles),¹¹⁴ the stability and effectiveness of their control over territorial and other resources,¹¹⁵ and their capacity and willingness to fulfill their international obligations.¹¹⁶ Two unstated factors have also been pertinent to League

¹¹² U.N. General Assembly, Res. 396 (V).

¹¹³ *I.e.*, in the U.N. the representation of Yemen in 1962 and the representation of the Congo in 1960; in the League of Nations, the representation of Ethiopia. The first two decisions are well summarized in Higgins, *op. cit.* note 1 above, at 161-164. The Ethiopian case is summarized in Walters, *History of the League of Nations* 623-669 (1952).

¹¹⁴ *E.g.*, the Congolese decision seemed to turn largely on the interpretation of the Congo's *Loi Fondamentale*. See the remarks of the delegates from Ghana, U.N. General Assembly, 15th Sess., Official Records, Plenary Meeting, at 883 (Doc. A/P.V. 918) (1960); the Camerouns, *ibid.* at 885-886 (Doc. A/P.V. 918); the Philippines, *ibid.* at 892 (Doc. A/P.V. 919); the Soviet Union, *ibid.* at 894-896 (Doc. A/P.V. 919); Guinea, *ibid.* at 907-911 (Doc. A/P.V. 920); the Congo (B), *ibid.* at 917-920 (Doc. A/P.V. 921); Czechoslovakia, *ibid.* at 924-925 (Doc. A/P.V. 921); Liberia, *ibid.* at 926 (Doc. A/P.V. 921); Poland, *ibid.* at 927 (Doc. A/P.V. 921); Bulgaria, *ibid.* at 933 (Doc. A/P.V. 921); Haiti, *ibid.* at 938-939 (Doc. A/P.V. 922); Albania, *ibid.* at 940 (Doc. A/P.V. 922); the Central African Republic, *ibid.* at 944-945 (Doc. A/P.V. 922); and the United States, *ibid.* at 957 (Doc. A/P.V. 923).

On the Yemen representation question, see, *e.g.*, remarks of the delegates of Jordan, U.N. General Assembly, 17th Sess., Official Records, Plenary Meeting, at 1220 (Doc. A/P.V. 1201) (1962); of Saudi Arabia, *ibid.* at 1222 (Doc. A/P.V. 1201) and at 1230-1231 (Doc. A/P.V. 1202); and of the U.A.R., *ibid.* at 1228 (Doc. A/P.V. 1202).

On the Ethiopian representation question, in its second report to the second session of the League Assembly, the Credentials Committee noted that the Ethiopian credentials were "derived from the same authority as had more than once in the past issued the full powers of the Ethiopian delegation to previous sessions of the Assembly." League of Nations Official Journal, 17th Assembly, at 40.

¹¹⁵ In the Congolese representation question, the issues of control were not at all clear when Mobutu and Lumumba sought to have their delegations represented at the United Nations. See, generally, U.N. Doc. A/4557 (1961), and the remarks of the representatives from Ghana, U.N. General Assembly, 15th Sess., Official Records, Plenary Meeting, at 884 (Doc. A/P.V. 918) (1960); and of the Philippines, *ibid.* at 892 (Doc. A/P.V. 919).

In regard to the Yemen representation question, *cf.* the remarks of the delegates of Jordan, U.N. General Assembly, 17th Sess., Official Records, Plenary Meeting, at 1220 (Doc. A/P.V. 1201); of Saudi Arabia, *ibid.* at 1222 (Doc. A/P.V. 1201); and of the U.A.R., *ibid.*

In the Ethiopian representation question, the League Credentials Committee described the Ethiopian situation thus:

"The Head of the State is in a foreign country; the Government is no longer in the capitol; according to some of the documents submitted a governmental authority is stated to be established in another part of the country. It seems exceptionally difficult to judge of the nature and extent of the power of that authority, and of the strength of the connection still existing between it and the Head of this State." League of Nations Official Journal, 17th Assembly, at 40 (1936).

¹¹⁶ In the Congolese representation question the Soviet Union and other Communist-bloc countries justified their votes against seating the delegation appointed by Mr.

and United Nations decisions: the legitimacy of origin of the candidates,¹¹⁷ and their dedication to a system of world public order.¹¹⁸ It is dangerous, however, to generalize about the "importance" of these factors to decision, for representation cases have been few in number and greatly diverse in factual context.

Considerable flexibility marks the procedures of past representation cases. In three cases, a Credentials Committee, acting by simple majority, appears to have been the responsible decision-maker.¹¹⁹ In one of these cases, however, the Credentials Committee was in effect a small summit, with representatives of the Great Powers replacing the regular Committee members.¹²⁰ In the two others, the full membership of the world organization debated the report of a Credentials Committee at considerable length and with great attention to the substantive impacts of decision.¹²¹

2. *Credentials Cases*

Credentials questions were all but ignored at the San Francisco Conference. Neither in the Charter nor in United Nations documents are there

Kasavubu on grounds that his regime was subservient to the United States, Belgium and colonialism generally. See, *e.g.*, the remarks of the Soviet Union representative at U.N. General Assembly, 16th Sess., Official Records, Plenary Meeting at 894-901 (Doc. A/P.V. 919). Questions of capacity and willingness to fulfill international obligations did not arise in the Yemeni case, but were of undoubted importance when the League Assembly voted to seat Haile Selassie's delegation. See, generally, Walters, *op. cit.* note 113 above, at 690.

¹¹⁷ This was a factor of undoubted importance in the Ethiopian case. The Credentials Committee decided to seat the Ethiopian Delegation because "(t)oo many Members of the Assembly were resolved not to be dragged any further along the path which they considered dishonorable." Walters, *op. cit.* note 113 above, at 690. On the Congolese decision, see, generally, the comments cited in footnote 93 above.

¹¹⁸ This was a factor of undoubted importance in the Ethiopian case. On the Yemen decision see the remarks of the Royalist-appointed delegate from Yemen, U.N. General Assembly, 17th Sess., Official Records, Plenary Meeting at 1221 (Doc. A/P.V. 1201) (1962). On the Congolese decision see the remarks of Czechoslovakia, U.N. General Assembly, 15th Sess., Official Records, Plenary Meeting at 922-923 (Doc. A/P.V. 921) (1960); of Bulgaria, *ibid.* at 933; and of the Ukrainian S.S.R., *ibid.* at 945 (Doc. A/P.V. 922).

For two representation decisions in the International Labor Organization, see Liang, "Recognition by the United Nations of the Representation of a Member State: Criteria and Procedure," 45 A.J.I.L. 689, 690 (1951).

¹¹⁹ *I.e.*, The Congolese, Yemeni and Ethiopian representation decisions.

¹²⁰ F. P. Walters has described the Ethiopian decision thus:

"In the past, the appointment of the Credentials Committee, and its proceedings, once appointed, had been a matter of quick-moving routine and necessary to the Assembly as to every other international conference, but totally devoid of political interests. Membership had been neither coveted nor avoided: the Secretary drew up a list, the Assembly accepted it. But on this occasion it proved difficult to find nine delegates willing to undertake so invidious a task. . . . Finally Eden and Delbos had to serve in person and Litvinov joined them, together with other willing delegates—an unexpected event, since hitherto the Committee had always been composed of delegates of the second and third rank." Walters, *op. cit.* note 113 above, at 690.

¹²¹ Debate on the Congolese question thus covers more than one hundred pages of General Assembly records.

explicit statements of the criteria for credentials decisions, and procedures for credentials approval originate in the Rules of Procedure for each organ, rather than in Charter articles.¹²² In United Nations practice, the Assembly's Credentials Committee has usually examined only the authenticity of the documents submitted to it, the identity of the delegates and the scope of the powers conferred on them.¹²³ There appear to have been no genuine credentials questions in the Security Council.

V. PAST TRENDS IN DECISION AND THEIR APPLICATION TO THE CHINESE PARTICIPATION QUESTION

I.S.A.'s argument
reflect international community's view
is still going on

In factual context the Chinese participation question is unique among past participation decisions. The two claimants each control more extensive bases of power than do many United Nations Members; one, indeed, is the world's most populous country. Nationalist China, which has always sat as the "State of China" at the United Nations, has had astonishing continuity in leadership, institutions and policy since the San Francisco Conference. Yet the bases of power it now commands, however extensive, are but a fraction of those it controlled when it became an original Member of the United Nations. Communist China, on the other hand, now governs the mainland of "China," but in leadership, cultural identification, social structures, institutions, objectives and strategies it is radically different from the "China" that participated in the founding of the United Nations. Nationalist China and Communist China—spatially separate and at loggerheads for some fifteen years—have in fact become two distinct territorial communities. Yet both are loath to admit this, and neither is willing to adjust its participation claims to contemporary realities. No international organization has ever faced a participation question so complex in factual context or so consequential in potential value outcomes.

A. PAST TRENDS IN SUBSEQUENT PARTICIPATION QUESTIONS AND THEIR APPLICATION TO THE CHINESE PARTICIPATION QUESTION

The Chinese participation question is not simply a problem of subsequent participation in the United Nations. It is distinct in factual context.¹²⁴ It is only indirectly concerned with the validity and authenticity

¹²² See note 11 above.

¹²³ See, e.g., the documents cited at note 103 above.

¹²⁴ In a relatively recent press conference (May 27, 1964; note No. 2932, p. 8), Secretary General U Thant offered a summary of perspectives as follows:

"The question of the admission or representation of China is sure to come up in the next session of the General Assembly. Regarding this question, as you are no doubt aware, there are two schools of thought. One school maintains that the question is one of the admission of China—the admission of a new Member State. This position has been held by the majority of the Member States. On the other hand, there is another school of thought which maintains that the question is one of representation and not admission. They argue that China is already a Member of the United Nations, China being a founding Member of the United Nations. The question is,

of a delegate's credentials; its real thrust goes to the authority of the individuals who, and the territorial communities which, issue the credentials.¹²⁵ Similarly, although it is commonly labeled as such, the Chinese participation question is not merely a "representation" question. Whatever the Chinese claim, China's civil war has been stalemated. Two competing governments are not struggling for power within one territorial community; rather, two different territorial communities seek disparate goals in the world arena.

In facts relevant to law, the China participation question bears no resemblance to past questions of subsequent participation. In legal essence it is a problem in the interpretation of fundamental constitutional prescription, and should be determined in accordance with the more fundamental policies sought by the Charter.¹²⁶ United Nations practice on the Chinese participation question is sharply distinct from its practice on questions of subsequent membership. Both the Security Council and the General Assembly have passed on the Chinese participation question; the Security Council has never decided on questions of subsequent participation. A Security Council seat and Great-Power status are at stake in the Chinese participation question; past subsequent participation decisions have never dealt with issues of such overriding importance. The Chinese participation question has been considered important for voting purposes under Article 18; past subsequent participation decisions have invariably been decided by a simple majority. Debates on the Chinese participation question have examined all characteristics of the two claimants; the criteria for past credentials questions are extraordinarily narrow in focus, and the criteria for past representation decisions are few and poorly articulated. Decision on the Chinese participation question, finally, could exclude a territorial community from the United Nations. No subsequent participation decision has had such extraordinary impacts.

In terms of immediate policy consequences it is likewise untenable to classify the Chinese participation question as a subsequent participation question. Let us assume that Communist China were seated by special majority vote as "China" in the General Assembly. It would not necessarily follow that Communist China would sit as "China" in the Security Council.

First, the Assembly resolution seating the Chinese Communists could not and would not dictate voting in the Security Council. Assembly Resolution 396(V) stipulated only that Assembly resolutions on "representa-

who should represent China? This is a concept held by some of the Members who, of course, form the minority. So, on this, I am not competent to take a public position. Of course, I have to abide by the decision of the General Assembly when it meets in the fall."

¹²⁵ Fitzmaurice, "Chinese Representation in the United Nations," 8 Year Book of World Affairs 36 (1952), notes that, in passing on the Chinese participation question, Members will vote "in the light of their view as to the status (of the authority issuing credentials) and its right to act on behalf of the State concerned . . ." (p. 39).

¹²⁶ See Pollux, "The Interpretation of the Charter," 23 Brit. Yr. Bk. Int. Law 54 (1946).

tion" questions should be "taken into account" by other organs of the United Nations. Often-repeated doctrines which might prevail in this context, though requiring qualification in others, are that each organ of the United Nations is autonomous in interpreting the Charter, and that Assembly resolutions are "recommendatory" and not "binding." Members, finally, have noted that their position on the Chinese participation question in the Assembly would not prejudice action elsewhere in the Organization.¹²⁷

Second, the Council vote on the Communist Chinese participation question is a question of substance under Article 27.¹²⁸ Assuming that a permanent member vetoes the Communist Chinese claim, the United Nations would face the dilemma of having Nationalist China sit as "China" on the Security Council, and Communist China sit as "China" in the General Assembly.

This seating pattern could be disastrous for the Organization. Nationalist China could sit in the General Assembly only if it were to apply for membership as a territorial community other than "China"; it would further be in the unusual position of passing on its own membership application. It would be extraordinarily difficult to apportion the budget between the two Chinas, to select members of the Secretariat from "China," and to recruit United Nations forces from "China." On issues requiring votes in both the General Assembly and Security Council, the two Chinas may cast opposing ballots. Conceivably Communist China could not be elected to non-permanent membership in the Council.

The results would be equally unwelcome if the Security Council vote should, by some quirk, be regarded as procedural. There would still be lack of uniformity in the seating of "China" if Nationalist China won the procedural vote. If, however, Communist China were seated on the Council, Nationalist China, with a territory and population larger than those of many U.N. Members, and with an enviable record in the United Nations and in the international community, would be perpetually excluded from the Organization. As a permanent member of the Council, Communist China would possess a veto on membership applications. It would be fanciful to imagine that Communist China (in the absence of prior agreement) would refrain from vetoing a Nationalist China membership application.

B. PAST TRENDS IN INITIAL PARTICIPATION AND THEIR APPLICATION TO THE CHINESE PARTICIPATION QUESTION

In factual context the Chinese participation question resembles past questions of initial participation. The "State of China" is a signatory of the United Nations Charter and an "original Member" of the United

¹²⁷ See the statement of the representative of the United Kingdom explaining his government's vote on the China question in the 17th Session of the General Assembly: General Assembly, 17th Sess., Official Records, 1162nd Meeting, at 648, 649 (1962).

¹²⁸ See text below.

Nations. The original state of China has, however, undergone tremendous changes in patterns both of authority and effective control, and two different territorial communities now claim to be the state of China. The community that is called the "Peoples' Republic of China" has, indeed, changed so drastically that its present perspectives and operations are completely antithetical to the basic principles of the U.N. Charter and even threaten the Organization itself. Some further examination of the factual context, spotlighting patterns both of change and continuity in authority and effective control over people and resources, is an indispensable prelude to rational appraisal of past trends of decision in relation to the Chinese participation question.

1. *Communist China as a "New" Entity*

To appreciate the extent of change in Communist China, it is enough for present purposes to review an insightful analysis by a leading modern Sinologist, Professor A. Doak Barnett.¹²⁹ Change in Communist China, writes Professor Barnett, has been "more far-reaching, rapid and thorough than at any time in (China's) long history."¹³⁰ In comparative perspective, it is one of the "few instances in history . . . where the process of social, political, and economic change has appeared to be so drastic, rapid and extensive."¹³¹ Although post-1949 change finds its roots in Chinese history,

the Communists have accelerated the pace of change so greatly that what has occurred in recent years appears, in many instances, to bear little relation to what went on before 1949. The change in degree has in many instances been so great, in short, that it amounts virtually to a change in kind.¹³²

This "process of revolutionary change" has occurred at a "breakneck pace."¹³³ "In many areas of Chinese life, the pace of change has been maintained, and even accelerated, despite all the resistance deeply imbedded in Chinese culture."¹³⁴ "Every aspect of Chinese society has been

¹²⁹ What we seek to establish by this review is that the mere fact that Communist China now has control over most of the people and territory of the original state of China does not identify it as the "Republic of China" upon which the United Nations Charter conferred membership. A state, it may be recalled, is more than mere territory and people: it is a "body politic" which exhibits both an internal governmental and social organization and a pattern of external relations. The state of China upon which the framers and ratifiers of the United Nations Charter thought they were conferring membership certainly is not in any factual sense the same state, as Professor Barnett's detailed description makes clear, which today exhibits itself upon the mainland. If a decision be taken, by way of legal fiction, to regard it as the "same" state, the question becomes: for what policies and with what probable consequences for world public order?

¹³⁰ Barnett, *Communist China in Perspective* 27 (New York: Frederick A. Praeger, Inc., 1962); we are indebted to the author and to the publishers for permission to make extensive use of materials from the book. Cf. Schurmann, *Ideology and Organization in Communist China* (1966).

¹³¹ Barnett, *op. cit.* 27.

¹³³ *Ibid.* at 38.

¹³² *Ibid.* at 46.

¹³⁴ *Ibid.* at 39.

affected, and virtually every one of China's 650-700 million people has been touched in significant ways."¹³⁵

The Communist Chinese have worked profound change in the demands and expectations of their citizenry. Their "Marxist-Leninist-Stalinist-Maoist" ideology "has become a new orthodoxy in China, one that the Chinese Communists insist should replace totally not only traditional Confucian values but also the many competing ideological forces that have penetrated China from the West during the modern period."¹³⁶ The new regime would replace the "ideas of harmony, compromise, adjustment, and stability, which have been so important in the past,"¹³⁷ with "a very different set of values and attitudes, emphasizing struggle, change, progress and innovation."¹³⁸ The family "is currently undergoing a fundamental transformation."¹³⁹ The Communists "are trying as rapidly as possible to minimize the family's functions and to make it clearly subordinate to other political and economic institutions." They propose to "create a new generation whose loyalties to the Party and the state will be so strong as to take precedence automatically over loyalties to the family or any other group."¹⁴⁰ "The traditional relationships of different age groups appear to be changing basically." Women are to have "an entirely new role."¹⁴¹

There has also been fundamental change in the individual's group relations. "A new class structure ("very different from any in China's past")¹⁴² has already emerged." A number of traditional classes—including the landlord-gentry class—"have, for all practical purposes, disappeared . . ."¹⁴³ The military has experienced a "spectacular rise" in "social prestige."¹⁴⁴ The older intellectuals "have . . . been subjected to vigorous indoctrination and severe political controls," and "a new young Communist intelligentsia . . . has slowly begun to replace them."¹⁴⁵ The "business, industrial and commercial" classes have been almost completely "absorbed"¹⁴⁶ into the Communist Chinese economic bureaucracy. The mainland populace has been politicized, bureaucratized, and regimented at an "accelerated rate."¹⁴⁷

Even the individual's cultural life has been affected. The Chinese language, in both its written and spoken forms, is "undergoing a revolutionary change."¹⁴⁸ No longer is there free expression in art; art now is to "serve the cause of revolution." Indeed, "a new utilitarian and revolutionary philosophy of aesthetics motivates the Chinese Communists' approach to art and literature."¹⁴⁹

¹³⁵ *Ibid.* at 27.

¹³⁷ *Ibid.* at 37-38.

¹³⁹ *Ibid.* at 34.

¹⁴¹ *Ibid.* at 35.

¹⁴³ *Ibid.* at 32.

¹⁴⁵ *Ibid.* at 33.

¹⁴⁷ *Ibid.* at 30.

¹⁴⁹ *Ibid.* at 36.

¹³⁶ *Ibid.* at 37.

¹³⁸ *Ibid.* at 38.

¹⁴⁰ *Ibid.*

¹⁴² *Ibid.* at 33.

¹⁴⁴ *Ibid.* at 35.

¹⁴⁶ *Ibid.*

¹⁴⁸ *Ibid.* at 35.

More dramatic has been the change in leadership objectives:

The Chinese Communist aim has been to alter, fundamentally, the entire nature of Chinese society; its political system—the exercise of leadership and the distribution of power; its economic structure—the ownership, organization, and management of production, as well as the distribution of output; its social structure—the pattern of existing classes and groups and their inter-relationships; and its basic ideology and system of values—the common assumptions generally held about the nature of man and his relationship to the universe, to society, and to his fellow man.¹⁵⁰

To achieve these objectives, the Communist Chinese have transformed the institutions of mainland China. The governmental structure, based on the Soviet model, is a “great innovation . . . for China,”¹⁵¹ and governmental functions have increased “enormously.”¹⁵² “An even more striking innovation has been the creation of innumerable mass political organizations. . . .” which “serve as unprecedented channels for extending the outreach of central political power. . . .” The Communists have also created “the strongest and most unified, centralized, modernized, and politicized army in Chinese history. . . .”¹⁵³ Economic institutions have been “fundamentally altered”¹⁵⁴ to yield “an unprecedented degree of state mobilization, allocation, and direction of China’s material and human resources.”¹⁵⁵ “Almost all the traditional, nongovernmental social institutions that were so important in China in the past have gone into eclipse.”¹⁵⁶

At the base of these institutional changes has been the Communist Party of China. “The political, social, and economic leadership of China has changed hands at almost every level . . .” since 1949, and “an almost entirely new leadership group—the Chinese Communist Party and its various supporters—has assumed control.” A “new political elite, a new ruling ‘class,’ has taken over.”¹⁵⁷ And this party practices a type of discipline “that most observers, before the Communist take-over, would have labelled ‘un-Chinese’ . . .”¹⁵⁸

These institutional developments dramatize Communist Chinese control over mainland resources. China’s “first effective totalitarian regime” has restored “centralized rule over most of the traditional Chinese empire. . . .”¹⁵⁹ “The entire economy has been restructured.” “Property and income have been drastically redistributed, and . . . wealth has been dramatically leveled.” As for the mainland Chinese populace,

[t]he Communists in China are true believers in, and practitioners of, “totalism,” involving maximum control and supervision of ordinary people’s lives, maximum involvement of the entire Chinese population in state-directed activities, maximum control over people’s thoughts and behavior, and maximum mobilization of China’s millions to serve the purpose of the nation’s new Communist regime.¹⁶⁰

¹⁵⁰ *Ibid.* at 27.

¹⁵² *Ibid.* at 30.

¹⁵⁴ *Ibid.* at 32.

¹⁵⁶ *Ibid.* at 33–34.

¹⁵⁸ *Ibid.* at 29.

¹⁶⁰ *Ibid.* at 31.

¹⁵¹ *Ibid.* at 29.

¹⁵³ *Ibid.*

¹⁵⁵ *Ibid.* at 31.

¹⁵⁷ *Ibid.* at 28.

¹⁵⁹ *Ibid.* at 28.

It is added that "remarkable new techniques and methods for propagandizing and indoctrinating the population have been developed to a level of great effectiveness."¹⁶¹

In the international arena change in Communist China has been equally obvious. Communist China has not merely "leaned to one side." It has moved in political orientation from the right-center of the free-world nations to the extreme left of the Communist bloc,¹⁶² and its alliances differ drastically from pre-1949 China's.¹⁶³ Communist China's short-term and long-range objectives are totally different from its predecessor's, and its actions, instead of promoting the peaceful resolution of disputes, threaten the foundations of world order.¹⁶⁴ Communist China, indeed, has virtually proclaimed itself a "new" state, for it has claimed for itself the exclusive right to decide which of its predecessor's treaty obligations it would honor, and which it would not.¹⁶⁵

¹⁶¹ *Ibid.* at 30.

¹⁶² *Ibid.* at 30. For general analyses of Communist China's foreign policy, see Barnett, *Communist China and Asia* (1960) and sources cited at pp. 558-559; *idem* (ed.), *Communist Strategies in Asia* (1963); Boyd, *Communist China's Foreign Policy* (1962) and sources cited at pp. 142-144; Cooley, *East Wind Over Africa* (1965); Clubb, *Twentieth Century China* (1964), esp. pp. 368-395; Halperin, *China and the Bomb* (1965); Halperin and Perkins, *Communist China and Arms Control* (1965); Halperin and Tsou, "Mao Tse-tung's Revolutionary Strategy and Peking's International Behavior," 59 *Am. Pol. Sci. Q.* 80 (1965); Halpern, "China in the Postwar World," 21 *China Quarterly* 20 (1965); *idem*, "Communist China's Foreign Policy: The Recent Phase," 11 *China Quarterly* 89 (1962); *idem* (ed.), *Policies Toward China: Views from Six Continents* (1965); Hinton, *Communist China in World Politics* (1966); *idem*, *Communist China's External Policy and Behavior as a Nuclear Power* (1963); Hsieh, *Communist China's Strategy in the Nuclear Era* (1962); Pentony (ed.), *China, The Emerging Red Giant* (1962), particularly the North and Whiting articles at pp. 48 and 53, respectively.

¹⁶³ For charts listing, as of March 1, 1965, the countries recognizing either the People's Republic of China or the Government of the Republic of China, see Halpern, *Policies Toward China: Views from Six Continents* 496-501 (1965).

¹⁶⁴ Authoritative statements of Communist Chinese views on war and peace occur throughout *The Polemic on the General Line of the International Communist Movement*, a volume published by the Foreign Languages Press, Peking, in 1965, which contains major editorials from the People's Daily and Red Flag from the 1963-1964 period (cited as "Polemic").

For comparative analysis of, and documents on, Communist Chinese and Soviet views of minimum order and other issues, see Brzezinski, *The Soviet Bloc: Unity and Conflict* (1961); Crankshaw, *The New Cold War: Moscow v. Peking* (1963); Dallin (ed.), *Diversity in International Communism* (1963), especially the introduction; Griffith, *Albania and the Sino-Soviet Rift* (1963); Griffith, *The Sino-Soviet Rift* (1964); Mosely, "The Chinese-Soviet Rift: Origins and Portents," 42 *Foreign Affairs* 11 (1963); Lowenthal, *World Communism: The Disintegration of a Secular Faith* (1965); Zagoria, *The Sino-Soviet Conflict* (1962). For other sources see Griffith, *The Sino-Soviet Rift* 491-492 (1964).

¹⁶⁵ For a recent explanation of this policy, see People's Daily, "A Comment on the Statement of the Communist Party of the U.S.A.," March 8, 1963, in 10/11 *Peking Review* 58, 61 (March 15, 1963).

2. *The Consequences of Change in Communist China for United Nations Policies*

Communist China's newness explicitly promises ill for the United Nations.¹⁶⁶ At present the government's stated long-range foreign policy objectives are antithetical to the purposes of the U.N. Charter. It has challenged the right of the United Nations to exist as a world organization, demanded institutional changes in the Organization, and acted in so strident a fashion in other organizations as to belie the possibility that it would co-operate, even on procedural matters, with the Members of the United Nations. In public pronouncement and occasional action Communist China has challenged virtually every exercise of U.N. powers. It has either ignored or maligned United Nations efforts for decolonialization. It has opposed virtually all United Nations actions for the maintenance of international peace and security. It has refused to participate in disarmament conferences under the aegis of the United Nations, and its own disarmament proposals have been near facetious. It has, finally, deprecated United Nations attempts at economic and social co-operation.

The principal purposes of the United Nations are twofold: "to maintain international peace and security". . . (and) "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . ."¹⁶⁷ Contrast these objectives with the following statement, regarded by many as authoritative, of Communist Chinese global strategy—a statement demonstrating that Communist China has projected onto the world arena the strategy it used successfully in its civil war:

It must be emphasized that Comrade Mao Tse-tung's theory of the establishment of rural revolutionary base areas and the encirclement of the cities from the countryside is of outstanding and universal practical importance for the present revolutionary struggles of all the oppressed nations and peoples, and particularly for the revolutionary struggles of the oppressed nations and peoples in Asia, Africa and Latin America against imperialism and its lackeys.

Many countries and peoples in Asia, Africa and Latin America are now being subjected to aggression and enslavement on a serious scale by the imperialists headed by the United States and their lackeys. The basic political and economic conditions in many of these countries have many similarities to those that prevailed in old China. As in China, the peasant question is extremely important in these regions.

¹⁶⁶ For a comprehensive, authoritative analysis of Communist China's view of the United Nations, consult Adams, *Communist China and the United Nations* (1964) (Master's essay on file at the Burgess-Carpenter Library of Columbia University).

The Chinese Communists have been no less kind to the League of Nations:

"... the League of Nations is a League of Robbers by which the various imperialisms are dismembering China. The principal task of the Lytton Commission of Enquiry sent to China by the League was to prepare the dismemberment of China and the repression of all the revolutionary movements that have raised the flag of the Chinese Soviets." From a telegram, dated Oct. 6, 1932, and signed (*inter alia*) by Mao Tse-tung, in Schram, *The Political Thought of Mao Tse-tung* 266-267 (1963).

¹⁶⁷ U.N. Charter, Art. 1, pars. 1, 2.

The countryside, and the countryside alone, can provide the broad areas in which the revolutionaries can manoeuvre freely . . . [and] can provide the revolutionary bases from which the revolutionaries can go forward to final victory. Precisely for this reason, Comrade Mao Tse-tung's theory of establishing revolutionary base areas in the rural districts and encircling the cities from the countryside is attracting more and more attention among the people in these regions.

Taking the entire globe, if North America and Western Europe can be called "the cities of the world," then Asia, Africa and Latin America constitute "the rural areas of the world." Since World War II, the proletarian revolutionary movement has for various reasons been temporarily held back in North American and West European capitalist countries, while the people's revolutionary movement in Asia, Africa and Latin America has been growing vigorously. In a sense, the contemporary world revolution also presents a picture of the encirclement of the cities by the rural areas. In the final analysis, the whole cause of world revolution hinges on the revolutionary struggles of the Asian, African and Latin American peoples who make up the overwhelming majority of the world's population. The socialist countries should regard it as their internationalist duty to support the people's revolutionary struggles in Asia, Africa and Latin America.¹⁶⁸

It is this last issue—the Communist-bloc support of "national wars of liberation" and "revolutionary civil wars"¹⁶⁹—that jars most sharply against the United Nations' dedication to minimum order. For the past eight years the Chinese Communists have urged greater risk-taking on the Communist bloc.¹⁷⁰ Their position rests basically on five propositions: (1) ". . . the U. S. imperialists are the wildest militarists of modern times, the wildest plotters of a new world war, and the most ferocious

¹⁶⁸ Lin Piao, "Long Live the Victory of People's War," in 36 Peking Review 9, 14 (Sept. 3, 1965). See also Resolution of the Indonesian Communist Party, in 13 *ibid.* 17 (March 27, 1964), analyzed by Tsou, "Mao Tse-tung and Peaceful Coexistence," 8 *Orbis* 36, 42 (1964).

Lin Piao's statement seems a chimerical rendition of the more traditional "united front" tactic. Cf. Statements by Mao Tse-tung, 20 Peking Review 6 (May 14, 1965), and 5 *ibid.* 5 (Jan. 31, 1964).

¹⁶⁹ It is not unlikely that the Communist Chinese will adjust their strategy, at least temporarily, if they continue to suffer strategic defeats in the Afro-Asian world. For valuable and analogous insights, see Brzezinski and Huntington, *Political Power: USA/USSR* (1964). For a Communist Chinese response to the Hilsman thesis, which held out the promise of more salutary U.S.-Communist Chinese relations to the second generation of Peking leaders, see 30 Peking Review 19 (July 24, 1964); see also People's Daily, "Cultivating and Training Millions of Successors to Proletarian Revolution," Aug. 3, 1964, in 32 *ibid.* 12 (Aug. 7, 1964).

¹⁷⁰ This is the opinion of many specialists on Communist Chinese foreign policy. See, e.g., Barnett, *Communist China in Perspective* 80; Halperin, *China and the Bomb* 13-14 (1965); Halpern, "China in the Postwar World," note 162 above, at 36-38; Hinton, *op. cit.* note 162 above, at 155-156; Hsieh, "The Sino-Soviet Nuclear Dialogue: 1963," 8 *Journal of Conflict Resolution* 99, 105 (1964); Lowenthal, "China," in Brzezinski (ed.), *Africa and the Communist World* 142, 149 (1963); Mosely, note 164 above, at 16-17; Tsou, "Mao Tse-tung and Peaceful Coexistence," 8 *Orbis* 36, 44 (1964); Zagoria, note 164 above, at 245-246.

enemy of world peace";¹⁷¹ (2) since 1957 the Communist bloc has had moral and material superiority over the free world;¹⁷² (3) the Afro-Asian world—the "storm center" of "world revolution"—is a prime present target for the Communist bloc;¹⁷³ (4) it is unlikely that national wars of liberation will escalate into world wars;¹⁷⁴ and (5) the cost of possible escalation is more than offset by probable gains.¹⁷⁵

For the fifth proposition, we do well to recall Mikhail Suslov's recent analysis,¹⁷⁶ discounting, of course, its possible polemic content:

In their fight against the Leninist policy of peaceful coexistence, which they counter with the idea of giving revolution a "push" by means of war, the CPC leaders have gone as far as to assert that war is an acceptable and, in fact, the only means of settling the contradictions between capitalism and socialism. They ignore the experience of

¹⁷¹ Editorial Departments of the People's Daily and Red Flag, "Two Different Lines on the Question of War and Peace," in Polemic, note 164 above, at 221, 235.

The U. S. nuclear threat was a principal stated justification for the first of Communist China's nuclear tests. Statement of the Government of the People's Republic of China, Oct. 16, 1964, in 42 Peking Review, Spec. Supp. ii (Oct. 16, 1964).

¹⁷² The United States, in the Communist Chinese view, is over-extended. Lo Jui-ching, "Commemorate the Victory Over German Fascism! Carry the Struggle Against U. S. Imperialism Through to the End!" (published in Red Flag), in 20 Peking Review 7, 13 (May 14, 1965); Peng Chen, speech of May 25, 1965, in 24 *ibid.* 10, 13 (June 11, 1965); People's Daily, "A Great People, A Glorious Banner," Dec. 20, 1964, in 52 *ibid.* 11, 12 (Dec. 25, 1964).

¹⁷³ See, e.g., Shih Tsu-chih, "The Fundamental Path for the Liberation Movements in the Colonial and Semi-Colonial Areas," in Studies in International Affairs, No. 5, May 3, 1960, 6024 JPRS 41-55; Chou En-lai, speech of Dec. 25, 1963, "African People's Example of Daring to Wage Armed Struggle and Seize Victory," in 1 Peking Review 34 (Jan. 3, 1964); Zagoria, note 164 above, at 360; Chou En-lai, speech of Jan. 8, 1964, in 3 Peking Review 18, 21 (Jan. 17, 1964).

¹⁷⁴ "... (the Chinese Communists) seem to have been guided not by a desire to bring on a general war but by the *perhaps correct calculation* that more vigorous Soviet action would not lead to general nuclear war." (Italics curs.) Halperin, note 162 above, at 14; see also *ibid.* at 39; Halperin and Perkins, note 162 above, at 58; Hinton, Communist China in the World Community 155 (1966); Zagoria, note 164 above, at 356-357.

¹⁷⁵ See particularly Zagoria, note 164 above, at 312-316. Armed struggle has been the "correct path" in Cuba (31 Peking Review 20 (July 31, 1964)); in the Congo (People's Daily, "No Change of Horses in the Congo Can Save the U.S. from Defeat," in part in 29 Peking Review 33, 34 (July 17, 1964)); in Malaya (C.P.C.C.C. letter of April 15, 1965, to the Central Committee of the Malayan Communist Party, in 19 Peking Review 6 (May 7, 1966)); for "Africans Who Want to Win and Sustain Independence" (People's Daily, "Long Live the Free and Independent New Africa," April 15, 1965, in 16 Peking Review 9, 11 (April 17, 1964)); in Algeria, Chou En-lai, speech of Dec. 25, 1964, in 1 Peking Review 29 (Jan. 3, 1964)).

¹⁷⁶ Cf. XVI (13) CDSP 5, 9-10 (April 22, 1964). Recent Communist Chinese policy pronouncements still possess the ardor Suslov has described: "The peoples want revolution and liberation, and there is no weapon that can intimidate them. The atom bomb can scare only the cowards who have lost their revolutionary will, it cannot scare revolutionaries." Lo Jui-ching, "The People Defeated Japanese Fascism and They Can Certainly Defeat U. S. Imperialism Too," speech of Sept. 3, 1965, in 36 Peking Review 31, 33 (Sept. 3, 1965); see also Statement of the Government of the People's Republic of China, 11 *ibid.* 6, 7 (March 12, 1965); Liu Ning-i, speech of July 28, 1965, in 32 *ibid.* 23 (Aug. 6, 1965); 20 *ibid.* 13 (May 14, 1965).

the world Communist movement and exalt the road of the victorious revolution in China as something absolute, trying to make it an incontrovertible truth for all countries and peoples. On every occasion, whether suitable or not, Chinese propaganda quotes what Mao Tse-tung said about war and peace in the thirties, during the civil war in China.

Among the widely popularised statements of Mao Tse-tung are the following: "the war to be waged by the overwhelming majority of mankind will pass into a new era in history;" "the world can only be reorganised by means of the rifle;" "we stand for abolishing war, we have no use for it, but war can only be abolished through war. If you want rifles to go out of existence, take to the rifle."

Almost three decades have passed since those statements were made. Radical changes have occurred in the world—the world socialist system has formed and has become a mighty force. . . .

The Chinese leaders refuse to take all [this] into consideration. Plainly showing off their irresponsible attitude, they affirm that a nuclear bomb is a "paper tiger" and in no way affects the issue of war and peace. In keeping with this logic, which runs counter to elementary common sense, Mao Tse-tung, speaking at the Moscow meeting in 1957, argued that the struggle for socialism even stood to gain from a world thermonuclear war. "Can one foresee," he said, "the number of human lives that the future war may take? It may be one-third of the 2,700 million inhabitants of the world, that is, a mere 900 million people. . . . I had an argument over this matter with Nehru. He is more pessimistic in this respect than I. I told him that should half of mankind be destroyed, the other half would survive; in return, imperialism would be wiped out completely and there would be only socialism in the world. In half a century or a whole century the population would grow again—even by more than half." ¹⁷⁷

When proposing strategies for the Communist bloc, the Communist Chinese have not stopped at urging increased risk-taking in national wars of liberation; they have urged that the bloc participate to a greater extent

¹⁷⁷In detailed exposition of the Chinese Communist attitude toward nuclear war, Suslov continues to document the Chinese unconcern with the certain destruction of large numbers of individuals, Communist and non-Communist:

"This concept is even more lucidly expressed in the collection of articles *Long Live Leninism!* which the CC CPC has approved and is circulating. 'On the ruins of fallen imperialism,' it says, 'the victorious people will build a thousand times more wonderful future at an extremely rapid rate.' That is the kind of ultrarevolutionary verbiage, complete political irresponsibility that is particularly dangerous because it is being demonstrated by people standing at the helm of a large socialist country.

"Here it would be appropriate to recall certain facts. When in a conversation with Tao Chu, member of the CC CPC, a Czechoslovak journalist mentioned that in the event of a thermonuclear war the whole of Czechoslovakia, where 14 million people live, might be destroyed, the answer he received was: 'In the event of a war of annihilation, the small countries in the socialist camp will have to subordinate their interests to the common interests of the camp as a whole.' Another high-ranking CPR official told Soviet representatives that Comrade Togliatti, General Secretary of the Italian Communist Party, was wrong when expressing anxiety for the fate of his people he said that if a thermonuclear war broke out the whole of Italy would be destroyed. 'Other people will remain,' declared this official, 'and imperialism will be wiped out. . . .'" *Ibid.*

in "local wars."¹⁷⁸ For local Communist parties, they have virtually denied the possibility of peaceful change.¹⁷⁹ In this last context it may be well to recall portions of an official Communist Chinese statement:

... in no country should the proletariat and the Communist Party slacken their preparations for the revolution in any way. They must be prepared at all times to repulse counter-revolutionary attacks and, at the critical juncture of the revolution when the working class is seizing state power, to overthrow the bourgeoisie by armed force if it uses armed force to suppress the people's revolution (generally speaking, it is inevitable that the bourgeoisie will do so).

In the present situation of the international communist movement, *it is advantageous from the point of view of tactics to refer to the desire for peaceful transition.* But it would be inappropriate to over-emphasize the possibility of peaceful transition. The reasons are:

* * * * *

1. If too much stress is laid on the possibility of peaceful transition, and especially on the possibility of seizing state power by winning a majority in parliament, it is liable to weaken the revolutionary will of the proletariat, the working people and the Communist Party and disarm them ideologically.

2. To the best of our knowledge, there is still not a single country where this possibility is of any practical significance.¹⁸⁰ (Our italics.)

Events have, unfortunately, demonstrated that there is more than fire-eating rhetoric to these goal statements. Communist China has participated in "local wars" in Korea in 1950,¹⁸¹ in Quemoy and Matsu in 1955

¹⁷⁸ "Local" wars, in Communist terminology, are wars started by the "imperialist powers"; "wars of national liberation" are begun by indigenous Communist or nationalist forces. See Halperin and Perkins, note 162 above, at 57, and Zagoria, note 164 above, who describes at pp. 195-199 Sino-Soviet differences over the handling of the Middle East crisis of 1958.

¹⁷⁹ "At (the 1957 Moscow meeting of Communist parties), the chief subject of controversy between us and the delegation of the CPSU was the transition from capitalism to socialism. In their original draft of the Declaration (the product of the meeting) the leadership of the CPSU insisted on the inclusion of the erroneous views of the 20th Congress on peaceful transition. The original draft said not a word about non-peaceful transition; moreover, it described peaceful transition as 'securing a majority in parliament and transforming parliament from an instrument of the bourgeois dictatorship into a genuine people's state power.' . . . The Chinese Communist Party resolutely opposed the wrong views contained in the draft declaration submitted by the leadership of the CPSU." Editorial Departments of the People's Daily and Red Flag, "The Origin and Development of the Differences Between the Leadership of the CPSU and Ourselves," in Polemic, note 164 above, at 55, 73.

In the Congo, the "parliamentary path to power" was an "illusion." People's Daily, "People of the Congo (Leopoldville), Fight on!", May 6, 1964, in 20 Peking Review 14, 15 (May 15, 1964). See, generally, People's Daily, "The Differences Between Comrade Togliatti and Us," Dec. 31, 1962, in Dallin, Diversity in International Communism 706 (1963); People's Daily, "More on the Differences Between Comrade Togliatti and Us," in *ibid.* at 794.

¹⁸⁰ Editorial Departments of the People's Daily and Red Flag, "The Origin and Development of the Differences between the Leadership of the CPSU and Ourselves," Appendix I, in Polemic, note 164 above, at 105-106.

¹⁸¹ Cf. General Assembly Res. 498 (V) (Feb. 1, 1951); Whiting, China Crosses the Yalu: The Decision to Enter the Korean War (1960).

and 1958,¹⁸² in Tibet in 1959,¹⁸³ in India in 1962,¹⁸⁴ and in Sikkim in 1965.¹⁸⁵ In Africa it has actively supported "wars of national liberation" in Burundi,¹⁸⁶ the Federal Republic of Cameroon¹⁸⁷ and the Congo (Léopoldville).¹⁸⁸ In these conflicts, except with respect to Korea, Communist China displayed guerrilla-type caution, skillfully limited the scope of the conflict, and successfully avoided a direct confrontation with the United States.¹⁸⁹ Communist China's contemporary tactics thus parallel strikingly the tactics practiced in China's civil war, and suggest that Communist Chinese long-term goal statements have considerable empirical content—a content which would subvert the purposes and principles of the U.N. Charter.

In short-range tactics, Communist China has challenged the right of the United Nations to exist as a world organization.¹⁹⁰ It has threatened crea-

¹⁸² Hinton, note 174 above, at 258-272; Hsieh, note 162 above, at 17-18, 123-130; Tsou, "The Quemoy Imbrolio: Chiang Kai-shek and the United States," 12 Western Pol. Q. 1084 (1959); *idem*, "Mao's Limited War in the Taiwan Strait," 3 Orbis 332 (1959); Whiting, "The Logic of Communist China's Policy: The First Decade," in Pentony, note 162 above, at 70, 78-81; Zagoria, note 164 above, at 200-221.

¹⁸³ Cf. General Assembly Resolutions 1353 (XIV); 1723 (XVI); Barnett, Communist China and Asia 314-315 (1960); Hinton, note 174 above, at 285-289.

¹⁸⁴ Hinton, note 174 above, at 273-307; Patterson, Peking Versus Delhi (1964). See also Crankshaw, The New Cold War: Moscow v. Peking (1965), who believes the Indian invasion was undertaken "as an essay in forcing tactics vis-a-vis Moscow." (p. 144.)

¹⁸⁵ See, generally, Pringsheim, "China's Role in the Indo-Pakistani Conflict," 24 China Quarterly 170 (1965). Liu Shao-chi, in a speech of Sept. 28, 1965, had this to say of the U.N. and Kashmir:

"As everybody knows, the United Nations has completely betrayed its own charter and it is in a mess. Recently on the Kashmir issue it disregarded the explicit statement in the charter about national self-determination and discarded its past resolutions providing for a 'plebiscite'. This is another entry in the shameful record of the United Nations." 40 Peking Review 15, 16 (Oct. 1, 1965).

See also Statement of the Government of the People's Republic of China, Sept. 7, 1965, in 37 Peking Review 6 (Sept. 10, 1965), *ibid.* at 7; 38 *ibid.* 11 (Sept. 17, 1965), *ibid.* at 14; 39 *ibid.* 8 (Sept. 24, 1965), *ibid.* at 9 and 13-16.

¹⁸⁶ Cooley, note 162 above, at 109-112; Hinton, note 174 above, at 193.

¹⁸⁷ Cooley, note 162 above, at 99-103; Hinton, note 174 above, at 192.

¹⁸⁸ "Usurping the name of the United Nations, the United States has placed the Congo under military occupation . . ." "The Chinese people have always staunchly supported the Congolese people's just struggle against imperialism and for national independence." People's Daily, "People of the Congo, (Leopoldville), Fight on!," May 6, 1964, in 20 Peking Review 14, 16, 17 (May 15, 1964).

¹⁸⁹ Whiting, *loc. cit.* note 182 above, has skillfully demonstrated Chinese "caution." For recent Communist Chinese attempts to subvert stable regimes, cf. Topping, "Peking Pressing Overseas Chinese," New York Times, July 10, 1965, p. 3, col. 2; (Burma), *ibid.*, Nov. 1, 1964, p. 26, col. 4; (Congo), *ibid.*, Nov. 27, 1965, p. 1, col. 1.

¹⁹⁰ "The people have come to realize that the U. S. imperialist-manipulated United Nations is by no means something sacrosanct, that one can oppose the United Nations and withdraw from it and that one can do without entering it." Chou En-lai, speech of Jan. 24, 1965, in 5 Peking Review 5 (Jan. 29, 1965).

Compare the Communist Chinese stand with the "Final Communiqué of Second Afro-Asian Conference Preparatory Meeting," in 17 Peking Review 6 (April 24, 1964), which sought the strengthening of the United Nations.

tion of a "revolutionary world organization"¹⁹¹ if the United Nations "is not thoroughly reorganized."¹⁹² "Thorough reorganization" presumably means that "the U.N. Charter must be reviewed and revised jointly by all countries, big and small; all independent states should be included in the United Nations; and all imperialist's puppets should be expelled."¹⁹³ For Communist China neither the increase in Afro-Asian membership¹⁹⁴ nor the expansion of the Security Council and ECOSOC¹⁹⁵ meets the requirements of "thorough reorganization." Apparently the United Nations must admit East Germany, North Viet-Nam and North Korea, and exclude such "imperialist-dominated" countries as Malaysia.¹⁹⁶

Even beyond threatening to create a rival organization, Communist China has attempted to subvert the institutional base of the United Na-

¹⁹¹ The Communist Chinese have never clarified the constitutional basis of this organization. Presumably they thought that Communist China, Indonesia, and possibly Cambodia and Pakistan, would provide the initial membership. At a later date, the Communist Chinese seem to have assumed, the initial membership would be joined by the "emerging" "revolutionary" nations of Asia and Africa.

¹⁹² Predecessors of this threat include Statement by the Government of the People's Republic of China, Jan. 10, 1965, in 3 Peking Review 5 (Jan. 15, 1965) ("thoroughly remolded"); People's Daily, "Indonesia's Bold, Revolutionary Action," Jan. 10, 1965, in *ibid.* 7 (Jan. 15, 1965) ("thorough overhaul") at 9.

For the threat itself see Chou En-lai, speech of Jan. 24, 1965, in 5 Peking Review 5 (Jan. 29, 1965); Chen Yi, speech of Jan. 26, 1965, *ibid.* at 7; reaffirmed and modified by Chen Yi, Press Conference of Sept. 20, 1965, in 41 Peking Review 7, 12 (Oct. 8, 1965).

The threat parallels tactics the Communist Chinese have resorted to in the international Communist movement and elsewhere:

"The Chinese leaders do not limit themselves to proclaiming incorrect views. They are now striving wherever possible to isolate the democratic public organizations of (Asia, Africa and Latin America), to create separate, enclosed confederations and actually to oppose them to the international confederations of the working people." Kommunist, "Marxism-Leninism is the Basis for the Unity of the Communist Movement," Oct. 18, 1963, in Griffith, *The Sino-Soviet Rift* 466, 468 (1964).

¹⁹³ Presumably the Communist Chinese would eliminate from the United Nations all bodies of limited and specialized membership. "In international affairs, all countries should have equal rights. There should be absolutely no distinction between big and small ones. . . ." Observer, "The More He Tries to Cover Up, The More He Exposes—On Adlai Stevenson's U.N. Speech," People's Daily, Feb. 1, 1965, in 6 Peking Review 12 at 13 (Feb. 5, 1965).

¹⁹⁴ "The increase in the number of Asian and African members in the United Nations has by no means brought any fundamental change in the fact that the U.N. has become a U. S. imperialist instrument for aggression." People's Daily, Jan. 10, 1965, in 3 Peking Review 8 (Jan. 15, 1965).

¹⁹⁵ The Communist Chinese demanded "thorough" reorganization *after* they editorially approved the membership increase in ECOSOC and the Security Council. Cf. sources cited in note 197 below.

¹⁹⁶ Communist China has declared "illegal" the seating of Malaysia in the United Nations and the Security Council. Chou En-lai, speech of Jan. 24, 1965, in 5 Peking Review 5 (Jan. 29, 1965). It also sought to exclude Malaysia from the Second Afro-Asian Conference. Cf. 33 *ibid.* 18 (Aug. 13, 1965).

tions.¹⁹⁷ It has urged¹⁹⁸ and supported withdrawal from the United Nations itself and from U.N. Committees.¹⁹⁹ It has heaped invective on the three Secretaries General,²⁰⁰ and presumably believes that the Secretariat cannot be an important "neutral" organ for dispute settlement.²⁰¹ It has overlooked the Assembly's rôle as a "world forum,"²⁰² and it sees

¹⁹⁷ This is not to say that Communist Chinese policy has not been specialized to particular situations. At times they have proclaimed adherence to the Charter and support for the United Nations. Cf. Chou En-lai's press conference in Somalia of Feb. 3, 1964, 7 Peking Review 14, 15 (Feb. 14, 1964). Compare this with his press conference in Cairo a year later, printed in 15 *ibid.* 8 (April 9, 1965).

Communist China has also reversed positions to support increased membership in the Security Council and ECOSOC. Chou En-lai's press conference, above. For the previous Communist Chinese position, which proclaimed the seating of Communist China a pre-condition to enlargement of the Security Council and ECOSOC, cf. 2637 SCMP 43 (1964).

¹⁹⁸ Communist China's prime targets here have been Pakistan and Cambodia. A "China-Pakistan Joint Communiqué" of March 7, 1965, claimed that "the United Nations should reorganize itself in order to better reflect the balance of forces in the world and present international realities." 11 Peking Review 10 (March 12, 1965). This was not a reference to expansion of ECOSOC and the Security Council. For a similar statement in a Sino-Burmese communiqué, cf. 32 *ibid.* 30 (Aug. 6, 1965).

¹⁹⁹ Liu Shao-chi, on Sept. 28, 1965, declaimed at a state banquet in honor of Prince Sihanouk:

"Recently, Cambodia withdrew from the U.N. special committee of decolonialization. This is another just and courageous action following Indonesia's withdrawal from the United Nations. It is a resounding slap in the face of the apologetists for neo-colonialism as well as a protest of non co-operation against the U. S. control of the United Nations." 40 Peking Review 15, 16 (Oct. 1, 1965).

For Communist Chinese approval of Indonesia's withdrawal from the United Nations and the Specialized Agencies, see Statement of the Government of the People's Republic of China, Jan. 10, 1965, in 3 Peking Review 5 (Jan. 15, 1965); People's Daily, "Indonesia's Bold, Revolutionary Action," Jan. 10, 1965, *ibid.* 7 (Jan. 15, 1965); *ibid.* 10 (Jan. 15, 1965); 5 *ibid.* 9 (Jan. 29, 1965).

²⁰⁰ Trygve Lie, the Communist Chinese claimed, was a "servile American stooge," "an instrument and accomplice of aggression for the United States," "an out-and-out American tool and jackal," and a "Wall Street majordomo from head to foot." NCNA, April 8, 1952, in 313 SCMP 2 (1952).

The Communist Chinese deemed it "necessary" to "remove Dag Hammarskjöld, executor of the imperialist and colonialist policies, from the office of U.N. Secretary General." People's Daily, Feb. 18, 1961, 2443 SCMP 32, 34.

U Thant has been thought to be "acting" as "Washington's political broker," People's Daily, "U.N.—Sanctuary for the Indian Aggressor," Sept. 14, 1965, in 38 Peking Review 14 at 15 (Sept. 17, 1965); an "agent of U. S. imperialism," People's Daily, "The Second African-Asian Conference Should be Postponed," Oct. 23, 1965, in 44 *ibid.* 8 (Oct. 29, 1965).

²⁰¹ The Communist Chinese have paid little attention to the activities of the Secretariat. Adams, note 166 above, thus found no Chinese commentary on the Soviet Union's "troika" proposal. But cf. comments quoted in note 200 above.

²⁰² In Peking's view the 19th Assembly was a "farce," proving the United Nations "shamelessly" manipulated by the United States. 37 Peking Review 30 (Sept. 10, 1965). By the 20th Session the Assembly had become "a conference for opposing the revolutionary movements of the oppressed nations, and oppressed peoples . . . a conference which wilfully interfered in the internal affairs of sovereign states and a conference for pursuing the policy of American-Soviet cooperation for the domination

the Council rendered impotent by the United States veto.²⁰³ In its view the Specialized Agencies are a "trap" for the non-committed countries.²⁰⁴ Communist China, indeed, has virtually attempted to dictate terms for its own participation in the United Nations:

The United Nations must rectify its mistakes and undergo a thorough reorganization and reform. It must admit and correct all its past mistakes. Among other things, it should cancel its resolution condemning China and the Democratic People's Republic of Korea as aggressors and adopt a resolution condemning the United States as the aggressor; the U.N. Charter must be reviewed and revised jointly by all countries, big and small; all independent states should be included in the United Nations; and all imperialist puppets should be expelled.²⁰⁵

In public pronouncement Communist China has either ignored or challenged virtually every activity of the United Nations. On decolonization questions it has largely overlooked the accomplishments of the U.N.

of the world." *People's Daily*, "The U.N.—A Market Place for the U.S.-Soviet Political Deals," Dec. 27, 1965, in 1 *Peking Review* 13 (Jan. 1, 1966).

The Communist Chinese review of the 15th Assembly included these comments: "The U.N. General Assembly remains a tool of U. S. imperialism, a voting machine for it to pursue its policies of aggression and war. . . . The people of the world should in no way place their hopes for their liberation and for world peace on the United Nations which is dominated by U. S. imperialism." 2364 SCMP 40, 41 (1960).

²⁰³ *E.g.*: "As to Britain, France and the Soviet Union, although they are permanent members of the Security Council, they in fact cannot do much. Occasionally their proposals are adopted but only when they accord with or at least do not run counter to the interests of the United States." *People's Daily*, "Whither the United Nations," Feb. 15, 1965, in 8 *Peking Review* 13, 14 (Feb. 19, 1965).

²⁰⁴ Nan Han-chen, speaking at an Afro-Asian Economic Seminar on Feb. 23, 1965, declared that:

"At the same time, it must also be pointed out that so-called 'multilateral aid' through international organizations is a new trap set by the neo-colonialists to exploit the Afro-Asian countries. As is well known, the so-called International Monetary Fund, the International Bank for Reconstruction and Development (World Bank), the International Finance Corporation and the International Development Association are all 'political banks' with U. S. imperialism as their nerve centre for carrying out activities of aggression. . . . (The) debtor countries, in addition to submitting their national economic policy and planning to be 'reviewed' by the World Bank and accepting its 'supervision' over the use of such loans . . ." 10 *Peking Review* 16, 19 (March 5, 1965). See also *Red Flag*, Feb. 4, 1964, in 407 SCMM 42, 51.

Communist China has labeled the WHO "A U.S.-dominated agency conducting espionage activities under the name of health." NCNA, April 8, 1952, in 313 SCMP 2, 3 (1952).

For the Communist Chinese the League of Nations was a "League of Robbers": the "principal task of the Lytton Commission . . . was to prepare the dismemberment of China. . . ." Extract from an Oct. 6, 1932, telegram of the Chinese Soviet Government, in Schram, *The Political Thought of Mao Tse-Tung* 266-267 (1963). For contemporary corroboration of this view, *cf.* 6 *Peking Review* 14 (Feb. 5, 1965).

²⁰⁵ Press Conference of Chen Yi, Communist Chinese Vice Premier and Foreign Minister, on Sept. 29, 1965, in 41 *Peking Review* 7, 11-12 (Oct. 8, 1965). For a milder predecessor to this statement, *cf.* Chou En-lai's written responses to questions asked by Kamal Amer, 38 *ibid.* 8 (Sept. 17, 1965).

trusteeship system, the Committee of 16, and the Committee of 21.²⁰⁶ It would circumvent the world organization:

(T)he oppressed nations must not pin their hopes of liberation on the "benevolence" of the old or new colonialists or on "bestowal" from the United Nations which is manipulated by U.S. imperialism, and . . . they must rely on themselves to wage resolute revolutionary struggle. . . . "Without revolutionary violence it would be impossible to wipe out counter-revolutionary violence."

According to Khrushchov, the revolutionary people of Asia, Africa and Latin America should not and cannot themselves eliminate colonialism, but must look to the United Nations for help. . . . It is apparent that what he really means by looking to the United Nations for help is looking to the imperialists for help. The facts show that the United Nations, which is still under the control of the imperialists, can only defend and strengthen the rule of colonialism but can never abolish it.²⁰⁷

Communist China's position has been no less extreme on disarmament questions.²⁰⁸ In 1964 it refused participation in the Geneva talks and in

²⁰⁶ "Though (the Asian, African and Latin American countries) form a majority in (the United Nations), these countries cannot fully exercise their legitimate rights, and their proposals and demands are usually ignored or only perfunctorily discussed. Even when resolutions against imperialism, colonialism and neo-colonialism are adopted at their insistence, their drafts are invariably watered down or amended by the United States and its partners before they are approved. Anti-colonialist resolutions adopted after hard struggle are invariably pigeonholed." 42 Peking Review 10, Oct. 15, 1965.

See also People's Daily, Feb. 4, 1964, in 3156 SCMP 17-18 (1964); but cf. 21 Peking Review 22 (May 22, 1964), one of the few occasions when the Communist Chinese press cited with approval actions in the U.N. Decolonization Committee.

²⁰⁷ "A Great Victory for Leninism," Red Flag, April, 1965, in 19 Peking Review 7, 9, 10; "Apologists of Neo-Colonialism," Polemic, note 164 above, 196, 197.

See also a Nov. 28, 1963, speech by Liao Cheng-chih, in 49 Peking Review 12 (Dec. 6, 1963): "To advocate the bestowing of independence by the U.N. . . . would simply mean liquidating the national-independence movement and helping U. S. imperialism in advancing its neo-colonialist policy." (p. 15); Red Flag, "What the Congolese Situation Shows," March 1, 1962, in 306 SCMM 7 (1962); People's Daily, "People of the Congo (Leopoldville), Fight on!", May 6, 1964, in 20 Peking Review 14 (May 15, 1964).

Communist China has shown itself admirably informed about the activities of the Committees of 16 and 21. Cf. 21 *ibid.* 22 (May 22, 1964).

²⁰⁸ ". . . universal and complete disarmament can be realized only after imperialism, capitalism and all systems of exploitation have been eliminated." "Statement by the Spokesman of the Chinese Government . . ." Sept. 1, 1963, in Griffith, note 164 above, at 371, 386. "It is wrong to consider general and complete disarmament the 'overriding task' of the world peace movement." 50 Peking Review 14 (Dec. 13, 1963).

See, generally, Adams, note 166 above; Chiu, "Communist China's Attitude Towards Nuclear Tests," 21 China Quarterly 96 (1965); Halperin and Perkins, note 162 above.

However dramatic the statements of recent vintage, Peking's attitude has a long-standing base. Adams, note 166 above, writes thus of the period from 1957-1960:

"Peking evidenced little interest in this period in the Soviet concern about surprise attack, and was pointedly dubious about the possible accomplishments of an experts' meeting on the subject. Nor was Peking any more favorable to the convening of an experts' conference on the problem of detecting test ban violations." (p. 236.)

the Summit talks suggested by the Secretary General;²⁰⁹ in 1965 it criticized a General Assembly proposal for participation in world-wide disarmament talks.²¹⁰ On more than one occasion it has called the United Nations "completely incapable of handling the disarmament question."²¹¹ It was not that Communist China was not a participant in the United Nations. The United Nations was manipulated by the United States, and the United States had no intention of disarming. Communist China's own disarmament proposals are absurd on their face,²¹² and, unlike the Soviet

²⁰⁹ "The Geneva 18-nation disarmament conference is in fact still under the manipulation and control of the United States and can in no way reflect the aspirations of the peoples. . . . We thank the U. S. Government for its generosity in not opposing China's participation in the Geneva disarmament conference but we must tell it frankly that it will not have the pleasure of our company." *People's Daily*, Nov. 22, 1964, in 48 *Peking Review* 14 (Nov. 27, 1964).

Of U Thant's proposal, the *People's Daily* wrote: "So-called talks among countries possessing nuclear weapons would in fact be a nuclear club in disguise. We will not join such a club even if an invitation is sent us together with a sedan chair." *Ibid.*

Contrast these statements with an earlier policy position: ". . . it must be pointed out that any international agreement concerning disarmament, without the formal participation of the Chinese People's Republic and the signature of her delegate, cannot, of course, have any binding force on China." Resolution of the National People's Congress Standing Committee, in 4 *Peking Review* 19 (Jan. 26, 1960).

²¹⁰ *New York Times*, Dec. 2, 1965, p. 1, col. 7.

²¹¹ *People's Daily*, "New Starting for Efforts to Ban Nuclear Weapons Completely," Nov. 22, 1964, in 48 *Peking Review* 12, 14 (Nov. 27, 1964); see also 4 *ibid.* 14 (Jan. 22, 1965).

²¹² The latest comprehensive Communist Chinese proposal reads thus:

(1) All countries in the world, both nuclear and non-nuclear, solemnly declare that they will prohibit and destroy nuclear weapons completely, thoroughly, totally and resolutely. Concretely speaking, they will not use nuclear weapons, nor export, nor import, nor manufacture, nor test, nor stockpile them; and they will destroy all the existing nuclear weapons and their means of delivery in the world, and disband all the existing establishments for the research, testing, and manufacture of nuclear weapons in the world.

(2) In order to fulfill the above undertakings step by step, the following measures shall be adopted first:

a. Dismantle all military bases, including nuclear bases on foreign soil, and withdraw from abroad all nuclear weapons and their means of delivery.

b. Establish a nuclear-weapon-free zone of the Asian and Pacific region, including the United States, the Soviet Union, China and Japan; a nuclear-weapon-free zone of Central Europe; a nuclear-weapon-free zone of Africa; and a nuclear-weapon-free zone of Latin America. The countries possessing nuclear weapons shall undertake due obligations with regard to each of the nuclear-weapon-free zones.

c. Refrain from exporting and importing in any form nuclear weapons and technical data for their manufacture.

d. Cease all nuclear tests, including underground nuclear tests.

(3) A conference of the Government heads of all the countries of the world shall be convened to discuss the question of complete prohibition and thorough destruction of nuclear weapons and the question of taking the above-mentioned four measures in order to realize step by step the complete prohibition and thorough destruction of nuclear weapons.

Halperin, note 3 above, believes "these proposals are not meant to be negotiable. . . ." (p. 67.)

After its first nuclear test, Communist China made an apparently "new" proposal:

Union's proposals,²¹³ they deny the United Nations any important rôle in the disarmament process.²¹⁴ Communist China vehemently attacked the 1963 Test Ban Treaty;²¹⁵ its actions here suggest that its participation in future disarmament conferences may significantly obstruct opportunities for limited Soviet-United States agreement on arms control.²¹⁶ In marked disregard of numerous U.N. resolutions, Communist China has proclaimed itself willing to transmit nuclear weapons information to other Socialist countries, and possibly to countries in the Afro-Asian bloc.²¹⁷

During the Korean conflict,²¹⁸ and with mounting intensity since 1956,²¹⁹ Communist China has also maligned major U.N. attempts to maintain minimum order.²²⁰ It has often opposed dispute settlement under inter-

"the nuclear powers (should) undertake *not to use* nuclear weapons. . . ." People's Daily, Nov. 22, 1964, in 48 Peking Review 12 (Nov. 27, 1964). This was to be a commitment unqualified by traditional doctrines of self-defense; from it, according to the People's Daily, would follow ineluctably the end of nuclear testing and the cessation of nuclear production. *Ibid.* at 13. Note that in early 1960 the Chinese opposed a proposed Soviet troop reduction. Zagoria, note 164 above, at 292.

²¹³ See World Law Fund, Current Disarmament Proposals 1 (1964).

²¹⁴ See, e.g., 291 SCMM 42 (Dec. 11, 1961). The McCloy-Zorin Agreement of 1961 called for an "international disarmament organization . . . within the framework of the United Nations." Its inspectors "should be assured unrestricted access without veto to all places, as necessary for the purposes of effective verification." Joint Statement of Agreed Principles for Disarmament Negotiations of the Soviet Union and the United States, Sept. 20, 1961, in World Law Fund, note 213 above, at 189, 191.

²¹⁵ Major Chinese and Soviet documents are collected in Griffith, *The Sino-Soviet Rift* at 326, 331, 340, 371 (1964); see also Griffith's text at 159-166; Chiu, note 208 above, at 102-106.

²¹⁶ At the China Arms Control Conference (July 9-19, 1964, Airlie House, Warrenton, Virginia), the participants, including both China specialists and disarmament experts, were in virtual agreement that Communist China would not conclude an arms control agreement "within the next five or ten years." Halperin and Perkins, note 162 above, at 155. See also Chiu, note 208 above, at 107.

²¹⁷ "Statement by the Spokesman of the Chinese Government," Aug. 15, 1963, in 33 Peking Review 7, 12 (Aug. 16, 1963). See also 32 *ibid.* 16, 17 (Aug. 7, 1964).

In his press conference of Sept. 29, 1965, Chen Yi had this to say of Peking's attitude toward nuclear proliferation:

"As for the peaceful use of atomic energy and the building of atomic reactors, China has already been approached by several countries, and China is ready to render them assistance. . . . China hopes that Afro-Asian countries will be able to make atom bombs themselves, and it would be better for a greater number of countries to come into possession of atom bombs." 41 *ibid.* 7, 8 (Oct. 8, 1965).

Communist China has chided the Soviet Union for its apparent interest in a "non-proliferation" agreement (*cf.* People's Daily, "The Soviet Government Once Again Exposes Itself," Jan. 30, 1966, in 6 Peking Review 14 (Feb. 4, 1966)), and has criticized Khrushchev for over-estimating the possibilities of accidental war (20 *ibid.* 18 (May 14, 1965)).

²¹⁸ *Cf.*, e.g., Whiting, note 181 above, at 80-87, 99-101, 139-143.

²¹⁹ See, generally, Adams, note 166 above.

²²⁰ Liao Cheng-chih, one of Peking's foreign policy planners, has recently stated:

"The flag of the United Nations is dripping with the blood of the peoples of Asia and Africa. Manipulated by the United States, the United Nations has become a tool of U. S. imperialism for undermining and suppressing the national-liberation movements in Asia, Africa and Latin-America. And now, through the instrumentality

national auspices, whether by discussion,²²¹ mediation,²²² observation,²²³ investigation,²²⁴ arbitration or judicial decision.²²⁵ Invariably Communist

of the so-called U.N. 'Special Committee for Peace-Keeping Operations,' the U. S. imperialists and their partners are plotting to set up a permanent U.N. force to suppress the national-liberation movements. We Afro-Asian peoples shall never tolerate the use of the United Nations by U. S. imperialism and its accomplices for their dirty deeds." 21 Peking Review 15 (May 21, 1965).

²²¹ "We favour negotiations with imperialist countries. But it is absolutely impermissible to pin hopes for world peace on negotiations, spread illusions about them and thereby paralyze the fighting will of the peoples, as Khrushchev has done." Editorial Departments of the People's Daily and Red Flag, "Two Different Lines on the Question of War and Peace," Polemic, note 164 above, at 221, 253.

In the following situations, the Communist Chinese protested proposals for or attempts at U.N. discussion of critical international issues:

Viet-Nam, July-August, 1965: 33 Peking Review 8-10 (Aug. 13, 1965).

Viet-Nam, January-February, 1965: 7 *ibid.* 19, 20 (Feb. 12, 1965).

Viet-Nam, Fall, 1964: Liu Ning-i, "The Militant Unity of China and Viet-nam," in 49 *ibid.* 26, 28 (Dec. 4, 1964).

Viet-Nam, Summer, 1964: C.P.C.C.C. Reply to the C.P.S.U.C.C. letter of July 30, 1964, in 36 Peking Review 6 (Sept. 4, 1964). (The C.P.S.U. wrote the Communist Chinese, had "aided and abetted the aggressor by actively supporting the U. S. attempt to intervene in Viet-Nam through the United Nations." *Ibid.* 7.)

Malaysia, Summer, 1964: 37 Peking Review 8 (Sept. 11, 1964).

Dominican Republic, Spring, 1964: Statement of the Government of the People's Republic of China, May 3, 1964, in 19 *ibid.* 12 (May 7, 1964).

²²² On the India-Pakistan conflict over Kashmir in September, 1965: "The so-called mediation by the United Nations is based on a report of the Secretary-General. The report itself is unfair. . . . On the Kashmir question, the United Nations has once again proved a tool of U. S. imperialists and their partners in their attempt to control the whole world." "Chinese Government Statement," Sept. 7, 1965, in 37 Peking Review 6 (Sept. 10, 1965). See also People's Daily, "U.N.—Sanctuary for the Indian Aggressor," Sept. 14, 1965, in 38 *ibid.* 14 (Sept. 17, 1965).

Of the Security Council action, the Communist Chinese wrote: ". . . (t)he U. S. Government instructed its representative to the United Nations Arthur J. Goldberg to get on the move and collaborate with the Soviet Union in manipulating the Security Council to pass two resolutions for the purpose of intervention. Both resolutions distorted the facts . . ." People's Daily, "Who Backs the Indian Aggressors?," Sept. 18, 1965, in 39 *ibid.* 13 (Sept. 24, 1965).

²²³ Cambodia-Viet-Nam border, May, 1964: opposed a U. S. proposal to send U.N. observers to investigate Cambodian charges that South Viet-Nam forces had entered Cambodian territory. People's Daily, "U. S. Imperialism Must Not Be Allowed to Lead the U.N. Into Indo-China," May 25, 1964, in 22 Peking Review 8 (May 29, 1964).

Cuba, Fall, 1962: opposed U.N. supervision of missile withdrawal from Cuba. Editorial Departments of the People's Daily and Red Flag, "Why Khrushchov Fell," Polemic, note 164 above, at 481, 485.

²²⁴ Communist China has opposed proposals for U.N. "fact-finding" missions in—at the very least—the following situations:

1. Dominican Republic, Spring, 1965: 21 Peking Review 33 (May 21, 1965);

2. Viet-Nam, Fall, 1963: 42 *ibid.* 25 (Oct. 18, 1963);

3. Malaysia, 1963-1964: 3 *ibid.* 14 (Jan. 15, 1965); People's Daily "Oppose Malaysia—A Product of Neo-Colonialism, Support the Struggle of the North Kalimantan People," in 14 *ibid.* 28 (April 3, 1964);

4. Cuba, Fall, 1962: Editorial Departments of the People's Daily and Red Flag, "The Origin and Development of the Differences between the Leadership of the CPSU and Ourselves," in Polemic, note 164 above, 55, 56;

China has been sharply critical of all United Nations "police force" activities,²²⁶ whatever their composition.²²⁷ It has suspected the UNEF,²²⁸ denounced the ONUC,²²⁹ and attacked the Yugoslavs for contributing troops to the Congo operation.²³⁰ It has even chastized the Russians for their proposed "voluntary" "assessments" contributions,²³¹ and for their participation in the U.N. Special Committee on Peace-Keeping Operations:

Particularly grave is Soviet active support for the setting up of a permanent armed force of the United Nations. This means becoming a partner in organizing an international gendarmerie in the service of U.S. imperialism for the suppression of the revolutionary struggles of the peoples of the world. . . . It is absolutely clear that their so-called "support for the national-liberation movement" is false while

5. Lebanon, Summer, 1958: labeled UNOGIL an "instrument of U. S. British intervention," 1796 SCMP 42, June 20, 1958, quoted in Adams, note 166 above, at 68.

²²⁵ In 1963 the Indian Government proposed that the Sino-Indian border dispute be arbitrated by the International Court of Justice or another arbitral body. The Communist Chinese refused. See Note from the Foreign Ministry of the People's Republic of China, Oct. 9, 1963, in 42 Peking Review 9 (Oct. 18, 1963).

²²⁶ The Communist Chinese have opposed proposals for an international force in the following situations:

Viet-Nam: an Indian proposal called for an Afro-Asian force to be sent to Viet-Nam. 20 Peking Review 25 (May 14, 1965);

Laos: the Vice President of the Laotian National Assembly recommended that an international force be stationed in Laos for 10 or 15 years. 23 *ibid.* 14 (June 5, 1964);

Viet-Nam: Britain's Prime Minister Wilson proposed an "international peace force" for Viet-Nam. 28 *ibid.* 8 (July 9, 1965);

Cyprus: People's Daily, "Indonesia's Bold, Revolutionary Action," Jan. 18, 1965, in 3 *ibid.* 7, 8 (Jan. 15, 1965); see also 8 *ibid.* 16 (Feb. 21, 1964).

Cf. the Albanian Zerri Popullit article summarized in 17 *ibid.* 27 (April 23, 1965) and entitled "Soviet-U. S. Plot to Establish an International Gendarmerie."

²²⁷ It made little difference to the Chinese Communists that ONUC was composed in part of Asians and Africans. *Cf.* People's Daily, Feb. 18, 1961, 2443 SCMP 32, 34. And the Communist Chinese have virulently attacked the Soviet Union for its rôle in the Congo conflict. See Editorial Departments of the People's Daily and Red Flag, "Apologists of Neo-Colonialism," Polemic, note 164 above, 185, 199-200; People's Daily, "People of the Congo (Leopoldville), Fight On!," May 6, 1964, in 20 Peking Review 14, 15 (May 15, 1964); Red Flag, "A Great Victory for Leninism," April, 1965, in 19 *ibid.* 7, 10 (May 7, 1965).

²²⁸ "The purpose of United States in supporting the Canadian proposal is obviously to take over with the so-called emergency international force the areas in Egypt which have been occupied by Britain, France and Israel unlawfully so as to realize the vile scheme of depriving Egypt of its sacred sovereignty over Suez." Statement of the Government of the People's Republic of China, Nov. 7, 1956, quoted in Adams, note 166 above, at 59.

²²⁹ For Communist Chinese appraisal of U.N. activities during 1964, see People's Daily, "Hail the Triumphant Revolutionary Developments in the Congo (L)," June 24, 1965, in 27 Peking Review 15 (July 3, 1964); statement by Chairman Mao Tse-tung, Nov. 28, 1964, in 49 *ibid.* 5 (Dec. 4, 1965).

²³⁰ Editorial Departments of the People's Daily and Red Flag, "Is Yugoslavia a Socialist Country?", in Polemic, note 164 above, at 139. See especially pp. 162, 167-170.

²³¹ Editorial Departments of the People's Daily and Red Flag, "A Comment on the March Moscow Meeting," in 13 Peking Review 7, 9 (March 26, 1965).

their collusion with U.S. imperialism to strangle the national-liberation movement is genuine.²³²

Communist China's behavior in past multinational conferences, finally, belies the possibility that it will act constructively at the United Nations.²³³ It has caviled against having U.N. "observers" at several such conferences,²³⁴ and, in the preparatory meetings for the Second Afro-Asian Conference,²³⁵ it opposed attempts to introduce the U.N. Rules of Procedure.²³⁶ In numerous multinational conferences, including inter-Communist Party-congresses, Communist China has proclaimed its adherence to nineteenth-century notions of sovereignty,²³⁷ and has resisted majority rule—even on procedural issues.²³⁸ Six years ago the Central Committee of the Communist Party of China announced:

... where the fundamental principles of Marxism-Leninism are concerned, the problem of exactly who is right and who is wrong cannot

²³² 19 *ibid.* 10 (May 7, 1965). To the same effect, 20 *ibid.* 18 (May 14, 1965); 24 *ibid.* 16 (June 11, 1965); 25 *ibid.* 8 (June 18, 1965).

²³³ Communist China has sought to manipulate the membership and timing of international conferences to insure that the conferences produced preferred results. It has, for example, attempted to exclude the Soviet Union from the Second Afro-Asian Conference, principally on grounds that the Soviet Union was not an Asian state. *E.g.*, Statement of the Government of the People's Republic of China, May 30, 1964, in 23 Peking Review 6 (June 5, 1964). It also was a prime mover for postponement of the Second Afro-Asian Conference. Statement of the Government of the People's Republic of China, "China Will Not Attend African-Asian Conference Which Leads to a Split," Oct. 26, 1965, in 44 *ibid.* 5 (Oct. 29, 1965).

²³⁴ Communist China has formally protested against a UNECA representative attending an Afro-Asian Economic Seminar held in Algeria Feb. 22-27, 1965 (11 Peking Review 18 (March 12, 1965)), and against U Thant attending the Second Afro-Asian Conference (Chen Yi, Press Conference of Sept. 29, 1965, in 41 *ibid.* 7, 10 (Oct. 8, 1965)).

²³⁵ *Cf.* Chen Yi, speech at the Second Asian-African Conference Preparatory Meeting, April 11, 1964, in 16 *ibid.* 6, 8 (April 17, 1964).

²³⁶ Cheng, "Anti-Imperialism: Keynote of the Second African-Asian Conference," in 26 *ibid.* 5, 6 (June 25, 1965).

²³⁷ "The Chinese formula is 'unanimity through consultation'. . . . The Communist Party of China did not accept Khrushchev's demand for majority rule at international conferences. The CPC's insistence on unanimity, which so far has neither been officially endorsed nor officially rejected by the (Communist) movement as a whole, obviously represents a claim to a veto for itself . . . and for the right to form and lead 'fractions' (combinations) within the international Communist movement." Hinton, note 174 above, at 98-99.

²³⁸ *E.g.*, World Council of Peace, Nov. 28, 1963, described by Liao Cheng-chih in 49 Peking Review 12, 15 (Dec. 6, 1963). The Chinese Communists, often finding themselves in a minority position, have sought "unanimity through consultation" at transnational conferences. *E.g.*:

(1) Various Communist Party Conferences; *cf.* Editorial Departments of the People's Daily and Red Flag, "Why Khrushchev Fell," Polemic, note 164 above, at 481, 488.

(2) Sixth World Trade Union Congress (Warsaw, Oct. 9-22, 1965); *cf.* 44 Peking Review 15 (Oct. 29, 1965).

(3) The Second African-Asian Conference; *cf.* People's Daily, "Keep Up Efforts for Success of Second African-Asian Conference," June 29, 1965, in 27 Peking Review 6 (July 2, 1965); Chen Yi, speech of April 17, 1964, quoted in 25 *ibid.* 18 (June 18, 1965).

in every case be judged by who has the majority. After all truth is truth. Error cannot be turned into truth because of a temporary majority, nor will truth be turned into error because of a temporary minority.²³⁹

3. Nationalist China as a "New" Entity

Though exhibiting many elements of continuity in authority, both internal and external, with the "Republic of China" which became an original Member of the United Nations, Nationalist China has of course undergone many changes in effective control. It is enough for present purposes selectively to compare the approximate resources and production of pre-1949 and post-1949 Nationalist China:²⁴⁰

<i>Resource</i>	<i>Pre-1949</i>	<i>Post-1949</i>
Land (sq. mil.)	9,761,012	13,884
Population	582,603,417	11,883,523
Coal (million metric tons)	440,000	737
Iron Ore (million tons)	1,200	almost negligible
Arable Land (million acres)	240	7
<i>Yearly Production</i>	<i>Pre-1949</i>	<i>Post-1949</i>
Coal (thousand tons)	61,875	2,700
Power (m.kwh.)	5,955	6,000
Pig Iron (thousand tons)	1,801	negligible
Cement (thousand tons)	2,293	negligible

C. THE CONSEQUENCES OF CHANGE FOR PARTICIPATION PROBLEMS

To distill the critical elements from this extraordinarily complex factual situation, and to trace their legal consequences as we apply past trends in the articulation of fundamental community policies, it is essential to distinguish sharply between the Nationalist and Communist Chinese claims to participate in (1) the General Assembly and (2) the Security Council. It is equally important to determine (a) the decision-maker (the Security Council, the General Assembly, or both) which will pass on both sets of claims, (b) the criteria that will guide decision, (c) the procedures for arriving at decision, and (d) the timing of decisions on the four claims.

At the outset we should make clear that there are no past trends whose policies would govern either the Communist Chinese or the Nationalist Chinese claim to participate *in the Security Council*. Decision here must look to the basic constitutional framework of the United Nations and the major purposes of the United Nations Charter. Past initial participation

²³⁹ Quoted in Editorial Departments of the People's Daily and Red Flag, "The Leaders of the CPSU Are the Greatest Splitters of Our Times," Polemic, note 164 above, at 303, 337. A principal issue in the Sino-Soviet rift has been Chinese unwillingness to accept either Soviet leadership or majority decision. See Dallin, *Diversity in International Communism* xxix (1963).

²⁴⁰ This chart is principally derived from the following sources: Hsieh, *Taiwan-Ilha Formosa: A Geography in Perspective* (1964); Rostow *et al.*, *The Prospects for Communist China* (1954); Mancall, *Formosa Today* (1964); U. S. Bureau of Foreign Commerce, Far Eastern Division, *Investment in Taiwan (Formosa): Basic Information for United States Businessmen* (1959).

decisions for the General Assembly, conversely, are numerous and range along a broad continuum. At the one extreme the Assembly has solved initial participation questions by the methods of informal consensus. At the other, it has turned to the explicit criteria and rigorous procedures of the Charter's Article 4. One of our present tasks is to locate along this continuum the Nationalist and Communist Chinese claims to participate in the Assembly.

1. *The Communist Chinese Claim to Participate in the General Assembly*

The Communist Chinese claim to participate in the General Assembly is not likely to be accepted by informal consensus, and is scarcely governed by the policies of the Cuban, Polish or Czechoslovakian cases.²⁴¹ Myopic application of these cases, which, indeed, were not articulated decisions at all, would mean that the Communist Chinese would sit in the General Assembly without formal vote on their claim to participation. Even the most ardent supporters of the Communist Chinese claims have expected that at least a simple majority would be required to seat the Communist Chinese.

United Nations history aside, there are more important distinctions between the Communist Chinese claim and the past Cuban, Polish and Czech decisions. Change in mainland China has been more drastic. In political orientation, it has swung from the far right of the free world to the extreme left of the Communist bloc; the Poles and Czechs started from a different base, and they, together with the Cubans,²⁴² have adopted generally a pro-Soviet attitude in the Sino-Soviet controversy.²⁴³ Communist China clearly has the capacity, and has demonstrated its willingness, to subvert the principles of the Charter. Neither element was so apparent in the three other decisions. The earlier decisions, finally, did not promise the extraordinary impacts that a decision on the Communist Chinese claims is almost certain to have. They could not have ousted from the General Assembly a territorial community which has demonstrated its willingness to assume the obligations of the Charter.

By this point it should be clear that the Chinese participation question is not exclusively an initial participation question. It is something more—a question of infinitely greater consequence than the vast majority of so-called “membership” decisions. In the Chinese participation question, two territorial communities each seek a single “Member’s” General Assembly and Security Council seats. Past initial participation questions posit neither choice between such claimants nor allocation of a Security Council seat; instead they assume that one claimant seeks a single seat in the General Assembly. A General Assembly decision on Chinese participation claims may affect the distribution of “China’s” seat in both the Security Council and the Specialized Agencies. Assembly resolutions

²⁴¹ Delegates’ credentials went unchallenged after the pertinent post-World-War-II revolutions. See text above, at notes 103–105.

²⁴² Indeed, it was not until the spring of 1963 that Cuba was thought to be a “socialist country” by members of the Communist bloc.

²⁴³ See Griffith, *op. cit.* note 215 above.

on "membership" questions, on the other hand, have a past notable for their inability to determine Council action.²⁴⁴ The Chinese participation question threatens lack of uniformity in seating the "Chinese" delegation in both the United Nations and the Specialized Agencies. No past initial participation question has so entangled the United Nations. As commonly formulated, the Chinese participation question promises, finally, either that one territorial community will yearly be kept outside the United Nations, or that the other will be perpetually excluded from the Organization. How unlike the genuine "membership" decisions, which invariably seek to increase responsible participation in the United Nations.

(a) The Decision-Maker.—Although the Security Council was the first to pass on the Chinese participation question, for the past fourteen years it has been virtually assumed that the General Assembly would be principally responsible for deciding on the Nationalist and Communist claims to sit both *in the General Assembly and in the Security Council*. In corollary fashion, it has also been assumed that the Security Council would have no rôle in a decision to seat either claimant *in the General Assembly*. Both assumptions rest on two propositions: (1) it has been politically expedient for both the Soviet Union and the United States to keep debate on the Chinese participation question confined to the General Assembly; and (2) "in virtue of (the Assembly's) composition . . . consideration can best be given to views of all Member States in matters affecting the functioning of the Organization as a whole. . . ." ²⁴⁵

The Soviet and U. S. tactical maneuvers have little basis in either law or community policy. Presumably the Soviet Union has chosen not to confer "Great Power" (*i.e.*, Security Council) status on initially a potential, and then an actual, competitor within the Communist bloc. Certainly it might not have been wise tactics for the Soviets to risk a Council ruling that decision on the Chinese participation question is vetoable. The United States simply has never viewed the question comprehensively, and has proceeded along lines of least effort.

It is, moreover, at the very least questionable to assert primary Assembly competence on grounds of Assembly "universality." The legal consequences of General Assembly Resolution 396 (V), the prime authoritative source of Assembly competence, are far from clear. It is relevant that each United Nations organ subscribes to the principle of auto-interpretation, that Assembly Resolution 396 (V) is only "recommendatory," and that an Assembly decision on the Chinese participation question is only to be "taken into account in other organs of the United Nations and in the Specialized Agencies." The Security Council itself has passed on the Chinese participation question. It, further, undercut the rationale of primary Assembly competence when that body rejected an amendment to its Rules of Procedure which would have required the President of the

²⁴⁴ *E.g.*, U. N. General Assembly Resolutions 35 (I); 113 (II); 197 (III); 296 (IV); 450 (VI); 620 (VII).

²⁴⁵ U.N. General Assembly Res. 396 (V).

Council to ascertain the views of all U.N. Members before the Council decided a "representation" question.²⁴⁶

Indeed, it borders on the unconstitutional for the General Assembly to be principally responsible for decision on the Chinese participation question. Articles 4, 5 and 6 of the Charter require prior Security Council approval for the admission of a "new" Member or the suspension or expulsion of a current Member. Prior Security Council approval was a principle accepted at Dumbarton Oaks, and only weakly challenged at San Francisco.²⁴⁷ Its major purpose was to insure that the Council, which was to be primarily responsible for the maintenance of international peace and security, would have a controlling voice in determining whether potential or actual Members would fulfill, or were fulfilling, their Charter obligations. Since (absent a comprehensive settlement) seating Communist China in the General Assembly will have all the important operational effects of "admission" and "expulsion," prior Security Council approval would appear a constitutional prerequisite to decision on Communist China's claim to Assembly participation. Entrusting the General Assembly with principal responsibility would thwart one of the major purposes of Articles 4, 5 and 6.

Thus it would appear sound constitutional policy for a Security Council decision to precede Assembly action on Communist China's claim to participate in the Assembly. In this way, both the "responsible" and the "universal" United Nations organs could bring their special competences to solution of the question. Most importantly, this procedure would minimize a potential lack of uniformity in the seating of "China's" delegations within the United Nations. To give the General Assembly principal responsibility for settling the Chinese participation question would be almost to guarantee that different "Chinese" delegations will sit in different organs of the United Nations.

(b) Criteria for decision

(1) *In the Security Council.*—The Chinese participation question is so much more consequential in impact than past initial participation questions that, at the very least, the modest "membership" criteria of Article 4 should govern decision on the Communist Chinese claim to participate in the General Assembly. Absent a comprehensive settlement,

²⁴⁶ Security Council, 5th Year, Official Records, Jan.-May Supp. 16-18 (U.N. Doc. S/1457 and Corr. 1) (1950).

²⁴⁷ Admission is, under Art. 4 (2) of the Charter, "effected by a decision of the General Assembly upon the recommendation of the Security Council." Goodrich and Hambro, after a survey of both the Dumbarton Oaks and the San Francisco *travaux*, conclude that "(t)here is nothing to indicate that the delegates did not intend to make a favorable recommendation by the Security Council a necessary condition to admission by vote of the General Assembly." Charter of the United Nations: Commentary and Documents 135 (rev. ed., 1949). Their conclusion is borne out by the subsequent practice of the relevant organs. In the first session of the General Assembly, Australia proposed that the Assembly "has primary and final responsibility in the process of admission." (U.N. Docs. A/C.1/23/Rev. 1 and A/C.1/23/Corr. 1.) Neither this nor a similar Argentinian proposal was accepted. Goodrich and Hambro, *op. cit.* at 136. A similar proposal, made by the United States in the Security Council in 1947, was also not accepted. U.N. Doc. S/P.V. 190.

past trends in decision would suggest that the Council should decide *not* to seat the Communist Chinese delegation. For guidance in decision, it could make no difference whether the Council looked to the stated requirements of Article 4, or instead focused on the content which Article 4 has acquired in practice. If the former is considered, the Council could reject the Communist Chinese on grounds that they are neither "peace-loving" nor "willing . . . to fulfill the obligations of the Charter." If the latter, it could refrain from seating the Communist Chinese because they are demonstrably unwilling to fulfill their international obligations to all the camps in the bi- or tri-polar world.

(2) *In the General Assembly*.—Article 4 criteria, interpreted in accordance with the recommendations above, should similarly guide General Assembly decision on the Communist Chinese claim for Assembly participation.

(c) Procedures for decision

(1) *In the Security Council*.—Past trends, when coupled with the history of the Chinese participation question, demonstrate also that a Council decision on the Communist Chinese claims for Assembly participation is not a decision on a "procedural matter," and is subject to the veto. The purposes and practice of Article 4 reinforce this conclusion: Communist China is a "new" entity for purposes of participation in the General Assembly, its perspectives and operations promise violation of Charter principles, and its claim is thus vetoable. Absent a comprehensive settlement, Article 6 dictates a similar result. ✓

(2) *In the General Assembly*.—Past trends in decision would appear to also require that the General Assembly vote on the Communist Chinese claim to participation be by a two-thirds special majority. For the past four years the Chinese participation question has been regarded as "important" for voting purposes and thus subject to special majority approval in the Assembly. It would be irrational for the next Assembly to label the issue "not important" when the consequences of decision remain unchanged, the factual situation is unaltered, and the Communist Chinese have made more explicit their challenge to the Organization. Article 18 of the Charter, further, requires the Assembly to vote by a two-thirds majority when it admits new Members to the Organization, elects non-permanent members of the Council, suspends the rights and privileges of membership, and expels Members from the Organization. The Chinese participation question, as usually conceived, could have all four of these consequences. Seating Communist China in the Assembly would have all the significant operational effects of admitting a new Member. Upholding the Communist Chinese claim in the Assembly might importantly affect the seating rights of a permanent member of the Security Council—a matter of perhaps more consequence than the election of a non-permanent member of the Council. Seating Communist China in the General Assembly, finally, might end in the suspension or expulsion of Nationalist China. If each of the Article 18 decisions alone requires a special majority, it follows *a fortiori* that the Chinese participation question, which

combines all four in a single decision, is "important" under Article 18 for voting purposes.

2. *The Nationalist Chinese Claim to Participate in the General Assembly*

Nationalist China's claim to participate in the General Assembly falls, at the very least, within the 1961 Assembly decision to seat Syria after dissolution of the U.A.R.²⁴⁸ Just as in the Syria case, there is no question of Nationalist China's dedication to Charter principles. The procedures and criteria of informal consensus, therefore, should govern Nationalist China's claim to Assembly participation, whether it sits as "China" or under some other label.

3. *Communist China's Claim to Participate in the Security Council*

(a) Criteria for decision.—The criteria for participation as a permanent member in the Security Council are found, not in specific Charter articles or in United Nations practice, but in deliberations prior to and at the San Francisco Conference, and in the policies sought to be achieved by the United Nations Charter. At San Francisco, the Security Council was delegated "primary responsibility" for maintaining international peace and security.²⁴⁹ Its permanent members had co-operated successfully in restoring minimum order after World War II, and it was hoped that they would jointly halt aggression in the postwar world. It was not enough, in the words of Article 4, that the permanent members were "able and willing to carry out (their general Charter) obligations." They were to be capable of co-operating, and willing to co-operate, in fulfilling the Council's primary purpose, namely, the maintenance of international peace and security.

To effectuate the purposes of the Charter-framers, similar criteria should guide decision on the Communist Chinese claim for Security Council participation. Communist China is certainly a "new" entity for purposes of participating as a permanent member on the Council. Since its past behavior belies a *willingness* to co-operate in safeguarding minimum order, and, indeed, promises severe disruption of Council activities, the Council should reject the Communist Chinese claim.

(b) Procedures for decision.—Past trends would require that the Chinese participation question be regarded as "substantive" for voting purposes in the Security Council. In Article 4 practice, permanent members have had a veto over applications for membership *in the General Assembly*. How much more substantive is a claim by a "new" entity for participation *in the Security Council*, particularly when that "new" entity has virtually proven its willingness to obstruct Council actions to maintain minimum order.

Article 6 of the Charter, further, reads as follows:

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the

²⁴⁸ See text above at p. 691.

²⁴⁹ U. N. Charter, Art. 24(1).

Organization by the General Assembly upon the recommendation of the Security Council.

It would be extreme irrationality to expel from the Organization a territorial community which, as a permanent member of the Council, has consistently *upheld* Charter principles, and to seat in its place an entity, "new" for United Nations membership purposes, whose past actions promise behavior that will persistently *violate* the Principles of the Charter. A Council decision on the Chinese participation question thus is of considerably more consequence than Council decisions on past initial participation questions, and is, *a fortiori*, a decision requiring the concurring votes of all the permanent members of the Council.

4. *Nationalist China's Claim to Participate in the Security Council*

Capacity and willingness to promote maximum order are the two important criteria for guiding decision on Nationalist China's claim to participate in the Security Council. We would note that the Nationalist Chinese have capability, as indicated in one of the larger and better equipped military establishments in Asia, and willingness, as demonstrated by past support for United Nations action. In the absence of a new comprehensive solution, a presumption might be indulged—as it has been—in favor of continuity of authority.

5. *The Timing of Decision*

Of all the issues in the Chinese participation question, there is none more complex than the timing of decision. Within the United Nations itself, the General Assembly and the Security Council must decide on four separate claims. Yet there are no established procedures which would require simultaneous presentation of these claims, and there is absolutely no assurance that the responsible organs will reach congruent decision at the same time. Disparity in seating "China's" delegations may be the inevitable result.

Given these procedural ambiguities, the power alignments of both claimants, and the possibility that Nationalist China could be permanently excluded from the United Nations, past experience might suggest that the Chinese participation question be settled by a variation of the "package deal." If both claimants were to apply to become "new" Members in the Assembly, it is certain that their applications would be traded one against the other. How much more important are prior negotiations when two claimants, each aligning with opposing poles in the bi- or tri-polar world, seek seats both in the Assembly and in the Security Council.

VI. RECOMMENDATIONS

Past trends in practice, the values at stake, and the disasters certain to ensue from unthinking resort to current procedures, all demand that the Chinese participation question be settled by advance negotiations. We

would recommend that a fifteen to twenty-member group,²⁵⁰ with delegates from the two Chinese claimants sitting without vote in advisory capacity,²⁵¹ frame solutions to the problem, which should be submitted both to the General Assembly, the Security Council, and the Specialized Agencies. The General Assembly vote "approving" a particular solution should be by two-thirds majority. The Security Council vote should be "substantive," and the permanent members of the Council, except perhaps for Nationalist China as a party in interest, should retain their veto. The Specialized Agencies should approve the plan by special majority. If the solution should call for Charter amendment, Members should deposit their ratifications with all possible speed.

Any particular solution might simply reallocate "China's" present seats, or create "new" participation rights in the United Nations,²⁵² or tie a decision on the participation question in with a general political settlement.²⁵³ One "reallocation" plan might place Communist China in

²⁵⁰ The group should consist of the permanent members of the Security Council other than China, and Members representative of the major voting blocs in the United Nations. All Members of the United Nations should be entitled to submit solutions to the Chinese participation question, and to comment in writing on solutions being considered by the group. We recommend that the group generally hold public meetings; yet we note that it may be advisable for the group to iron out the intricacies of particular plans in private sessions.

²⁵¹ The two Chinese claimants should be entitled to submit proposals themselves for solving the Chinese participation question, and should have rights to comment on and criticize proposals submitted to the committee.

It is not inconceivable that either or both of the Chinese claimants would refuse to participate in the 15-to-20 group which we recommend. Given the novelty of the Chinese participation question, we would suggest, in these circumstances, that a refusal to participate in the discussions be regarded as an unwillingness to fulfill one's international obligations.

²⁵² This is a proposal not unknown in the history of international organization. Prior to Germany's admission to the League as a permanent member of the Council in 1926, Poland, Brazil, Spain, China and Belgium all claimed permanent membership in the Council. Eventually, the Assembly's First Committee proposed a plan which created a new form of "semi-permanent" membership. In principle non-permanent members of the League Council could not be re-elected after their term expired. The First Committee's proposal relaxed this rule, and permitted the Assembly, by a two-thirds majority vote, to declare not more than three states "re-eligible" for Council membership. No limit was placed on the number of times a state might be re-elected. Presumably Poland, Spain and Brazil would qualify for "re-eligibility," and thus would assume a position in the League intermediate between the Great Powers and the rank and file of League Members. See, generally, League of Nations Official Journal, 7th (Ordinary) Assembly, Spec. Supp. 45 (1926); and Walters, *A History of the League of Nations* 316-327 (1952).

When Georgia and Armenia submitted applications for League membership, they were permitted to take part in the social and economic activities of the League, even though their applications were not approved.

²⁵³ This proposal, too, is not without precedent in the history of international organization. When Abyssinia, and later Estonia, Latvia and Lithuania, applied for League membership, they were seated only after appropriate declarations—in the former case to eliminate slavery and traffic in arms, and in the latter three, to adhere to the provisions of the Minorities Treaties. See, generally, Hudson, "The Members

the Security Council and General Assembly and seat Nationalist China (as "Taiwan") in the General Assembly.²⁵⁴ Another plan might leave vacant the "Chinese" seat on the Security Council,²⁵⁵ or grant that seat to a responsible representative of the African, Asian, and Latin American nations.²⁵⁶ "New" participation rights for the Security Council might include permanent participation *without* the veto, participation terminable on special majority vote by the General Assembly, or participation only on issues affecting peace and security in Asia. "New" forms of General Assembly membership could permit participation in Assembly debate *without* the right to vote, participation only on selected issues, or participation with special rights to election to the Security Council as a non-permanent member.²⁵⁷ Terms of a related political settlement²⁵⁸ might include, in illustration of the kinds of relevant commitment, such items as the following:

- (1) Mutual renunciation of force in the Taiwan Straits;
- (2) Communist Chinese guarantee of the independence of Taiwan indefinitely or for a specified number of years;
- (3) Settlement of the Sino-Indian border controversy by an international arbitral body, and/or creation of an international force, financed by Communist China and India, which would patrol the Sino-Indian border (or other borders thought necessary) which adjoin China;
- (4) Communist Chinese guarantee that it will not support revolutionary parties in the less-developed countries;
- (5) Sanctions—diplomatic, cultural, economic and military—which the international community would apply on violation of a related political settlement.

of the League of Nations," 16 Brit. Yr. Bk. Int. Law 130 (1935), and Graham, *The League of Nations and the Recognition of States* (1933).

²⁵⁴ Cf. the Dec. 8th, 1964, speech by Ireland's Foreign Minister Aiken to the General Assembly. *New York Times*, Dec. 9, 1964, p. 6, col. 3.

²⁵⁵ The vacancy might be only temporary, and Communist China might be seated as a permanent member once it gave evidence that its perspectives and operations were consonant with the principles and purposes of the Charter.

²⁵⁶ India has been suggested. *E.g.* Wilcox and Marcy, *Proposals for Changes in the United Nations* 307 (1955).

²⁵⁷ *E.g.*, prior to 1955, Italy participated in deliberations of the Trusteeship Council without being a Member of the U.N. Although it was without the vote when either Somalia or general trusteeship problems were discussed, Italy could (1) include items in the agenda, (2) request special sessions of the Trusteeship Council, (3) submit draft resolutions and propose other motions or amendments without a second, and (4) append its views to the reports or recommendations of the Trusteeship Council. Italy, moreover, had access to the private meetings of the Council, and it was to be notified of the first meeting of each session of the Trusteeship Council and of the provisional agenda. Italy, however, was not permitted to participate in the work of the subsidiary organs of the Council. Trusteeship Council Res. 310 (VII) entitled "Question of the Full Participation of Italy in the Work of the Trusteeship Council."

²⁵⁸ For an earlier and still relevant projection and evaluation of alternatives, see Dean, "United States Foreign Policy and Formosa," 33 *Foreign Affairs* 360 (1955).

We would recommend that the fifteen-to-twenty-nation "drafting" committee devise solutions to the Chinese participation question *only after* it has comprehensively analyzed all the characteristics of the two claimants, and *only after* it has related these characteristics to proposed rights of participation in specific United Nations organs. The principles of universality and responsibility should be at the base of every proposed solution.²⁵⁹ In particular, every plan should grant a seat on the Security Council—in the United Nations system the organ of primary responsibility for safeguarding international peace and security—only to a claimant demonstrating both willingness and capability of promoting maximum order.²⁶⁰

²⁵⁹ See text above at p. 682.

²⁶⁰ It is obvious that Communist China could not, without substantial modification of its foreign policy objectives, adhere to a "compromise" settlement designed by the drafting committee, if the compromise permits separate representation for Taiwan in the United Nations. This, however, should not preclude the drafting committee from reaching such a compromise. It is for the world community to spell out the terms of participation in the United Nations, and not for Communist China to dictate terms to the United Nations. Rejection of the world community-approved settlement plan would be a virtual demonstration that Communist China is unwilling to fulfill the terms of the Charter.

We note that both France and the United Kingdom have employed variants of a "two China" policy. Both countries have consulates in Taiwan; France has an ambassador, and the United Kingdom a chargé d'affaires in Communist China. Communist China has, however, unceasingly rejected proposals for "compromise," particularly those in the form of a "two-Chinas" solution. Cf. Chen Yi, June 20, 1964, Press Conference: People's Daily, "The Chinese People are Determined to Liberate Taiwan," June 27, 1965, in 27 Peking Review 9 (July 2, 1965); Commentator, "Don't Fall into the Imperialist Trap," People's Daily, July 9, 1964, in 29 *ibid.* 35 (July 17, 1964) (Malawi had invited representatives of both "Chinas" to its independence celebrations); "India Aids U. S. 'Two Chinas' Plot," 27 *ibid.* 23 (July 3, 1964); "What is the Sato Government up to in the U.N.?", 51 *ibid.* 6 (Dec. 18, 1964); "Eisaku Sato's Daydream," 49 *ibid.* 30 (Dec. 4, 1964); "New Delhi's Attempt to Create 'Two Chinas' Denounced," 47 *ibid.* 18 (Nov. 20, 1964) (India had invited delegations from both "Chinas" to the 22nd International Geological Conference).

At a June 20, 1964, press conference, Foreign Minister Chen Yi declared:

"We are convinced that U. S. imperialism's manipulation of the United Nations will sooner or later break down and the Chiang Kai-shek gang will sooner or later be ousted from it. The lawful seat of the People's Republic of China in the United Nations will sooner or later be restored. This, of course, takes time. We are not in a hurry, we can wait. Under no circumstances will we barter away principles and sovereignty; any attempt to make the restoration of China's seat in the United Nations a bait for our acceptance of the 'two Chinas' scheme is doomed to failure." 26 *ibid.* 6, 7 (June 26, 1964); People's Daily, "China's Sovereignty Over Taiwan Brooks No Intervention," May 12, 1964, 20 *ibid.* 6 (May 15, 1964); People's Daily, "On Establishment of Diplomatic Relations Between China and France," Jan. 29, 1964, 5 *ibid.* 10 (Jan. 31, 1964); Chou En-lai, Press Conference, Pakistan, Feb. 25, 1964, 10 *ibid.* 18 (March 6, 1964); Chou En-lai, interview with Bernard Tesselin, Feb. 3, 1964, 7 *ibid.* 14 (Feb. 14, 1964).

A FRAMEWORK FOR THE LEGAL ANALYSIS OF WAR-PEACE ISSUES

BY KENNETH S. CARLSTON

Professor of Law, University of Illinois

To state the province and function of law in the control of war requires an understanding, in the broadest possible terms, of the nature of interstate conflict in the twentieth century. When such an understanding is reached, it will be seen that the traditional methodology of international law is inadequate for handling war-peace issues. While international lawyers should be faithful to the legal tradition of fact inquiry and judgment on the basis of legal norms, they should enlarge their perspective of international conflict and restructure their approach to the problem of war. The elaboration of this thesis is the subject of this note.

1. *Nature of twentieth-century war.* War appeared in the relations of primitive tribal groups as an affective and instrumental activity for the individual members of the group. Bodily skills for waging war were developed and used with personal gratifications. War provided situations charged with excitement, thrill, and danger. The spear became a symbol of the personality of man. The outcome of war was the acquisition of land, booty, and slaves or the settlement of inter-tribal disputes created by such offenses as the seduction of women or theft.

With the emergence of states as structures of social action, war became an instrument of national policy. It still retained a means-end rationality.

Twentieth-century war represents the use of the individual by states to achieve national and ideological ends. It is conflict among states to establish or preserve a world order which reflects their particularistic values and master symbols. For example, Communist master symbols of "the dictatorship of the proletariat" and the elimination of "imperialists" and "capitalists" clash with Western master symbols of "freedom and respect for the individual" and "democracy." Symbolic characterizations of the demonic qualities of other peoples are carried to the point that in China official propaganda attributes bestial character to the Americans in order to promote attachment to the central government and to provide scapegoats for the failure of governmental policies, as well as to release internal tensions created by rapid cultural change. The West on its part is not free from hatred of "Communists."

War today is a struggle between one group of states linked together by ideology and interest to preserve their grouping against another. It is conflict as to how the world society shall constitute itself. Even though a particular war may be initially quite local in its character, the equilibrium of world order is so precarious and the ramifications of the conflict

throughout world society are so widespread that the conflict tends rapidly to affect the basis upon which the current international order is constituted and to expand to a world war. The participants in such a war are concerned with the nature of the world order which will be its outcome.

In other words, war in primitive society and war in the early period of nationalist and industrially-organized states was an instrument for achieving group or state goals. War in the twentieth century is perceived by states to represent a defense of their national interests against interference by other states. Each state always considers its foreign policy to be legitimate and justified. The foreign policies of opposing states are perceived to be selfish, menacing, and potentially aggressive. War ensues as a means to preserve the national system and the type of inter-state order in which the state will endure and prosper. Any rationality of such a perception of war is now destroyed by the irrationality of nuclear war, but states are so committed to war as a means of preserving their preferred forms of order that they cannot relinquish its use both as threat and as action.

Yet, even as we characterize war as a product of the type of culture in which it is found, we must realize that our globe is not uniformly populated by peoples who have reached the stage of development of the industrially-organized, democratic states of the Atlantic basin. It is instead a place in which we find diverse cultures at different stages of development. The populations of the emerging states of Africa and Asia are predominantly organized in kinship structures of social action. They have a thin veneer of élite who perform the governmental, military, management, and educational functions requisite for the modern state. Southeastern Asia is composed of states of this character, differing only in the size of the élite class. China is in the relatively early stages of industrialization, although hot-house feeding of war technology and war industries is taking place. China and Russia together have, in the form of Communist ideology, a most extraordinary frame of reference for perceiving the nature of the Western world, as well as a most limited means of communication for obtaining an empirically valid image of that world. The peoples of the emerging states still seem to perceive war as instrumental in character rather than suicidal.

2. *Current theories of conflict in international relations.* A number of explanations of the phenomenon of war may be hypothesized.

(a) *Psychological theories of conflict.* War may be considered to be the appearance in the public sphere of the following aspects of psychological behavior: (1) a product of the projection to out-groups of in-group hostilities; (2) a displacement upon out-groups of aggression arising from frustrations occurring in interaction within groups; or (3) the direct expression of aggression arising from frustration occurring in interaction between groups.

War in modern society is akin to the life and death cycle of the lemmings of the Arctic lands. They multiply in their tunnels and nesting places below the surface of the soil, experience the tensions of frustration

which increasing numbers bring, until there is a headlong flight of the group to self-immolation in the waters of the Pacific. So with modern man in his warrens of cavernous streets and bleak barracks of steel, stone, concrete, and glass for work and family life, battered by crowds and traffic, deafened by noise and clamor, experiencing passion and sex instead of compassion and love, deprived of healthy play and the full flowering of the personality, finding the confusion of his daily life repeated in the confusion of modern music and art, and with little religious experience to endow his life with meaning and felt spiritual emotion. The outcome for modern man is the symbolic release of tensions in the demonic characterizations of other peoples and their ideologies and finally in self-immolation in nuclear war.

Also important is the psychological situation of the state official in situations of international conflict. His typical background of experience is that of the administrator or the lawyer. In either event, he has grown accustomed to highly abstract characterizations of action and to dealing in abstractions. He prefers routine instead of creative solutions to problems. He categorizes situations of conflict into a single all-embracing concept, which is torn from its roots in the world of reality and made the sole basis for the governance of action. He justifies decisions on the basis that they are a "commitment," a "moral necessity," or a way to "grandeur." Faced with the necessity of making decisions in precarious situations entailing both reward and deprivation, whatever choice is made, he overestimates the favorable aspects of the chosen solution and underestimates the unfavorable aspects. He enhances the importance of information consistent with his decision and depreciates information which is inconsistent with it. Moreover, the official channels of communication provide him with information which is muddled and distorted. He tends to receive information serving the cause of occupancy of office rather than that of truth. Finally, he is subjected to the pressures of domestic politics, in which the complex realities of international politics are cast in the most rudimentary and unreal terms.

(b) *Sociological theories of conflict.* Conflict arising within or between groups has the social functions of (1) releasing tension, (2) maintaining group identity, (3) promoting group cohesion or integration, and (4) maintaining group boundaries.

A sociological view of war would see it as a recurring form of action in international relations and a part of the system and process of international relations. In the long-run perspective of time, war is a part of the international system of action and an essential factor in its maintenance. It is part of the way in which world society has learned to organize itself in the long term. While momentarily of a disintegrative character, war represents a discharge of the friction and tension arising within the system. It results in a certain degree of restructuring of the system to accommodate political, social, and economic change, thereby enabling the system to operate and maintain an equilibrium in an order of peace for

a period of time. In other words, tension is built up as a consequence of conflicting foreign policies and communications systems which fail to provide full and accurate information concerning the character of other actors, their intentions, and their acts. At the same time, the race to build up armaments hastens its pace. The system becomes increasingly unstable. Some small, local disturbance receives magnified perceptions of its significance and impact. Decision-making is hasty and ill-advised under the menace of impending violent conflict. War breaks out. Its violence results in fatigue of the actors, changes in their power relations, new perceptions of the changed conditions of the international order, an acceptance of those conditions, and a period of peace in which the tension build-up and the arms build-up again take place.

Committed to an international order consisting of a cycle of conflict in peace and conflict in war, each phase of the cycle succeeding the other with the inexorability of day and night, the international order is today confronted with the fact of self-destruction as it approaches the war phase. Caution in decision-making by the two great nuclear Powers characterizes their behavior as they approach the threshold of war, yet a possible collision course is still followed. Emerging nuclear Powers, such as China, seem clearly committed to the eventual use of nuclear power to support foreign policy objectives.

(c) *Political and economic theories of war.* War is held to be (1) a product of dynastic rivalries, (2) a struggle for the bases of power, or (3) the use of power to achieve political and economic ends, including the maintenance of a balance-of-power system of states.

(d) *War as a product of laggard cultural development, including false perceptions of current international reality and inadequate modes of structuring international action.* World society is still compartmentalized politically and legally into states. Yet there is an expanding sphere of international action which cuts across state boundaries to achieve the goals of individuals, corporate organizations, and even states themselves. This stream or system of international action is perceived by the actors within it to be extensions of states beyond their territorial boundaries. The linkages of states with the international order are held by states to be subject to their authority and power. Each state seeks to preserve its participation in international life from interference or disruption by the authority and power of other states. The world order is valued as a means to achieve national ends and not as a system of action to be developed as intrinsically valuable for the benefit of all.

It is submitted that the linkage of each state with international society should instead be viewed as part of an international order. That order should be granted its own autonomy and ability to make authoritative decisions directed to preserving and developing the order as a means for value-realization by those participating in it.

3. *Steps toward the elimination of war.* If war is an integral part of the operation of the international system, reflecting continuing conflict as

to the nature of the order which international society shall assume, then the following steps, among others, appear necessary in order to eliminate war:

(a) A fundamental change in the ways in which the members of one state perceive and appraise the action of other states. Demonic symbolization of other states and their actions must be discarded. Mass media of communication should cease to be captives of national ideologies and state control and should instead become dedicated to the ideal of integrity in communication. No organism or group can successfully adapt to its environment on the basis of false or distorted information.

(b) A change from the permissive attitude held toward war itself to one of profound cultural revulsion.

(c) The emergence and acceptance of master symbols which will depict and justify a world order of peace.

(d) The growth of a system of interaction between states which will yield increasing value realization by the members of states. Thus, in international economic relationships there must be improvement in the marketing of basic commodities from the developing nations, increase in the flow of technology and capital equipment to the developing nations, and harmonizing of the opposing philosophies of GATT and economic autarchy.

(e) The accomplishment of objectives (c) and (d) implies the growth of international organizations for structuring international action, instead of states, as in the European Economic Community. Such an outcome will not take place unless international organizations provide better ways of life for the members of states than their own national structures of action.

4. *A framework for the legal analysis of war-peace issues requires a fundamental recasting of the methodology of international law.* The following procedures should be adopted in order to provide international law with a framework for resolving war-peace issues:

(a) *The problem should be appreciated as one requiring investigation by a task force of many scholars.* The roots and ramifications of a situation of international conflict are so many that a most comprehensive frame of reference and body of information must be created for stating the nature of the problem and making recommendations for its resolution. This implies investigation of the situation by a task force of scholars drawn from all relevant disciplines.

(b) *The factual aspects of the conflict situation must be stated with fidelity and thoroughness by an international group or institution of esteem.* A central task of the lawyer and judge is to arrive at an impartial and authoritative statement of the facts of the situation of conflict, with the authority which flows from respect and esteem as well as the holding of office. Any fact-finding body in the international realm must have a position of impartiality and esteem supporting the authority of its findings. If this is done, the very statement of the relevant facts will tend to reduce the area of controversy and to change the perceptions and cognitions of the parties in conflict, as well as public communications

of their positions. They will tend to move from national perspectives of reality to more empirical perspectives.

The importance of such fact-finding procedures in the solution of international conflict cannot be over-emphasized. Students of the control of conflict among states have centered their attention upon political and legal instruments of control. The significance of accurate and full factual information in appreciating the nature of the conflict and appraising the conduct of the disputing parties has tended to be neglected.

(c) *While the international lawyer should confine himself to the legal aspects of a problem in international conflict and be faithful to the law in stating his views, his action should be integrated with that of others in a comprehensive approach to the solution of the problem, in which consideration is given to its historical, political, economic, social, and cultural aspects, and recommendations made as to the action to be taken.* To insist upon a reign of law, in the jural sense, as a basis for world order and the solution of international conflict is to overlook the fact that law, as a basis for order, is to be equated with government. Government, in turn, is a product of the history of a society. It creates its enduring design, quiets the clamor of politics, and controls conflict among its citizens. Situations of international conflict may be statable in the norms of international law but their resolution must go to the roots of conflict, if the appropriate legal norm is to be seen and applied effectively.

(d) *Decision should be made of any legal issues in accordance with international law.* To state this fact, however, is to ignore the conflicts existing among states today as to the form which international law norms shall take. Three central groups of states are engaged in this struggle: first, the mature, industrially-organized, essentially democratically-structured states of the Atlantic basin; second, the Communist states; and third, the developing nations. This struggle reduces the universality of international law norms and lessens their common appeal for the solution of international controversy. This difficulty will not be overcome until there is greater consensus on values and value priorities among states generally.

5. *Conclusion.* Pre-twentieth-century war was perceived as a rational means for attaining group goals, notably those of the state. War today retains a modicum of rationality, viewed in the limited context of preserving an existing national system or type of international system. It loses its rationality whenever man, whatever his race, color, or nationality, is seen as a sentient, warm, worth-while personality entitled to dignity, respect, and survival. It loses any semblance of rationality when it takes the form of nuclear destruction. The control and elimination of war require a world-wide cultural revulsion toward war, in which its mass killings are seen to be in the same context as the killings of Dachau and Buchenwald. Rationally and ethically, war is a cultural disease.

The King's peace was brought to England by the power of the King's forces. The King's justice was extended throughout the land in the form of law sanctioned by force. International law, in contrast, lacks force to sanction its authority and rests instead on reason and reciprocity. The

fundamental question which international law faces is whether it can promote peace in the world on a broader perspective than one which is oriented to rules of law as a primary basis for order. Law exists because it is valued, not merely because it is inherited or enforced. The elimination of war through reason and law requires the institutionalization of fact-finding procedures to handle conflict situations, investigation by scholars on a broad front of the roots of conflict, political proposals through the United Nations or otherwise of a new order in which the causes of conflict are reduced, and finally, the statement of the controlling legal norms. In such circumstances, the applicable legal norms are viable because they exist in a setting of a rational realization of values.

THE PARTITION OF THE NEUTRAL ZONE

BY SAYED M. HOSNI

Legal Adviser, Ministry of Foreign Affairs, Kuwait

The conclusion on July 7, 1965, of an Agreement* between the independent sovereign states of Kuwait and Saudi Arabia in relation to the so-called Neutral Zone, of which exchange of instruments of ratification was effected on July 25 of this year, is a striking illustration of the ability of the Arab States to settle by free decision, unclouded by external influence, a unique and puzzling problem involving interests of great importance. It is an encouraging expression of the policy of common sense and good neighborliness, and raises interesting questions of international and domestic law.

Kuwait is a small state, some six thousand square miles in extent, with a population of less than half a million, wedged in between Iraq to the north, and Saudi Arabia to the south and west. Founded in the early part of the last century by the ancestors of the ruling family of al-Sabah, migrating from central Arabia, it has succeeded, through the wisdom of its rulers, in surviving the vicissitudes of two world wars and of emerging as a sovereign state enjoying, by virtue of its strategic position and more recently through the endowment of great natural wealth, a position of commanding importance in the Arab world.

During the nineteenth century Kuwait, while not an integral part of the Turkish Empire, was under the suzerainty of the Ottoman Sovereign. The major event in the development of the international status of the country was the establishment of British influence. International maneuverings throughout the century—with the Ottoman Empire on the one side and Great Britain on the other—led eventually to the conclusion in 1899 of a treaty establishing a relationship between Britain and the ruler of Kuwait, not only with regard to the territory under the actual jurisdiction and rule of the ruler of Kuwait, but also with regard to any part of the territory under the jurisdiction of the Shaikh of Kuwait, even if that part happened to be at the time in the possession of the nationals of other states. This clause is believed to have been added as a precaution against any attempt by the Turks to transfer the ownership of any part of Kuwait territory to any aspirant among their allies, either the Russians or the Germans.

Although the treaty banished the influence of other contending Powers over Kuwait and established a special relationship between the ruler of

* A translation of the Agreement is annexed below. See also 4 Int. Legal Materials 1134 (1965). The Arabic text appears in the official gazette of Kuwait, *Kuwait Al-Yoam*, No. 581 (June 19, 1966).

Kuwait and Britain, it did not define what it meant by the "Kuwait territory" within which the ruler was pledged not to accept the representative of any foreign Power or to dispose of any territory to any foreign Power.

Apparently the first attempt at a geographical delimitation of this area appeared in the so-called "Anglo-Turkish Treaty" of July 19, 1913,¹ unratified because of the outbreak of war, which recognized Kuwait as "an autonomous *kaza* of the Ottoman Empire" and by which the Ottoman Government declared that it would "refrain from interference in the affairs of Kuwait, including the question of succession, and from any administrative act as well as any government or military act in the territories belonging to it." By this treaty the territory of Kuwait was divided into two categories, the limits of which were geographically indicated on a map. In one of these areas complete autonomy of the Shaikh of Kuwait was recognized; in the other, the outlying area, the authority exercised was that of a more limited and administrative character.

The first category is defined as follows:

Article 5: The autonomy of the Shaykh of Kuwayt, is exercised by him in the territories, the limit of which forms a semi-circle with the town of Kuwayt in the center, the Khur-al-Zubayr at the northern extremity and al-Qurayyin at the southern extremity. This line is indicated in red on the map annexed to the present convention (see map annexed). The islands of al-Warbah, Bubyān, Mashjan, Fay-lakah, 'Awhah, al-Kubr, Qaru, al-Maqta' and Umm-al-Maradim, together with the adjacent islets and waters, are included in this zone.

A second area over which administrative control only was admitted, and which included the area from which the Neutral Zone was later carved out in 1922, was then described (Articles 6 and 7), and marked out by a green line. Within this area

The tribes therein situated are recognized as within the dependence of the Shaykh of Kuwayt who will collect their tithes as in the past and who will exercise the administrative rights belonging to him in his quality of Ottoman kaymakam.

While, as noted, the treaty was not ratified, the geographical limitations given are of importance in view of their adoption by reference in later treaties.

Shortly after the outbreak of war, on November 3, 1914, Great Britain, by a note addressed to the Sheikh, recognized Kuwait as "an independent government under British protection."

Furthermore I make to you, on behalf of the British Government, certain provisions concerning your Excellency personally, viz:— . . . That the British Government does recognise and admit that the Shaikdom of Kuwait is an independent Government under the British protection.²

¹ J. C. Hurewitz, *Diplomacy in the Near and Middle East: A Documentary Record*, Vol. 1, p. 269; or 10 Gooch and Temperley, Part 2, *British Documents on the Origins of the War, 1898-1914*, p. 192 (1938).

² 11 Aitchison, *Treaties, Engagements and Sanads relating to India and Neighbouring Countries* 265-266 (5th ed., 1933).

This note made no reference to territorial boundaries, as it was principally concerned with securing the military co-operation of the Sheikh in the war against Turkey and the assistance to be offered in such case by Great Britain.

At the conclusion of the war, Great Britain undertook to confirm the situation with regard to the frontiers of Kuwait with the neighboring countries which were the successors of the Ottoman Empire. In November, 1922, at the invitation of the British High Commissioner for Iraq, Sir Percy Cox, a conference was held at Uqair at which Ibn Saud was present in person. Iraq was represented by its Minister of Communications and Works, and Kuwait by the British Political Agent in that country. In his capacity as representative of a state friendly to all the parties, Sir Percy Cox acted as a trusted umpire between the interested parties.

The physical situation of the area, as presented to the negotiators, has been graphically summarized by a competent authority as follows:

But east and south of Kuwait neither tradition nor science would draw a proper frontier. Two parcels of land, each roughly fifty miles square, defied classification. In the heat of summer they were empty. At times Ibn Saud's bedouin peopled them; at times the tribes from Iraq had possession; and again, when the quick spring rains covered the rolling prairie with a thin carpet of green, the wells of Arqshadf and Wafra gave water to both Saudis and Kuwaitis, while Samah refreshed the camels of Iraqis and Nejdīs alike. Who could say to whom these territories belonged?³

The Uqair Conference established two zones—one as between Saudi Arabia and Iraq and another between Kuwait and Saudi Arabia—which thereafter came to be known as the Kuwait-Saudi Arabia Neutral Zone. With the former the present note is not concerned, its resources, as far as presently known, being negligible.

The Najd-Kuwait Convention of December 2, 1922,⁴ adopted as the northern boundary of the Neutral Zone the southern part of the red semi-circle specified in the unratified Anglo-Turkish treaty of 1913, and went on to recite that this line marked "the undisputable southern frontier of Kuwait territory." The other land boundaries of the Zone were defined by reference to named geographical features.

The treaty provided that within the territory thus indicated, the governments of Kuwait and Najd "*will share equal rights until, through the good offices of the Government of Great Britain, a further agreement is made between Najd and Kuwait concerning it.*"

For the circumstances surrounding the conclusion of this treaty a unique source of authority fortunately exists in the published record of one of the participants in the negotiations, the late Colonel H. R. P. Dickson.⁵ After reviewing in some detail the tedious processes of personal negotiation

³ Richard H. Sanger, *The Arabian Peninsula* 152 (Cornell University Press, 1954).

⁴ 11 Aitchison, *Treaties, etc.*, 213.

⁵ *Kuwait and Her Neighbours* 270-278 (London, George Allen & Unwin Ltd., 1956). See also the same author's well-known work, *The Arab and the Desert* (London, George Allen & Unwin Ltd., 1949).

between the representatives of the Arab States and what he refers to as the eloquently presented and contradictory pretensions of each, Colonel Dickson continues (the importance of his words calls for their quotation in full):

On the sixth day Sir Percy entered the lists. He told both sides that at the rate they were going nothing would be settled for a year . . . Sir Percy's Arabic was not too good, so I did the translating. As far as I can remember, Ibn Sa'ud took little further part in the frontier discussions, leaving it to Sir Percy to decide for him this vexed question. At a general meeting of the Conference, Sir Percy took a red pencil and very carefully drew in on the map of Arabia a boundary line from the Persian Gulf to Jabal 'Anaizan, close to the Trans-Jordan frontier. . . . South and west of Kuwait proper, he drew out two zones, which he declared should be neutral and known as the Kuwait Neutral Zone and the Iraq Neutral Zone. Replying to the mild expostulations of 'Abdul Latif Pasha el Mendil, against the need for a Kuwait Neutral Zone, Sir Percy said that the Kuwait tribes proper must have more grazing room. Pressed by the Pasha, he snapped out: "Why, pray, are you so anxious that this area go to Najd?" "Quite candidly", the Pasha replied, "because we think oil exists there." "*That*", retorted Sir Percy, "*is exactly why I have made it a neutral zone. Each side shall have a half-share.*" (pp. 274-275.)⁶

It would seem clear enough from the above that at the time of the creation of the Neutral Zone in 1922 the idea of the formal establishment of a joint sovereignty was not in the contemplation either of Sir Percy Cox or of the rulers involved. A simpler conception prevailed. The primary interests were grazing. This did not involve many of the incidents of sovereignty. The question of oil was mentioned as a possibility but nothing was said to exclude a continued assertion of sovereign rights by either of the parties. Both rulers expressed their dissatisfaction with the adjustment which they grudgingly accepted. Two passages from the report of the principal witness are significant.

Referring to the unfavorable reactions to the settlement in Kuwait, Colonel Dickson relates that when Sir Percy Cox broke the news to the ruler of Kuwait that he had been obliged to give away to Ibn Sa'ud nearly two-thirds of the Kingdom claimed for Kuwait, the Sheikh asked him if Great Britain had not entered the war in defense of the rights of small nations, to which Sir Percy replied in the affirmative. Colonel Dickson continues:

⁶ See also, in continuation of the above, the following graphic incident. "At about nine o'clock that evening there was an amazing sequel. Ibn Sa'ud asked to see Sir Percy alone. Sir Percy took me with him. Ibn Sa'ud was by himself, standing in the centre of his great reception tent. He seemed terribly upset. 'My friend,' he moaned, 'you have deprived me of half my kingdom. Better take it all and let me go into retirement.' Still standing, this great strong man, magnificent in his grief, suddenly burst out into sobs. Deeply disturbed Sir Percy seized his hand and began to weep also. Tears were rolling down his cheeks. No one but the three of us was present, and I relate exactly what I saw. The emotional storm did not last long. Still holding Ibn Sa'ud's hand, Sir Percy said: 'My friend, I know exactly how you feel, and for this reason I gave you two-thirds of Kuwait's territory. I don't know how Ibn Sabah will take the blow.'"

"If some day," said Shaikh Ahmad, "Ibn Sa'ud dies and I grow strong like my grandfather, Mubarak, will the British Government object if I denounce the unjust frontier line and recover my lost territories?" "No!" laughed Sir Percy, "And may God bless your efforts."

To this, Colonel Dickson adds the following:

In later years Shaikh Ahmad often told me that, as he considered the whole of the Kuwait Neutral Zone to be part of his territory, he would never consent to go half-shares with Ibn Sa'ud in the granting of any oil concessions.

On his part, the feelings of Ibn Sa'ud have already been indicated.

Events, however, moved along. The oil, whose existence in large quantities had been merely hopefully suspected, turned out to be an asset of untold possibilities. Its sharing fell within the scope of the rule of equal rights. Joint measures were required to facilitate its exploitation. These called for the presence of foreign workers in the area. The problem of criminal jurisdiction arose, and led to the conclusion in 1942⁷ of an Extradition Treaty signed, on the one hand by Great Britain "on behalf of His Highness the Sheikh of Koweit"—Great Britain being at that time still responsible for the foreign relations of the Sheikhdom—and for the Government of Saudi Arabia by H. E. Yussef Yasin, Head of the Political Section and Private Secretary to the King. After the general provisions concerning the mutual surrender of their nationals or those of other Arab states, in the case of crimes committed in such states, the treaty (Article 8) provides for several cases involving the exercise of criminal jurisdiction within the zone itself.⁸ The attitude thus assumed by the parties towards the Neutral Zone is a sufficient indication that they had begun to treat the area as an extension of their several criminal jurisdictions, with due regard to the exercise of corresponding jurisdiction by the other party.

Individual concessions to exploiting companies followed, granted in varying terms. At first the terms used were noncommittal as to the nature of the rights conceded. Thus, in 1948, in the concession granted by Kuwait to the Aminoil Company of Delaware, it is merely stated that the Sheikh "granted to the Company to the extent of his right, title and interest" the right to drill for oil within the Neutral Zone.

⁷ See text in 10 U.N. Treaty Series 100 *et seq.* (1947).

⁸ "1. Where an offence, as defined in Article 3 of this Agreement, has been committed in either of the two territories, and the offender has fled to the Neutral Zone, the offender shall be deemed to be still within the territory in which the offence was committed, and may be arrested and tried by the Government thereof.

"2. Where an offence, as defined in Article 3 of this Agreement, has been committed in the Neutral Zone and the offender escapes to the territory of the Government of which he is a national, he shall be deemed to have committed the offence within the territory of his own Government and shall be liable to arrest and trial by that Government.

"3. Where an offence, as defined in Article 3 of this Agreement, has been committed in the Neutral Zone, and the offender, being a national of one of the two Governments, escapes into the territory of the other, he shall be deemed to have committed the offence within the territory of the Government of which he is a national and shall be liable to extradition proceedings under this Agreement."

The concession agreement of November 20, 1949, from Saudi Arabia to the Pacific Western Oil Co. (now the Getty Oil Company), in respect of its right in the Neutral Zone, used terms a little broader. The right of Saudi Arabia in the Neutral Zone was referred to as an "undivided" one-half interest in the mainland, in the islands if any, and also the territorial waters. The word "undivided" was here used for the first time.

In the concession agreement of July 13, 1958, between Kuwait and the Arabian Oil Company of Japan, we find still more interesting distinctions. The Sheikh's title is now described in the Preamble to that agreement, and for the first time in a formal document, as a title of sovereignty. The agreement recorded that "Whereas the Sheikh, among other things, has sovereignty over an undivided one-half interest in and to the Neutral Zone."

STATUS OF THE NEUTRAL ZONE

In the light of the development thus reviewed, the classification of the Neutral Zone in terms familiar to international law is not free from difficulty. The term "neutral" is not helpful. It seems to have been used as a matter of convenience, in default of any better term. The zone belongs to *both* parties and is not "neutral" as to either. As El Erian correctly observes—the territory is referred to as a Neutral Zone—"i.e., neutral in the sense that it is not national, as it does not belong to one state but belongs to two or more partners of the Condominium. Thus the term 'neutral' here should not be confused with its corresponding one in the rules of war and neutrality."⁹

As to the use of the term "condominium," question also has been raised, especially in view of the somewhat equivocal terms used by the parties themselves during the early stages of its existence. However, the question would seem to have settled itself through the later declarations made in the concessions, and the general use of the term by commentators.¹⁰ At

⁹ El Erian, *Condominium and Related Situations in International Law* 97 (Cairo, 1952).

¹⁰ El Erian, *op. cit.* above, p. 100: "Between the territories of Saudi Arabia and Kuwait a neutral zone (Condominium) exists."

Issam Abdul Rahman Azzam: "The sharing of jurisdiction in the Neutral Zone by the Governments of Saudi Arabia and Kuwait suggests 'Boundary Condominium' as a more accurate term." "The International Status of the Persian Gulf States," 15 *Revue Egyptienne de Droit International* 54 (1959).

Oppenheim: "In this case [Condominium] a piece of territory consisting of land or water is under the *joint* tenancy of two or more States, these several States exercising sovereignty conjointly over it and over the individuals living thereon. . . . Until a final settlement, the interested States do not each exercise an individual sovereignty over these territories but they agree upon a joint administration under their conjoint sovereignty." 1 *International Law* 453-454 (8th ed., 1955).

To these references may be added the following note by the publishers (The Middle East Research and Publishing Center, Beirut, Lebanon) of the late Edward H. Brown's important little volume, *The Saudi Arabia Kuwait Neutral Zone* (Beirut, 1963), which appears on its inside cover: "The Neutral Zone between Saudi Arabia and Kuwait is without doubt one of the world's most curious and complex legal entities. In fact, it is not strictly speaking a Neutral Zone at all but might best be described as a 'condominium', since both countries enjoy equal rights of sovereignty over the entire territory of the Zone."

any rate the question of terminology is of relatively small importance.¹¹ The facts are clear. The only two states having territorial rights in the area have acted ever since as if each enjoyed equal and undivided sovereignty over the entire area. Each has assumed the right of granting concessions to operating companies covering its half-share in the resources of the entire territory; each has established the machinery of administrative government; each has allowed its nationals to enter and reside in any part of the area and, in such part, to cultivate the land, to work, and to own property. It is sufficiently clear from these facts that the parties have treated this area as under their joint and undivided sovereignty—a concept finding its origin in the Sharia (Islamic) law to which both parties strongly adhere, and according to which ownership of an undivided share in a certain property extends to every particle thereof. Their agreement today on a partition of their undivided ownership, subject to such mutual obligations as they find to their interest, is a matter for their sovereign appreciation.

THE NEUTRAL ZONE DIVISION AGREEMENT

While the principle of "equal rights" accepted by the parties in 1922 offered a fairly clear working basis for the sharing of natural resources, it was, nevertheless, understood from the beginning that some modification or clarification of the agreement might some day be called for. The states "will share equal rights *until* through the good offices of Great Britain a further agreement is made between Najd and Kuwait concerning it." Meanwhile, throughout a long and prosperous period of development, the principle announced has been applied in a spirit of good will by the states and the concessionary companies.

At the same time the effective exercise of the necessary measure of public supervision and control has led to increasing difficulties. These arise primarily from the existence of operations conducted in a large and unpopulated area over which no unequivocal assertion of sovereignty has been made. While concessionary companies have been held responsible to both states, each state has been obliged to establish postal, labor, health and police services, with great resulting complications and inconveniences. Questions of smuggling have also presented difficulties, as there has been no effective measure of control along the boundary lines of the Zone. The fact that the rights of nationals of the two states within the area have not been the subject of any regulation has led to a situation of double control and administrative chaos.

These and other related difficulties have long since pointed to the necessity of having a single clearly-established government authority operating in any given part, and to the conclusion that the only acceptable solution was to divide the area into two equal parts, each to be annexed as an integral part to one of the two adjoining states, subject to maintaining the prin-

¹¹ One is reminded of the reply of Lord Cromer when invited to explain the status established by the Anglo-Egyptian Sudan Agreement of 1899: "I replied that the political status of the Soudan was such as was laid down in the Agreement of January 19, 1899, and that I could give no more precise or epigrammatic definition."

ciple of equal rights to natural resources on which the whole economy of the area has been based. Such is the purpose of the Agreement (text annexed below) which has now been made, following the signing on May 8, 1963, of a preliminary Exchange of Notes establishing the general principle of division.

The basic plan is simple. Subject to the enjoyment of *equal rights* in the resources of the entire area, the Neutral Zone is no longer to be a matter of joint and undivided ownership; it is to be divided into two parts, each part to become incorporated into the territory, and to be subject to the sovereignty, of one or the other of the two states. This division is unequivocal and complete. Each state is to exercise over the newly-added portion of its territory (Article III) the same rights of "administration, legislation and defense" as over all other parts. The resulting division is an expression of another Sharia principle, *ifraz*, according to which an undivided share in a certain property is transformed by agreement into an exclusive title over a certain part of such property to the extent of the original share.

On the other hand (Article IV):

Each of the Contracting Parties shall respect the rights of the Other Party to the shared natural resources either existing at present or which shall exist in the future in that part of the divided zone which is annexed to his territory.¹²

It thus appears that the Agreement calls for the co-existence and the reconciling of two simple and clearly expressed principles—the mutual recognition of territorial sovereignty and the mutual acceptance of sharing of natural resources.

The terms of the Agreement are directed to giving effect to these principles, in the execution of which problems may arise. For their solution by amicable settlement ample provision is made (Article XXIV), including recourse to the Arab League and the International Court of Justice, whose compulsory jurisdiction is accepted.

Among other provisions of the Agreement is one of special interest, designed to protect the exercise of "equal rights" from the danger of political transformations. It goes without saying that the right of each party, covered by the Agreement, existing in the territory of the other, is not one to be transferred to a third state. Such a transfer would expose the state over which the right existed to unknown risks of danger and interference in its domestic affairs. Article V contains a formal prohibition of any such cession, accompanied by the sanction that if such forbidden cession of rights should be made, the other party would be relieved from its obligations under the Agreement.

As to territorial waters, each state is to enjoy as to the newly integrated area rights similar to those enjoyed by the rest of its territory. For the

¹² As to the proper qualification of this right, or its interpretation in the event of territorial changes, discussion must be left to the future. Briefly, The Law of Nations, Ch. V, The Territory of States, par. 5, Servitudes, p. 190 *et seq.* (1963); O'Connell, The Law of State Succession, Ch. III, Dispositive Treaties, p. 49 *et seq.* and references (1956).

purpose of the exploitation of the natural resources in the divided zone, not more than six marine miles of the seabed and waters adjoining the divided zone are to be annexed to the mainland zone, *i.e.*, to be included in the area of territorial waters.¹³

Special provision is made in Article VIII for the demarcation of the northern boundary and the off-shore area of the divided zone, the southern boundary of the off-shore area having already been agreed upon in the Notes exchanged between the two parties. The demarcation of the northern boundary is to be based on the principles which applied before the division of the Neutral Zone, *i.e.*, the reference points controlling the northern boundary are to be fixed as if the Neutral Zone had not been partitioned. Within the limits of the off-shore area, after its having been demarcated on such principles, the two parties will continue their joint exploitation unless otherwise agreed. The Agreement does not provide for a division of the off-shore areas, since there are no practical difficulties arising out of the exercise of equal rights as was the case of such rights within the Neutral Zone.

Each party (Article IX) is required to evacuate the establishments on the other's territory. Thus the port of Sa'ud (Mena Sa'ud), which has been built in the Neutral Zone close to the southern boundary of Kuwait by the concessionary company from Saudi Arabia, will be handed over to Kuwait; as also postoffices, labor offices and health offices where Saudi Arabian officials have been working. Establishments concerning measurements of oil, however, are to remain, because they relate to the natural resources which also remain common property.

A special article (Article X) undertakes to equalize the situation which arises from the fact that the Saudi Arabian concessionary has built a much larger number of operating establishments in the area to be annexed to Kuwait than is the case with its Kuwait opposite number. Where new establishments are required to be constructed under existing concessions, the cost of the same may be deducted from the capital expenses of the company now called on to undertake them.

The present concession agreements will remain in force (Article XI), and their provisions may not be unilaterally modified. The oil is common property and the concessionary companies continue to be entitled to operate their concessions throughout the area.

Article XII of the Agreement involves an important principle. Since the grantor states are no longer in a position to continue to protect their concessionaries in the area which has become an integral part of the opposite state, such protection is now assumed by the state in which the area lies. This involves necessarily a modification imposed by sovereign authority on the concessions already granted.

¹³ It is interesting to note that, while the Saudi Arabia Decree of Feb. 16, 1958, extends its territorial waters to twelve miles in place of the previous six fixed by the Decree of 1949, in the case of the Kuwait Decree the extent of territorial waters is not defined. In reference to the Saudi Decree, Mr. Brown (*op. cit.* 114) has observed: "Where this leaves the various concessionary companies in the Neutral Zone will certainly be a matter of dispute."

Since the enjoyment of the resources of the entire area still remains a matter of joint exercise, double taxation, including the imposition of customs duties (Article XIII), is forbidden and the necessary legislative or administrative action to secure this end is required to be taken by each party.

The principle of reciprocal protection, including freedom of entry and movement (Article XIV), is extended to citizens of the opposite states working as officials and employees. The protection also extends to the practice of a profession or occupation, as far as relates to the development of oil under existing concessions or under the concessions which may supersede them. In effect these several provisions create within the newly integrated areas a considerable measure of special protection to the citizens of the other state. Rights in connection with natural resources discovered in the future (Article XV) will be made the subject of joint agreement. Rights of the other party's citizens in existing establishments and constructions (but not in land) (Article XVI) are to be respected.

The safeguard of future exploitation is covered by provision (Articles XVII and XVIII) for a joint permanent committee to be composed of an equal number from each of the two states. Their competent Ministers for Natural Resources are to agree upon the number of the members of the committee and its rules of procedure. The powers of the committee are defined (Article XIX), and the competent Ministers are authorized, in consultation, to grant or amend concessions, subject to the protection of existing rights (Articles XX and XXI).

Such in substance are the terms of an agreement which offer a just and reasonable solution to problems which have been awaiting settlement between two Arab neighbor states for over forty years. The Agreement puts an end to difficulties arising out of a state of double authority and the non-existence of a clear assertion of criminal and civil jurisdiction. It opens the door for each country to regulate the affairs of an area of great importance. It ensures for the citizens of both parties the exercise of unhampered rights, and substitutes for a state of anxiety and uncertainty a regime of sound co-operation and good neighborly relations.

ANNEX

[*Translation*]*

AGREEMENT

BETWEEN

THE STATE OF KUWAIT AND THE KINGDOM OF SAUDI ARABIA

RELATING TO

THE PARTITION OF THE NEUTRAL ZONE

Signed July 7, 1965; in force July 25, 1966

IN THE NAME OF GOD THE COMPASSIONATE, THE MERCIFUL

Whereas the two Contracting Parties have equal rights in the shared Zone whose land boundaries are delineated in accordance with the Boundary

* Unofficial translation supplied by the author.

Convention of Al Uqair dated 13 Rabi Al-Thani, 1341 H., corresponding to 2nd December, 1922, and the agreed Minutes signed at Kuwait on 12 Shawal, 1380 H., corresponding to 21st March, 1961 (called hereinafter the "Partitioned Zone"), and

Whereas the aforesaid Convention did not regulate the exercise of those rights, and as that state of affairs was of a provisional nature which entailed serious practical difficulties, and

Whereas the two Contracting Parties, by an exchange of notes on 15/3/1383 H., corresponding to 5/8/1963 (in regard to partitioning the Neutral Zone) have agreed to put an end to that temporary state of affairs by means of partitioning that Zone into two sections, so that the one shall be annexed to the State of Kuwait and the other shall be annexed to the Kingdom of Saudi Arabia, provided that these equal rights of the two Parties shall be preserved in full in the whole partitioned Zone as this had originally been decided by the Convention made at Al Uqair that it is shared between the two parties, and shall be safeguarded by the provisions of international responsibility. They therefore have agreed upon the following:

ARTICLE I

The boundary line between the two sections of the Zone is to be the line which divides them into two equal parts and which begins from a point at the mid-eastern shore on the low-tide line, and ends at the western boundary line of the Zone. That boundary line shall be demarcated in a natural manner by the Committee of Survey which is to determine the boundary lines of the Neutral Zone and which is to be set up in the manner agreed upon in the protocol annexed to the notes exchanged between the two parties at Jeddah on 15/3/1383 H., corresponding to 5/8/1963. This boundary line shall be approved by the two sides in an agreement they will conclude later on.

ARTICLE II

Without prejudice to the provisions of this Agreement, the area lying to the north of the line dividing the partitioned Zone into two equal parts shall be annexed to Kuwait as an integral part of its territory, and the area lying to the south of the line dividing the Partitioned Zone into two equal parts shall be annexed to the Kingdom of Saudi Arabia as an integral part of its territory.

ARTICLE III

Each of the Contracting Parties shall exercise over that part of the Partitioned Zone annexed to its territory the same rights of administration, legislation and defense as those exercised in its territory of origin, while observing other provisions of this Agreement, and without prejudice to the rights of the Contracting Parties to natural resources in the whole of the Partitioned Zone.

ARTICLE IV

Each of the Contracting Parties shall respect the rights of the other Party to the shared natural resources either existing at present or which shall exist in future in that part of the Partitioned Zone which is annexed to its territory.

ARTICLE V

If one of the parties cedes or otherwise alienates all or part of said equal rights which are safeguarded by the provisions of this Agreement and which are exercised over any part of the Partitioned Zone to any other State, the other Party shall be relieved of its obligations under this Agreement.

ARTICLE VI

Each of the Contracting Parties shall be under obligation not to take any local or international measure or action which may result in whatsoever manner in hindering the other Party from exercising the rights which are safeguarded by this Agreement, and it shall be under obligation to co-operate with the other Party fully to protect those rights.

ARTICLE VII

Each of the Contracting Parties shall exercise over the territorial waters which adjoin that part of the Partitioned Zone which will be annexed to its territory the same rights as those exercised over the part annexed to its territory; and the two Contracting Parties shall agree to determine the boundary line which divides the territorial waters which adjoin the Partitioned Zone.

For the purpose of exploiting the natural resources in the Partitioned Zone, not more than six marine miles of the sea-bed and sub-soil adjoining the Partitioned Zone shall be annexed to the mainland of that Partitioned Zone.

ARTICLE VIII

In determining the northern boundary of the submerged area adjoining the Partitioned Zone, it shall be delineated as if the Zone has not been partitioned and without regard to the provisions of this Agreement.

The two Contracting Parties shall exercise their equal rights in the submerged area beyond the aforesaid six mile limit mentioned in the preceding article by means of joint exploitation, unless the two Parties agree otherwise.

ARTICLE IX

Each of the Contracting Parties shall, in the part of the Partitioned Zone annexed to the other Party, evacuate the establishments occupied by its government officials who perform administrative and legal work, and hand it over to the other Party, provided that such provision shall not

apply to establishments occupied by government officials engaged in oil-gauging, checking and auditing accounts, technical supervision, purchasing committees and such similar supervision work.

ARTICLE X

If one of the Contracting Parties entrusts the companies that have been granted a joint concession by the two Parties with the construction in that part of the Partitioned Zone annexed to its territory of establishments for judicial and administrative purposes in accordance with terms of the concession, the cost of constructing such establishments shall be deducted from the capital expenses of the concessionary companies, provided that such costs shall be limited to necessary and reasonable expenses.

ARTICLE XI

The present agreements of oil concessions shall remain in force and each Party pledges to respect, in that half of the Partitioned Zone to be annexed to its territory, their provisions and the amendments entered into. It shall also undertake such legislative and legal measures necessary for the continued exercise by the concessionary companies of their rights and the discharge of their obligations.

ARTICLE XII

Each Contracting Party shall be responsible, in that part of the Partitioned Zone to be annexed to its territory, for protection and security according to the obligations provided for in the present concession agreements in force.

ARTICLE XIII

To avoid double taxation, each Contracting Party shall undertake to enact legislative safeguards which ensure the non-imposition of taxes, customs duties or royalties on the companies that have been granted a concession in the Partitioned Zone by the other Party.

ARTICLE XIV

Entry and movement in the Partitioned Zone of citizens of the two Contracting Parties, who are working as officials, employees, labourers and contractors in establishments and firms engaged in the exploitation of natural resources according to concessions now in force or affiliated firms shall be by a valid passport issued by the other Party or by a card of special form to be issued by one of the Contracting Parties, and to be agreed upon, without the need to obtain an entry visa.

ARTICLE XV

Without prejudice to the concessionary oil agreements in force, each of the Parties shall ensure, in that part of the Partitioned Zone to be

annexed to its territory, to the citizens of the other Party freedom to work and the right to practice any profession or occupation on equal footing with its citizens, concerning oil resources granted in the present concessions or in what may supersede them in future.

With regard to natural resources which may be discovered in future, the two Parties shall agree on the rights of each other's citizens to work or practice any occupation related thereto.

ARTICLE XVI

Each of the Contracting Parties shall respect the rights of the other Party's citizens in the present establishments and constructions existing in that part of the Partitioned Zone to be annexed to its territory.

ARTICLE XVII

To ensure the continuance of the two Contracting Parties' efforts in exploiting natural resources in the Partitioned Zone, a joint permanent committee (called hereinafter the "Committee") shall be set up.

ARTICLE XVIII

The Committee shall be composed of an equal number of representatives of the two Contracting Parties; and the two competent Ministers for Natural Resources in the two Contracting Governments shall agree upon the number of Committee members, its rules of procedure and the manner of securing the necessary appropriations for it.

ARTICLE XIX

The Committee shall have the following powers:

(a) To facilitate passage of officials and employees (other than the citizens of the two Parties) of concessionary companies and of ancillary companies and establishments in the Partitioned Zone.

(b) Studies relative to projects of exploiting shared natural resources.

(c) To study the new licenses, contracts, and concessions relating to shared natural resources and submit its recommendations to the two competent Ministers as to what it deems appropriate in this respect.

(d) To consider whatever the two competent Ministers refer to it.

The Committee in performing its duties shall have the right to sign contracts, and shall submit its reports and recommendations directly to the two competent Ministers.

The two Contracting Parties shall endeavour to make sure that the Committee be ready to start its work within six months at most from the date of the entry into force of the present Agreement.

ARTICLE XX

The two competent Ministers shall consult together in granting or amending any new concession relating to shared natural resources. The

Party which does not agree with the other shall send him a written notification giving the reasons, before granting or amending the new concession.

If any other establishment or company is allowed to replace any present establishment or company exploiting natural resources in the Partitioned Zone, this replacement shall not be considered as a new concession, provided that the rights of the other Party shall not be prejudiced.

ARTICLE XXI

The two Contracting Parties shall undertake to supply the Committee with information, data and documents which it may require to facilitate its task.

ARTICLE XXII

If a dispute arises with regard to the interpretation or application of this Agreement or the rights and obligations which it creates, the two Contracting Parties shall seek to settle such dispute by friendly means for the settlement of disputes including recourse to the Arab League.

If the aforesaid methods fail to settle the dispute, then it shall be submitted to the International Court of Justice.

The two Contracting Parties accept the compulsory jurisdiction of the International Court of Justice in this respect.

If one of the two Contracting Parties takes a measure which is objectionable to the other Party, the objecting Party may, pending the final settlement of the dispute, ask the International Court of Justice to indicate any interim measures to be taken to suspend the measure which is objected to or allow its continuance.

If one of the Contracting Parties refuses to abide by the judgment made against it, the other party shall be relieved from its obligations under this Agreement.

ARTICLE XXIII

This Agreement shall be subject to ratification by each Contracting Party in accordance with its constitutional procedure and shall come into force on the date of exchanging instruments of ratification.

Done in two original texts in Arabic, both of which are equally authentic.

FOR THE STATE OF KUWAIT
JABER AL-AHMAD AL-SABAH

FOR THE KINGDOM OF SAUDI ARABIA
AHMAD ZAKI YAMANI

LEGAL ASPECTS OF THE VIET-NAM SITUATION

BY QUINCY WRIGHT

Of the Board of Editors

The Viet-Nam hostilities arose and have escalated because of the radically different perceptions of the situation by the principal parties.¹ A settlement might be possible if each side understood the image perceived by the other. An analysis of the interpretation of the situation which would result from an impartial application of international law, presumably reflecting the consensus of world opinion, might also be helpful.

The United States position has been repeatedly stated by the President and the Secretary of State² and was expounded in a fifty-two page memorandum, published on March 4, 1966, by the Legal Adviser of the Department of State, entitled "The Legality of United States Participation in the Defense of Viet-Nam."³

The United States holds that the cease-fire agreement of 1954 established a boundary between what became virtually independent states of North and South Viet-Nam, that North Viet-Nam, by infiltrating men and supplies to assist the Viet-Cong, was guilty of "armed attack" upon South Viet-Nam in violation of international law and the cease-fire agreement, that South Viet-Nam was justified in using force in self-defense, and that the United States was justified, under international law and Article 51 of

¹ The importance of distorted images and diverse perceptions of the situation, resulting from established stereotypes and ideologies, as well as from inconsistent desires and expectations for the future, in the initiation and development of international conflicts is emphasized in *The Craigville Papers, International Conflict and Behavioral Science*, Roger Fisher, ed. (N. Y., Basic Books, 1964), especially in contributions by Anatol Rapoport (p. 13), William Gamson (p. 27), Kenneth Boulding (p. 85), Morton Deutsch (p. 142), Urie Bronfenbrenner (p. 161), and Lester Grinspoon (p. 272). See also my comments in *A Study of War* 1116, 1503, 1562 (University of Chicago Press, 1965); *Problems of Stability and Progress in International Relations* 145, 165 (Berkeley, Calif., 1954); "International Conflict and the United Nations," 10 *World Politics* 38 ff. (1957); "The Escalation of International Conflicts," 9 *Journal of Conflict Resolution* 417 (1965).

² See Department of State, White Papers, December, 1961, and February, 1965; White House Statement, Oct. 2, 1965; and President Johnson's address at Johns Hopkins University, April 7, 1965, printed in *The Vietnam Reader* 123, 128, 193, 343 (Marcus Raskin and Bernard Fall, eds.) (hereafter cited as Raskin and Fall). The White Papers of February, 1965, the Johns Hopkins address of April 7, 1965, and Secretary of State Rusk's address to the American Society of International Law, April 23, 1965 are printed in *Vietnam, History, Documents and Opinions* 284, 323, 330 (Marvin E. Gettleman, ed.; New York, Fawcett Publications, 1965) (hereafter cited as Gettleman).

³ Department of State, Office of the Legal Adviser, *The Legality of United States Participation in the Defense of Vietnam*, March 4, 1966; reprinted in 60 A.J.I.L. 565 (1966) (cited hereafter as U. S. Legal Brief).

the United Nations Charter, in assisting South Viet-Nam at its request by measures of "collective self-defense against armed attack," including the bombing of installations in North Viet-Nam. It contends, I believe correctly, that, in spite of the express limitation of Article 51 to defense against armed attack upon "a Member of the United Nations," the principle of the article, affirming a principle of customary international law, applies equally to a non-Member even if it is not a wholly independent state.⁴ Furthermore, the United States points out that it reported its action to the United Nations as required by Article 51, and that organization, by failing to take any action to restore international peace and security in accord with the authority and responsibility given it by Articles 39 and 51, has tacitly approved the United States position. Express approval of the United States position was given by the SEATO Council at its meeting in Canberra, Australia, on June 29, 1966, with the French representative abstaining and the Pakistan representative reserving.⁵

The North Vietnamese Government under Ho Chi Minh has been less explicit in defining its position⁶ but it seems to hold that the Democratic

⁴ It has been argued that the Charter intended to permit "collective self-defense" only of "members of the United Nations" in order to prevent third-party intervention in behalf of a revolting community or colony whose independence the intervening state may have recognized. International law, however, permits defensive alliances. Art. 2, par. 4, of the Charter forbids armed attack upon any "state," and a valid cease-fire line forbids such attack upon the territory protected by it. It would, therefore, appear that a state can exercise "the inherent right of collective self-defense" (Art. 51) in behalf of any genuinely independent "state" the victim of "armed attack" in violation of Article 2, par. 4, or even an imperfectly independent state protected by an internationally valid cease-fire line. The United States assumed that it could collectively defend non-Members of the United Nations when it admitted Portugal (before it was a Member) and West Germany to NATO and when it made defensive alliances with Japan (before it was a Member) and South Korea. The Soviet Union made a similar assumption in making defensive alliances with certain of its "satellites" in Europe before they were Members.

⁵ New York Times, June 30, 1966, p. 12. The International Commission to supervise the Geneva Cease-Fire in Viet-Nam considered the *de facto* alliance of the Southern Zone of Viet-Nam with the United States and SEATO a violation of the cease-fire agreement. See 8th Report, 1957-58, par. 30; Special Report, 1962, par. 20 (Gettleman 175, 188); and below, notes 53, 63. Endorsement of the United States position by SEATO has no weight in international law. The Harvard Research in International Law suggested that aggression could not be attributed to a state unless "duly determined by a means which that state is bound to accept" (33 A.J.I.L. Supp. 871 (1939)). While a necessity for self-defense permits a temporary unilateral determination of aggression by armed attack, such determination, whether by a state or an alliance, is not authoritative in international law because the other side is not bound to accept it. Failure of the United Nations to act cannot be assumed to indicate tacit approval of defense measures under Art. 51, unless the reasons for this failure so indicate.

⁶ The statements of the South Viet-Nam National Liberation Front (Viet-Cong) of Dec. 20, 1960, and of March 22, 1965, with notes by the North Viet-Nam government; the Policy Declaration by North Viet-Nam Premier Pham Van Dong, stating four points for negotiation of peace, April 14, 1965; and the Joint Statement by North Viet-Nam and the Soviet Union, April 17, 1965, are printed in Raskin and Fall 216, 232, 342, 362. The Vietnamese Declaration of Independence, Sept. 2, 1945; the Abdica-

Republic of Viet-Nam, proclaimed in September, 1945, with Ho as its head, and recognized as a "free state" by France and Bao Dai, who had abdicated as Emperor of Annam, is one state; furthermore, that Ho, as the leader of Vietnamese nationalism, was justified by the principle of "self-determination" in resisting the French effort in 1946 to re-establish Bao Dai as head, not of an independent Viet-Nam, but of a "free state" within the French Community. It points out that after Ho's forces in a seven-year war had defeated France at Dien Bien Phu in 1954, Ho was in a position to establish his authority over the whole of Viet-Nam and that he agreed to the cease-fire line, established by the Geneva Conference of 1954, because the compromise settlement would prevent further foreign intervention and the temporary division of Viet-Nam would be terminated by an election to be held in July, 1956, which would result in union under his government.⁷ On the basis of these facts, North Viet-Nam contends that the Diem Government in South Viet-Nam succeeded to the obligations of France under the Geneva Agreement (Article 27), even though Bao Dai's representative reserved on them at Geneva, and that it violated those obligations by refusing to implement the provisions concerning elections and by accepting United States military contingents in South Viet-Nam and establishing a *de facto* alliance. Ho Chi Minh is therefore convinced that these continuing violations of provisions of the Geneva Agreement which had induced him to accept it, justified him by 1958 in considering the cease-fire line suspended and in continuing his efforts, begun against France in 1946, to unite Viet-Nam by force. Ho Chi Minh, in short, contends that after he was defrauded, by a conspiracy of Diem and the United States, of the opportunity pledged by the Powers at Geneva to extend his government by peaceful means over the whole of Viet-Nam, then recognized as a single state, he became free to consider the cease-fire line suspended and to assist the Viet-Cong, his supporters in the south,

tion of Bao Dai as Emperor of Annam, August, 1945; the French recognition of Viet-Nam as a "free state," March, 1946; and the Viet-Minh's directive for resistance of Dec. 20, 1946, are printed in Gettleman 57, 59, 61, 87. See especially Ho Chi Minh's letter to the heads of several states printed in the Washington Post, Jan. 29, 1966, p. A 12.

⁷ In this he agrees with President Eisenhower who wrote in his memoirs, *Mandate for Change* 372: "I am convinced that the French could not win the war because the internal political situation in Vietnam, weak and confused, badly weakened their military position. I have never talked or corresponded with a person knowledgeable in Indochinese affairs who did not agree that had elections been held as of the time of fighting, possibly 80 percent of the population would have voted for the Communist Ho Chi Minh as their leader rather than Chief of State Bao Dai. Indeed, the lack of leadership and drive on the part of Bao Dai was a factor in the feeling prevalent among Vietnamese that they had nothing to fight for." See Robert Scheer, *How the United States Got Involved in Vietnam* 11 (Center for the Study of Democratic Institutions, Santa Barbara, Calif., 1965). It is unlikely that this estimate, if correct for 1954, would have changed radically by 1956. In an election in South Viet-Nam in 1955, Diem proved to be much more popular than Bao Dai, but there was never a test of his relative popularity with Ho Chi Minh.

For texts of Geneva Agreements, 1954, and other relevant documents, see 60 A.J.I.L. 629-649 (1966).

in hostilities against the Diem and subsequent South Vietnamese governments which opposed the Geneva political settlement.⁸ The situation was therefore, in Ho's opinion, one of "civil strife" within the domestic jurisdiction of Viet-Nam, and the United States violated international law, the United Nations Charter, and the Geneva agreements by intervening with armed force.

The United States has replied to this position by asserting that, while ultimate unification of Viet-Nam by free elections is not ruled out, the Geneva Powers could not have really intended that Viet-Nam be united by an election in 1956 because conditions for "free general elections by secret ballot" to establish "fundamental freedoms guaranteed by democratic institutions," called for by the Geneva resolutions, could not be established by that date, especially in Communist North Viet-Nam. Consequently the failure to hold the elections did not suspend the cease-fire agreement which the United States insists was violated by North Viet-Nam first. Referring to the Geneva prohibition (Articles 16, 17) of the introduction into Viet-Nam of troop reinforcements and new military equipment (except for replacement and repair) and of adherence of either zone to any military alliance, and the use of either zone for the resumption of hostilities or to "further an aggressive policy," the United States seeks to justify its establishment of forces and bases in South Viet-Nam as replacements of personnel and equipment,⁹ as assistance to the South Vietnamese Government to fight Communism in its zone,¹⁰ or as resistance to infiltration or invasion from the north in violation of the Geneva Agreement. For the latter justification it cites:

the international law principle that a material breach of an agreement by one party entitles the other at least to withhold compliance with an equivalent, corresponding, or related provision until the defaulting party is prepared to honor its obligations.

It therefore contends that:

the systematic violation of the Geneva Accords by North Viet-Nam justified South Viet-Nam in suspending compliance with the provision controlling entry of foreign military personnel and military equipment.¹¹

⁸ Premier Pham Van Dong of North Viet-Nam in his statement of April 8, 1965, indicated his willingness to go back to Geneva in a peace negotiation, provided it included the political as well as the military provisions (New York Times, April 14, 1965; Raskin and Fall 342). North Vietnamese assistance to the Viet-Cong across the cease-fire line would clearly be illegal if the cease-fire agreement were in effect, as insisted by the United States. In saying in this note "pending the peaceful unification of Vietnam . . . the military provisions of the 1954 Geneva agreement must be strictly respected," and referring to violations by the United States, he stated a bargaining position. This statement also recognized the autonomy of South Viet-Nam under the South Vietnamese Liberation Front and said "the peaceful reunion of Vietnam is to be settled by the Vietnamese people in both zones without foreign interference." (See note 20 below.)

⁹ U. S. Legal Brief 29; 60 A.J.I.L. 576 (1966).

¹⁰ International Control Commission, Special Report, 1962, par. 6, referring to joint declaration of Vice President Johnson and Premier Diem, May 13, 1961, Gettleman 186, 205.

¹¹ U. S. Legal Brief 30-31; 60 A.J.I.L. 577 (1966).

It has been widely believed that Ho Chi Minh's activity has been motivated less by a nationalistic policy of uniting Viet-Nam than by a policy of expanding Communism to South Viet-Nam and other states;¹² and that the United States intervention has been motivated less by love for, or obligations to, the South Vietnamese people than by the Truman doctrine of containing Communism and preventing the fall of dominoes.¹³ Whatever motivations may have been influential, it is clear that international law does not recognize ideological differences, and that intervention by a state in the internal affairs of another state, even on invitation of the government which it recognizes, whether in behalf of a Communist faction to assist its "war of liberation" or in behalf of an anti-Communist faction to "contain Communism," violates traditional international law and the United Nations Charter.¹⁴ Consequently these possible motivations have not been referred to in the legal arguments. Cold War ideologies have undoubtedly been important in the Viet-Nam hostilities, but other political motives have also played a part—both nationalism and humanitarianism. Ho Chi Minh, although a Communist, was accepted by both Communists and anti-Communist Vietnamese as the leader of Vietnamese nationalism during the struggle against Japan and France, and during the Geneva Conference the representatives of both Ho Chi Minh and Bao Dai

¹² See Ho Chi Minh, "The Path Which Led Me to Leninism," April, 1960, and "Founding of the Communist Party," February, 1930, printed in Gettleman 30, 33.

¹³ The White House statement of Oct. 2, 1965, said: "The Security of South Vietnam is a major interest of the United States as other free nations. We will adhere to our policy of working with the people and government of South Vietnam to deny this country to Communism." (Raskin and Fall 128.) President Eisenhower's statement (note 7 above) suggests that this motivation influenced the United States in seeking to prevent elections until the state of opinion in Viet-Nam had radically changed. The domino theory was first stated by President Eisenhower to indicate the United States' national interest in containment of Communism in Southeast Asia. Insofar as it implies a rigid and indiscriminating application of the containment policy, it is vigorously criticized by Don R. and Arthur Larson (Vietnam and Beyond 6 ff., Duke University, 1965); Hans J. Morgenthau (Vietnam and the United States 62, 77, Washington, Public Affairs Press, 1965, reprinted in Gettleman 365); George F. Kennan, who initiated the policy of containment in 1947 (Report to subcommittee of Committee on Foreign Affairs, House of Representatives, May 14, 1965, reprinted in Raskin and Fall 15); The American Friends Service Committee (Report on Peace in Vietnam 12 ff., 65, New York, Hill and Wang, 1966); Walter Lippmann (numerous columns in the New York Herald Tribune, 1965); 28% of 525 members of the New York Council on Foreign Relations polled in 1965 (American Dilemma in Vietnam, a Report on the Views of Leading Citizens in Thirty-Three Cities 14, New York, Council on Foreign Relations, 1965); J. W. Fullbright (Ark.), Chairman, Foreign Relations Committee; Mike Mansfield (Mont.), Dem. Floor Leader; Wayne Morse (Ore.); Ernest Gruening (Alaska); Frank Church (Idaho), and other Senators (quoted, Raskin and Fall 209, 281; Gettleman 376); Quincy Wright ("Principles of Foreign Policy," World View, Council on Religion and International Affairs, February, 1965, reprinted in Raskin and Fall 7).

¹⁴ Quincy Wright, "International Law and Ideologies," 48 A.J.I.L. 616 (1954); "International Law and Civil Strife," 1959 Proceedings, American Society of International Law 45 ff.; The Role of International Law in the Elimination of War 61 (University of Manchester Press, 1962).

claimed to be the head of a single Vietnamese national state. The United States had given extensive educational and economic aid to South Viet-Nam, establishing friendly ties especially during the Diem period, and was shocked by the reports of purges and barbarities in North Viet-Nam and the flow of refugees, mainly from the North, after the Geneva Conference.¹⁵

~ The legal issues, clarification of which might contribute to a judgment of the validity of the diverse images of the Viet-Nam situation, may be stated as follows:

- 1. Are the hostilities between North and South Viet-Nam international hostilities or civil strife, *i.e.*, is Viet-Nam two states or one?
2. Was the requirement for an election in 1956 dependent on the development of conditions assuring that the election would be free and fair?
3. Was the requirement concerning elections in the resolutions of the Geneva Conference such an integral part of the Cease-Fire Agreement between France and the Democratic Republic of Viet-Nam (Ho Chi Minh) as to permit suspension of the cease-fire when the elections were frustrated?
- 4. If it is assumed that the cease-fire line continued in operation, was North Viet-Nam guilty of "armed attacks" upon South Viet-Nam justifying the United States bombing attacks north of the cease-fire line, which began in February, 1965, as measures of "collective self-defense"?

The following issues of international law and United States Constitutional law have been discussed, but are of less importance in clarifying the different images of the situation.

- ~ 5. Did the reprisals undertaken by the United States in the Gulf of Tonkin episode of August, 1964, violate international law?
- 6. Did the Congressional Resolution of August 7, 1964, after the Tonkin episode authorize the extensive military action ordered by the President since February, 1965?
7. Did the United States have a binding commitment to use armed force in defense of South Viet-Nam before February, 1965?

¹⁵ Nearly a million refugees, mostly Roman Catholics and dependents of the colonial native army left North for South Viet-Nam after Geneva, and the land reform program in the North led to brutalities. General Nguyen Giap, Commander-in-Chief of North Vietnamese forces, in a speech of Oct. 31, 1956, admitted that the North Vietnamese government in this program had "executed too many honest people," resorted to "terror which became far too widespread," "failed to respect the principles of freedom of faith and worship in many areas," "attacked tribal chiefs too strongly," resorted to "disciplinary punishments and executions" instead of education, and "torture came to be regarded as a normal practice during party reorganization." These oppressions resulted in serious revolts among the peasantry which in Ho Chi Minh's home province had to be put down by the regular army. (See U. S. Legal Brief, p. 33; Bernard Fall, *New York Times Magazine*, July 10, 1966, p. 52.) Even worse brutalities were reported in the American press. Whether if shorn of exaggerations they were worse than in the South during the Diem regime has been controversial. See Friends Service Committee, note 13 above, p. 45; Scheer, note 7 above, pp. 26 ff., 58 ff.; Devillers, note 16 below, Gettleman 222 ff.

✓ 1. The evidence suggests that Viet-Nam is one state and that the hostilities of Ho Chi Minh's government against the Saigon Government would be civil strife within its domestic jurisdiction unless forbidden by the cease-fire Agreement.

✓ During the hostilities between the "Democratic Republic of Viet-Nam" under Ho Chi Minh and France, supporting the "Republic of Viet-Nam" under Bao Dai from 1946 to 1954 and during the Geneva Conference, both sides regarded Viet-Nam as one state, the legal issue being whether it was an independent state or a "Free State" within the French Community.¹⁶ When the hostilities ended with French defeat, large areas of the south were occupied by Ho Chi Minh's forces, the Viet-Minh, and areas in the north by forces of France and Bao Dai. The Cease-Fire Agreement of 1954 signed by representatives of France and the Democratic Republic of Viet-Nam provided for the withdrawal of these forces across the cease-fire line, substantially the 17th parallel, and very explicitly declared that

¹⁶ The underlying political issue was whether it should be a state with Communist or with Western orientation, but this was overshadowed by the desire for peace by all the Powers represented, except the United States and Bao Dai. See Donald Lancaster, former official in the British Legation, Saigon, "Power Politics at the Geneva Conference, 1954," from *The Emancipation of French Indochina* 313 ff. (London, 1961) reprinted in Gettleman 118 ff.; see also American Friends Service Committee, note 13 above, p. 41, and General de Gaulle's news conference, July 23, 1954, quoted in Raskin and Fall 268. There seems to have been a general expectation among the participants that the compromise settlement accepted by all the representatives, except those of the United States and Bao Dai, would result in elections which would unite Viet-Nam under Ho Chi Minh. "The Conference ended amid a flurry of mutual congratulations, while Molotov, giving further proof of the unusual amiability which had distinguished Soviet behavior throughout the proceedings, paid a fulsome compliment to Eden, stressing the latter's outstanding services and rôle in the Conference, a rôle which Molotov insisted 'cannot be exaggerated'." (Lancaster, *loc. cit.*, Gettleman 136, 159.) "The disproportion between the monolithic power of the Vietminh, armed with the halo of victory, and the almost derisory weakness of the so-called Nationalist Vietnam was such that in the summer of 1954 almost no one thought that the two years' delay won by M. Mendès-France at Geneva could be anything but a respite in which to salvage as much as possible from the wreck. At the end of the period, unity would certainly be restored, this time to the benefit of the Vietminh, the basic hypothesis then acknowledged by all being that the Geneva Agreements would definitely be implemented." (Philippe Devillers, "The Struggle for Unification of Vietnam," *The China Quarterly*, London, Jan.-March, 1962, p. 3; reprinted in Gettleman 211.) "The opinion of the French at the time of Geneva (and that of most Western experts) was that the Accords would simply delay the eventual Viet Minh victory, since Ho's forces would surely win the elections scheduled for July, 1956" (Robert Scheer, note 7 above, p. 20). "If Geneva and what was agreed upon there means anything at all, it means . . . Taps for the buried hopes of freedom in Southeast Asia! Taps for the newly betrayed millions of Indochinese who must now learn the awful facts of slavery from their eager Communist masters! Now the devilish techniques of brainwashing, forced confessions and rigged trials have a new locale for their exercise." (Cardinal Spellman, Speech, American Legion Convention, Aug. 31, 1954, quoted in *New York Times*, Sept. 1, 1954; Gettleman 239, and Robert Scheer, note 7 above, p. 21, who credits the Cardinal with much influence in inducing the United States to upset the Geneva settlement by building up Diem as head of an independent South Viet-Nam (p. 24).)

this line was not an international boundary but a "provisional military demarcation line" and that the territories at each side were not states but "zones."¹⁷ The final resolutions of the Conference declared that "the independence, unity and territorial integrity" of Viet-Nam should be respected, and provided that elections "shall" be held in July, 1956, to determine the government of Viet-Nam. These resolutions did not constitute a formal treaty and were not signed by any of the delegates. They were, however, accepted by all of the delegates except those of the United States and Bao Dai's Republic of Viet-Nam, both of whom made statements "noted" by the Conference. In regard to the reservation by Bao Dai's representative, the Chairman at the final session of the Conference, Anthony Eden, said:

We can not now amend our final act, which is the statement of the Conference as a whole, but the Declaration of the Representative of the State of Vietnam will be taken note of.¹⁸

It seems clear that the Conference recognized Viet-Nam as one state and provided that it should be united by one government in 1956.

After the Geneva Conference and frustration of a four-year effort by Ho Chi Minh to have the elections held, the Southern Zone, now under Ngo Dinh Diem, supported by the United States, declared itself independent and was recognized by some governments, placed under the protection of SEATO, and permitted to represent Viet-Nam in some international organizations, but it was not admitted to the United Nations.¹⁹

¹⁷ There was active debate at Geneva over the location of this line and the agreement put it further north than Ho's delegate wanted. The United States has argued that this indicates an opinion on both sides that the line would mark a division for a long time, probably beyond 1956, but it can also be argued that Ho gave way in spite of his strong military position because he thought the line would last for only two years. "The Vietminh was reluctant to agree to this partition, which left it slightly less than half of the territory of Vietnam despite the fact that at the time it controlled three-quarters. However, Ho Chi Minh's government was under strong Soviet and Chinese pressure to give way on this point. The concern of China and probably also the Soviet Union, was that a continuation of the war might cause the introduction of American military power—possibly atomic—in support of the French, a course of action which the United States did in fact come very close to taking. The Vietminh accepted this temporary loss because of the explicit promise in both the armistice agreement and in the Geneva Declaration that within a period of two years national elections would be held to unify the country. They had every reason to believe that these elections would take place because the agreements stipulated that France, the other party to the armistice, was to maintain control of civil administration in the South until elections were held. (Article 14a of the armistice agreement.) In effect, then, the elections and the military truce were interdependent." (Friends Service Committee, *op. cit.* note 13 above, p. 41.) This accorded with the expectation of most of the Powers at Geneva (see note 16 above).

¹⁸ Gettleman 159.

¹⁹ The U. S. Legal Brief (p. 12) says: "The Republic of Viet-Nam in the South has been recognized as a separate international entity by approximately 60 governments the world over. It has been admitted as a member of a number of the specialized agencies of the United Nations." Most of these sixty governments, including the United States, recognized the Republic of Viet-Nam (Bao Dai) before the Geneva division, though they accepted the Saigon Government as its representative

Ho Chi Minh, the Communist states and many unaligned states, including India, did not accept this situation. In 1956, Diem began to be actively resisted by the Viet-Cong, the name given to the Viet-Minh in the Southern Zone, and after 1958 Ho Chi Minh's government began to assist it by infiltrations of men and supplies from the Northern Zone. Diem's government, although supported by United States economic, educational and military aid, was not able to eliminate the Viet-Cong, which in 1960 organized the "South Vietnam National Liberation Front" in control of much of the Southern Zone outside of the major cities.²⁰ Diem became increasingly dictatorial and unpopular and was assassinated on November 1, 1963. The succession of unstable governments which have followed him have never controlled half of the territory of South Viet-Nam.

South Viet-Nam was clearly regarded as part of Viet-Nam before 1954 and as a "zone" of that state separated by a temporary cease-fire line by the Geneva Conference, and it seems not to have acquired sufficient governmental authority, stability, public support, or recognition to be-

after the division. A number of states recognized the Democratic Republic of Viet-Nam (Ho Chi Minh) before the Geneva separation and continue to accept the Hanoi government as its representative. Eight or nine states have missions with the National Liberation Front (Viet-Cong) in South Viet-Nam. (George A. Carver, Jr., 44 Foreign Affairs 347 at 367 (1966).) The Republic of Viet-Nam was admitted to UPU, UNESCO and WMO before Geneva, and to ILO, WHO, and FAO in 1950, and the Saigon Government has continued to represent Viet-Nam in these international organizations. These facts do not prove that South Viet-Nam is a "separate international entity" any more than the recognition by many states and the United Nations of the Republic of China, represented by the Government at Taipei (Chiang Kai-shek), proves that Taiwan is a separate political entity, though other facts may support this contention. The U. S. Legal Brief also says: "The United Nations General Assembly in 1957 voted to recommend South Viet-Nam for membership in the organization, and its admission was frustrated only by the veto of the Soviet Union in the Security Council." The brief does not notice that the Soviet Union proposed simultaneous admission of both Viet-Nams (Devillers in Gettleman 220), which the United States opposed, as it has opposed "two Chinas." The United States has also suggested that the extension of SEATO protection to South Viet-Nam soon after Geneva indicates that the Western-oriented states did not believe Viet-Nam would be united under a Communist government in 1956; but see notes 5 and 16 above.

²⁰ The Viet-Cong were originally the supporters of Ho in the South when he was considered the symbol of Vietnamese nationalism, and the South Vietnamese National Liberation Front, which was formed in December, 1960, includes many non-Communist elements (see Devillers, note 16 above, Gettleman 229 ff.). The United States considers it a mere arm of Ho's government which should not be independently represented at any peace conference. (See Secretary Rusk's television statement, reported in the New York Times, Dec. 8, 1965.) The Front, however, Ho himself, other Communist states and some Americans like Senators J. W. Fulbright, Robert Kennedy, and the Friends Service Committee, credit it with an autonomous status which justifies its representation at any peace negotiation. The negotiating position stated by Premier Dong on April 8, 1965, and by the Front on July 22, 1965, appears to be a recession from Ho's original position in that it recognizes that two Viet-Nams will exist until united by "the Vietnamese people themselves," and thus converges toward the United States position stated by President Johnson on April 7, 1965, and by Secretary Rusk on Aug. 3, 1965. (See note 8 above, and Friends Service Committee, note 13 above, p. 56 ff.)

come an independent state under international law since then.²¹ Consequently, apart from the Cease-Fire Agreement and American intervention, hostilities in Viet-Nam should be regarded as civil strife.

2. Diem and the United States have contended that it was understood at Geneva that the election called for by the resolutions could not be held until conditions assured that the election would be free and fair. It is true that the resolution referred to "free general elections by secret ballot" and that General Bedell Smith, reserving for the United States on the Resolutions, said:

In the case of nations now divided against their will, we shall continue to seek to achieve unity through free elections supervised by the United Nations to insure that they are conducted fairly.²²

The conditions in Viet-Nam which might impair the freedom and fairness of elections were, however, well known to the members of the Geneva Conference when they provided categorically for the holding of elections in July, 1956, for their supervision by the International Control Commission, and for consultations to prepare for them beginning on July 20, 1955. The delay of two years was "in order to ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will."²³ These political provisions resulted from compromises between the Western and Communist states represented at Geneva. They were believed necessary to achieve agreement and peace in Southeast Asia.²⁴ Failure to observe their precise terms would, therefore, jeopardize the entire agreement, as subsequent events demonstrated.

It would appear, therefore, that Ho Chi Minh was entitled to regard the holding of elections in July, 1956, as obligatory on the parties to the Cease-Fire Agreement, including France and its successor in South Viet-Nam, Diem. The premature withdrawal from Viet-Nam of the French, who were considered responsible for preparing for the elections in the Southern Zone has been criticized, but the government of the Southern Zone clearly succeeded to this responsibility.²⁵ General responsibility for

²¹ This is controversial. The United States argues that, whatever may have been the situation in 1956, the *de facto* existence of South Viet-Nam and its wide recognition probably gave it a status of independence during the Diem period and since, but that in any case it had become a "separate international entity" which the United States could defend from aggression (Legal Brief, p. 14). See note 19 above.

²² Gettleman 157; 60 A.J.I.L. 645 (1966).

²³ Gettleman 152; 60 A.J.I.L. 644 (1966).

²⁴ General de Gaulle, at a news conference on July 23, 1964, said: "At the time everyone seemed to desire it (an end of fighting) sincerely." Printed in Raskin and Fall 269. See also notes 16 above and 28 below.

²⁵ Art. 27 of the Geneva Cease-Fire Agreement (Gettleman 146; 60 A.J.I.L. 638 (1966)). At the same news conference (July 23, 1964) General de Gaulle referred to the "shock caused in the South by the withdrawal of our administration and our forces," which he attributed to the "determination of the Americans to take our place in Indochina" because of their assumption of an anti-Communist mission throughout the world, their aversion "to any colonial work which had not been theirs," and

carrying out the political provisions of the Geneva Conference lay with the "Co-Chairmen (Britain and the Soviet Union) and the Geneva Powers" as indicated by the International Control Commission in its tenth report in 1960.²⁶

3. The evidence suggests that the provisions concerning elections in the final resolutions of the Geneva Conference were considered essential elements in the Cease-Fire Agreement. This agreement, therefore, became suspendable when the elections were frustrated by one of the parties and the other party, Ho Chi Minh, was free to consider his obligation to respect the cease-fire line suspended and to continue his long effort to unify Viet-Nam by force.

There can be little doubt but that Ho Chi Minh regarded the Geneva resolutions as a part of the settlement to which he agreed. Military unification of Viet-Nam was within his grasp after the defeat of France at Dien Bien Phu if external aggression, especially by the United States, could be avoided. It is incredible that he would have agreed to the cease-fire, even though he desired it, in the hope that it would prevent such intervention, unless he was convinced that unification would shortly be effected by the peaceful method of elections.²⁷ A study of the diplomacy at Geneva suggests that the principal Powers except the United States were more interested in peace than in ideologies, and recognized that the political provisions of the settlement, which would probably result in a national Communist Viet-Nam, were the price of peace, and were therefore no less important than the military provisions.²⁸

to the "natural desire in such a powerful people to ensure themselves of new positions." Raskin and Fall 269.

²⁶ See note 36 below.

²⁷ It has been suggested that the provision requiring that elections be free and fair, and the bargaining at Geneva on the location of the cease-fire line and the length of the cooling-off period before the elections, on both of which Ho's representative receded, indicate that Ho was more interested in the cease-fire than in the elections. This argument is not convincing. Ho undoubtedly wanted a cease-fire to avoid United States intervention, for which Dulles had been pressing, but he may have attached more weight to the positive dating of the elections than to their freedom, and cared less for the location of the cease-fire line than to its prospective termination in two years. See Bernard Fall, "How the French Got Out of Vietnam," *New York Times Magazine*, May 2, 1965, printed in Raskin and Fall 88, and note 17 above.

²⁸ The British, led by Anthony Eden, who with Molotov was co-chairman of the Conference, and the French, led by Mendès-France, who had succeeded Laniel as Prime Minister during the Conference, took the lead in the negotiations and favored compromises which would assure peace, in opposition to the desire of the United States, led by Secretary of State Dulles and later by General Bedell Smith, to contain Communism by military intervention. The British and French spirit of compromise was supported by the Soviet Union, represented by co-chairman Molotov, who was anxious to induce France to reject the pending "European Defense Community," and by China, represented by Chou En-lai, who was worried about United States intervention. President Eisenhower, who had recently negotiated peace in Korea after his election as a "peace" President, moderated Dulles' Cold-War position and later wrote in his *Mandate for Change* that "By and large, the settlement obtained by the French Union at Geneva in 1954 was the best it could get under the circumstances." (Scheer, note 7 above, p. 18.) The United States, therefore, tolerated the compromise settlement, though it did not subscribe to it. Frustration of the election was, therefore, not

The Department of State's legal brief emphasizes the principle of international law that

A material breach of an agreement by one party entitles the other at least to withhold compliance with an equivalent, corresponding, or related provision until the defaulting party is prepared to honor its obligations.²⁹

The brief used this principle to justify its escalation of hostilities in response to North Vietnamese infiltration contrary to the cease-fire requirements, but the principle seems more in point to permit North Viet-Nam to regard the obligation to respect the cease-fire line as suspended after the provision for terminating this temporary line in 1956 was frustrated by the refusal of South Viet-Nam to co-operate in carrying out the election. Not only was the provision for elections a major factor in inducing Ho Chi Minh to accept the temporary cease-fire, but it is expressly mentioned in the Cease-Fire Agreement, which provides:

Pending the general elections which will bring about the unification of Viet-Nam, the conduct of civil administration in each regrouping zone shall be in the hands of the party whose forces are to be regrouped there in virtue of the present Agreement.³⁰

This provision of the Cease-Fire Agreement could only be interpreted by reference to the conference resolutions which provided:

The Conference recognises that the essential purpose of the Agreement relating to Viet-Nam is to settle military questions with a view to ending hostilities and that the military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary. The Conference expresses its conviction that the execution of the provisions set out in the present declaration and in the Agreement on the cessation of hostilities creates the necessary basis for the achievement in the near future of a political settlement in Viet-Nam.

The Conference declares that, so far as Viet-Nam is concerned, the settlement of political problems, effected on the basis of respect for the principles of independence, unity and territorial integrity, shall permit the Vietnamese people to enjoy the fundamental freedoms, guaranteed by democratic institutions established as a result of free general elections by secret ballot. In order to ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will, general elections shall be held in July 1956, under the supervision of an international commission composed of representatives of the member states of the International Supervisory Commission, referred

only a breach of faith with Ho but also with the major Powers. (See Lancaster, *op. cit.* note 16 above, and Friends Service Committee *op. cit.*, note 13 above, p. 41.) Anthony Eden, while noting in his memoirs (Full Circle 143) that through the Geneva accords "the Vietnamese (*i.e.*, Bao Dai) had saved more of their country than had at one time seemed possible," expressed his "regret" a dozen years after Geneva that these accords had not been accepted by the United States and carried out (44 Foreign Affairs 230 (1966)).

²⁹ U. S. Legal Brief, pp. 30, 31; 60 A.J.I.L. 577 (1966).

³⁰ Art. 14 (a). See Gettleman 140; 60 A.J.I.L. 632 (1966).

to in the Agreement on the cessation of hostilities. Consultations will be held on this subject between the competent representative authorities of the two zones from 20th July, 1955, onwards.³¹

Although the Government of the Republic of Viet-Nam (Bao Dai) was not a party to these agreements, France was, and the Diem government established in the Southern Zone as successor to France was bound by them. Its failure to carry out the provisions, which were regarded as the essence of the agreement by the "Democratic Republic of Viet-Nam" (Ho Chi Minh), would relieve the latter of the obligation to respect the cease-fire line and would entitle it to continue its interrupted effort to unify Viet-Nam by force.³²

The resistance to this effort by the Saigon Government, therefore, constituted "civil strife" within the domestic jurisdiction of Viet-Nam, and American intervention involving the use of armed force against the Viet-Cong in the south and the bombing of installations in the north was a violation of traditional international law forbidding intervention in the domestic jurisdiction of another state and prohibited even to the United Nations,³³ unless the situation constituted a threat to or breach of the peace entitling it to take measures to restore international peace and security.³⁴

There is no doubt but that breach of a valid cease-fire line constitutes a violation of international law, as does violation of an international boundary. This was held in the Korean situation of 1950, as noted by the State Department's legal brief.³⁵ This brief does not discuss the question of whether the cease-fire line in Viet-Nam became suspendable after frustration of the conditions which induced its acceptance by one of

³¹ Pars. 6, 7, Gittleman 150-151; 60 A.J.I.L. 644 (1966). These resolutions were not signed, but the P.C.I.J. recognized that oral agreements might be binding in the Eastern Greenland case (Series A/B, No. 53). See also Eberhard P. Deutsch, "The Legality of the United States Position in Vietnam," 52 American Bar Association Journal 436 at 440 (1966).

³² "When in a civil war a military struggle for power ends on the agreed condition that the competition will be transferred to the political level, the side which repudiates the agreed conditions must expect that the military struggle will be resumed." (Friends Service Committee, *op. cit.* note 13 above, p. 43.) The U. S. Legal Brief (p. 33) says: "The South Vietnamese Government realized these facts [that conditions for a fair election did not exist in North Viet-Nam] and quite properly took the position that consultations for elections in 1956 as contemplated by the accords would be a useless formality." The Brief adds in a footnote: "In any event, if North Viet-Nam considered there had been a breach of obligation by the South, its remedies lay in discussion with Saigon, perhaps in an appeal to the co-Chairmen of the Geneva conference, or in a reconvening of the conference to consider the situation. Under international law, North Viet-Nam had no right to use force outside its own zone in order to secure its political objectives." No reference is made to the fact that Ho Chi Minh had attempted all these remedies for four years without results. Not until 1958 did he conclude that Diem and the Powers had buried the Geneva agreements, and begin to give assistance across the cease-fire line to the Viet-Cong, which had renewed civil strife in South Viet-Nam in 1956, after the date for the elections had passed. See Devillers, in Gittleman 216 ff.; Fall, in Raskin and Fall 90.

³³ U.N. Charter, Art. 2, par. 7.

³⁴ *Ibid.*, Art. 39.

³⁵ U. S. Legal Brief, p. 13; 60 A.J.I.L. 570 (1966).

the parties, nor is this question discussed by the International Control Commission, which continued to examine alleged violations of the Cease-Fire Agreement up to 1965, thus suggesting that it continued to operate and to bind the parties. The Control Commission's responsibility was, however, limited to supervising the execution of the military provisions of the Geneva Agreement and did not extend to judging the effect on these provisions of non-fulfillment of the political settlement reached at Geneva. It did, however, recognize the importance of fulfillment of these provisions and the responsibility of the Geneva Powers in the matter. In its tenth report in 1960 the Commission said:

During the period under report, there has been no progress in regard to the political settlement envisaged in the Final Declaration. The parties have not held consultations with a view to holding free nation-wide elections leading to the reunification of Vietnam and thereby facilitating early fulfillment of the tasks assigned to the Commission and the termination of its activities. The Commission is confident that this important problem is engaging the attention of the Co-Chairmen and the Geneva Powers and that they will take whatever measures they deem necessary to resolve it.³⁶

The United States legal brief dismisses the contention that the hostilities were civil strife, by characterizing any analogy to the American Civil War as:

an entire fiction disregarding the actual situation in Viet-Nam. The Hanoi regime is anything but the legitimate government of a unified country in which the South is rebelling against lawful national authority.³⁷

There are undoubtedly differences in the two cases but there are also similarities. The issue of civil strife in America in 1861 and in Viet-Nam in 1965 was whether the Declaration of Independence of the United States of July 4, 1776, and the Declaration of Independence of the Democratic Republic of Viet-Nam of September 2, 1945, closely resembling it,³⁸ contemplated in each case a unified state as held by Lincoln and Ho Chi Minh, or permitted secession as held by Jefferson Davis and Diem. There is no doubt that a "unified country" did not exist in the United States during the period when the Confederate States of America occupied the South or in Viet-Nam when the Republic of Viet-Nam (Diem) occupied much of the southern half of that country. It is true the analogy is imperfect because the United States was a unified country for many years before 1861 and Viet-Nam has been in almost continuous strife with France or South Viet-Nam since its Declaration of Independence. Furthermore South Viet-Nam has received more recognition as a state than did the Confederate States.³⁹ Nevertheless the position of Ho in regard to the

³⁶ Par. 68; Gettleman 181.

³⁷ U. S. Legal Brief, p. 12; 60 A.J.I.L. 569 (1966).

³⁸ Gettleman 57.

³⁹ There is also the ideological difference that in Viet-Nam the South professed the doctrine of individual freedom against Communism in the North, while in the United

legal unity of Viet-Nam is similar to that of Lincoln in regard to the United States, and the position of the United States in Viet-Nam is similar to that which Great Britain would have had if it had intervened in behalf of the Confederacy as it threatened to do in 1861, giving rise to diplomatic notes by Secretary of State Seward and a resolution by Congress indicating that such a move would be an unfriendly act.⁴⁰

Giving full consideration to the military and political provisions of the Geneva settlement, it would appear that the cease-fire had lapsed by 1958 and the situation had become one of civil strife in which outside states were forbidden by international law to intervene even on the invitation of one side.

4. Even if the cease-fire line remained legally effective, North Viet-Nam could not be accused of "aggression" against South Viet-Nam unless it had launched an unjustifiable "armed attack" upon the latter prior to the United States bombing raids across that line in February, 1965.⁴¹ The basic American argument to justify these raids was that they were acts of "collective self-defense" permitted by Article 51 of the United Nations Charter.⁴² The meaning of this article has been controversial.

It is true that traditional international law permitted military action in self-defense if there were an "instant and overwhelming necessity permitting no moment for deliberation," *i.e.*, if hostile forces were about to attack. It seems clear, however, that the San Francisco Conference, by limiting self-defense to cases of "armed attack," intended to eliminate all preventive or pre-emptive action in order to maintain to the utmost

States the North professed this doctrine against slavery in the South. As noted above, such ideological differences are not recognized in international law except insofar as a state may have accepted covenants of human rights (note 14 above). This difference, however, probably prevented British intervention in behalf of the Confederacy after Lincoln had turned the Civil War into a war against slavery, rather than a war to preserve the Union, by the preliminary Emancipation Proclamation of September, 1862. (6 Moore, *International Law Digest* 7.) The difference also undoubtedly influenced U. S. intervention on the side of South Viet-Nam. Stereotypes about the offensive character of Communism and evidence of lack of respect for human rights in North Viet-Nam aroused American opinion against Ho Chi Minh, even though there was evidence of similar denials of human rights by Diem's Government, leading to his assassination, and the intervention itself resulted in increased brutalities against civilians from government and guerrilla activities on both sides and aerial bombings by the United States (see note 15 above).

⁴⁰ The British lost interest in intervention after the war became one against slavery, but France continued to urge intervention. See 6 Moore, *Digest of International Law* 6-10.

⁴¹ On this assumption, these raids, if of a magnitude to constitute "armed attack" and if not justifiable as "collective self defense" measures, would constitute aggression against North Viet-Nam, justifying that country in military action in defense. See Q. Wright, *The Role of International Law in the Elimination of War* 60.

⁴² The United States at first sought to justify these raids as "reprisals" in response to attacks on Pleiku and Tuy Hoa "ordered and directed by Hanoi" (White House Statement, Feb. 7, 1965). This was similar to the justification given for the Tonkin Bay action six months earlier, but legal examination indicated that the facts would not justify "reprisals" in either situation, and that in any case military reprisals are forbidden by the U.N. Charter. See notes 56-58 below.

the basic obligation of Members of the United Nations to "refrain in their international relations from the threat or use of force."⁴³

Furthermore it is clear that "armed attack" implies military action. Consequently military defensive action is not permissible under the Charter in response to economic, psychological, or other forms of subversion or intervention not involving military coercion. There can be no doubt but that bodies of armed "volunteers" crossing a frontier or cease-fire line, such as the Chinese in the Korean hostilities of 1950, or ostensibly private "military expeditions" or "armed bands" leaving one country for the purpose of attacking another, as the Cuban refugees in the Bay of Pigs affair of 1961, constitute, if of considerable magnitude, an "armed attack."⁴⁴

Finally an "armed attack" which constitutes a legitimate act of self-defense against an illegal "armed attack" cannot justify subsequent attacks by the aggressor.⁴⁵

According to the International Control Commission⁴⁶ there were frequent violations of the Cease-Fire Agreement after 1957. In that and subsequent years it noted violations by the Southern Zone by permitting the establishment of United States military personnel and aircraft in its area and by entering into a *de facto* military alliance with SEATO and the United States.⁴⁷ The United States legal memorandum sought to justify these actions by asserting that "from the very beginning, the North Vietnamese violated the 1954 Geneva accords" by leaving Communist military forces and supplies in the South and infiltrating Communist guerrillas from the North to the South.⁴⁸ The Control Commission's report of June, 1955, however, indicated that both sides were satisfied with the manner in which withdrawals and transfers required by the agreement were effected.⁴⁹ The United States brief asserted that 23,000 men were infiltrated from the North to the South from 1957 to 1962,⁵⁰ and the Control Commission noted charges of such infiltration during this period, but not until 1962 did it assess the allegations and the evidence to support them. On that date it submitted a Special Report which called attention to the "rapid deterioration of the situation,"⁵¹ and quoted a report of its legal committee, with the Polish member dissenting:

⁴³ U.N. Charter, Art. 2, par. 4. See Philip Jessup, *A Modern Law of Nations* 166 (N. Y., Macmillan, 1948); Ian Brownlie, *International Law and the Use of Force by States* 273 (London, 1963); Q. Wright, *op. cit.* note 41 above.

⁴⁴ Q. Wright, "The Cuban Quarantine," 57 A.J.I.L. 546 ff. (1963).

⁴⁵ Note 41 above.

⁴⁶ The International Control Commission established by the Cease-Fire Agreement was composed of representatives of Canada, Poland and India, with the latter presiding. Its reports are printed in *British Command Papers*, 1955 to 1965, and extensive extracts are printed in Gettleman 166 ff., and Raskin and Fall 273 ff. In some of its reports either Poland or Canada abstained.

⁴⁷ Note 5 above.

⁴⁸ U. S. Legal Brief, p. 29; 60 A.J.I.L. 576 (1966).

⁴⁹ Interim Report, May-June, 1955. Gettleman 167.

⁵⁰ U. S. Legal Brief, p. 2; 60 A.J.I.L. 565 (1966).

⁵¹ Gettleman 185.

. . . in specific instances there is evidence to show that armed and unarmed personnel, arms, munitions and other supplies have been sent from the Zone in the North to the Zone in the South with the objective of supporting, organizing and carrying out hostile activities, including armed attacks, directed against the Armed Forces and administration of the Zone in the South. These acts are in violation of Articles 10, 19, 24, and 27 of the Agreement on the Cessation of Hostilities in Vietnam. . . . there is evidence to show that the PAV (Peoples Army of Vietnam) has allowed the Zone in the North to be used for inciting, encouraging, and supporting hostile activities in the Zone in the South, aimed at the overthrow of the Administration in the South. The use of the Zone in the North for such activities is in violation of Articles 19, 24, and 27 of the Agreement on the Cessation of Hostilities in Vietnam.⁵²

In the same report the Control Commission concluded that South Viet-Nam had violated Articles 16 and 17 of the Geneva Agreement by receiving military aid from the United States and Article 19 by making a *de facto* military alliance with that country.⁵³

In a Special Report of 1965 the Control Commission noted a joint communiqué of February 7, 1965, from the acting Premier of South Viet-Nam and the United States Ambassador announcing military action against military installations in North Viet-Nam in response to aggression by North Viet-Nam forces against Pleiku and Tuy Hoa; and also a communiqué of February 8, 1965, from the North Vietnamese mission protesting the bombing in North Viet-Nam on February 7 by air forces of "the United States imperialists." The Commission commented without concurrence of the Canadian member: "These documents point to the seriousness of the situation and indicate violations of the Geneva Agreement."⁵⁴

There seems to be no evidence that organized contingents of the North Vietnamese army crossed the cease-fire line until after the United States bombing attacks began in February, 1965. Whether infiltrations before that date were of sufficient magnitude to constitute "armed attacks" and whether they could be justified as defense measures against the military activities of South Viet-Nam and the United States in violation of the Geneva agreements is controversial. The Department of State's legal brief of March 4, 1966, says:

In these circumstances an "armed attack" is not as easily fixed by date and hour as in the case of traditional warfare. However, the infiltration of thousands of armed men clearly constitutes an "armed attack" under any reasonable definition. There may be some question as to the exact date at which North Viet-Nam's aggression grew into an "armed attack," but there can be no doubt that it had occurred before February 1965.⁵⁵

⁵² Par. 9; Gettleman 187; quoted in part in U. S. Legal Brief, p. 3.

⁵³ Par. 20; Gettleman 188.

⁵⁴ *Ibid.* 189-190. There has been doubt whether the attack on Pleiku and Tuy Hoa actually proceeded from North Viet-Nam. It was probably made by Viet-Cong guerrillas. See Raskin and Fall 398.

⁵⁵ U. S. Legal Brief, pp. 3-4; 60 A.J.I.L. 566 (1966).

The reports of the Control Commission indicating gradual increase in violations of the Geneva cease-fire by both sides after 1958 do not permit of a clear judgment on which side began "armed attacks." The problem is in any case irrelevant if the cease-fire line had become ineffective because of the frustration of the elections and United States intervention, as suggested above. There is no evidence of any action by North Viet-Nam which could be regarded as an armed attack upon the South prior to 1958, after Ho Chi Minh had engaged in four years of fruitless effort to carry out the resolutions of the Geneva Conference. In these circumstances Ho Chi Minh's action in support of the Viet-Cong did not constitute aggression or armed attack in international relations but civil strife within the domestic jurisdiction of Viet-Nam, similar to the action of the North against the South in the American Civil War. Whether called "intervention," "reprisals" or "collective defense," the United States response by bombings in North Viet-Nam, which began in February, 1965, violated international law, the United Nations Charter, and the Geneva Agreement, if the latter were in effect.

5. Reprisals in traditional international law were permitted only to remedy an injury resulting from violation by another state of its obligations under international law, after the injured state had made formal complaint and demanded reparation, and had unsuccessfully sought to obtain a remedy by all peaceful means available, and provided the measures of reprisal did not exceed in severity the injury complained of.⁵⁶ The United States "reprisals" in the Bay of Tonkin incident of August, 1964, seem to have conformed to none of these conditions, and the same was true of the Pleiku incident of February, 1965. There were no clear proof that an injury had been received because of a violation of international law by North Viet-Nam, no formal complaint to the North Viet-Nam government, no effort to obtain a remedy by peaceful means, and the response was far in excess of any alleged injury. Furthermore, the United Nations Charter abolished the traditional right of reprisals, as declared by the Security Council in April, 1964,⁵⁷ by requiring the Members to settle their international disputes by peaceful means and to refrain from the use or threat of force in international relations except in defense against armed attack or under authority of the United Nations.

The United States relied on the obsolete doctrine of reprisals in this case rather than on the right of self-defense against armed attack. It alleged that a United States naval destroyer had been attacked by North

⁵⁶ The *Nautilaa* Arbitration, Portugal v. Germany, 1928, 6 Hackworth, Digest of International Law 154; William W. Bishop, Jr., *International Law, Cases and Materials* 747 (Boston, Little, Brown, 1962).

⁵⁷ Passed as a criticism of the British retaliatory raid during hostilities on the Yemen border. See I. F. Stone, "International Law and the Tonkin Bay Incidents," *I. F. Stone Weekly*, Aug. 24, 1964, reprinted in Raskin and Fall 307 ff. The Security Council had passed similar resolutions on other border incidents on Nov. 24, 1953, Jan. 19, 1956, April 9, 1962. See also *The Corfu Channel Case*, [1949] I.C.J. Rep. 35; and Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* 217 (London, 1963).

Vietnamese torpedo boats while patrolling beyond territorial waters on August 2 and 4, 1964, in the Bay of Tonkin. North Viet-Nam contended that the destroyers were within its territorial waters, which it had extended to twelve miles, and that surveillance of these waters was necessitated because of a South Vietnamese naval attack on its installations on July 31. The United States destroyers seem not to have been injured but the United States reprisals destroyed several North Vietnamese torpedo boats and the installations in five North Vietnamese ports. Congress endorsed this reprehensible "shooting from the hip" by passing a resolution almost unanimously on August 7 authorizing the President to take similar action in the future.⁵⁸

6. By this resolution Congress:

Approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel armed attack against the forces of the United States and to prevent further aggression. . . . the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

The President has cited this resolution as justification for his extensive escalation of the hostilities in Viet-Nam, but it has been contended by some Senators that the action taken requires a declaration of war under the Constitution, and others have asserted that in voting for it they had in mind only limited actions such as that in the Bay of Tonkin. The text, however, goes much further. The issue seems unimportant in view of the broad Constitutional powers of the President to use armed force without Congressional support or declaration of war.

Practice and Supreme Court decisions make it clear that the President as Commander-in-Chief and under general legislation has extensive power to use the armed forces when he deems it necessary to defend American territory or citizens or to meet treaty obligations, but not as an instrument of policy. The major limitation upon such action appears to be the Congressional power to withhold appropriations.⁵⁹ In the Vietnamese situation Congress not only voted the funds requested by the President but authorized him to use armed force to assist SEATO states and states mentioned in the Protocol.

7. The United States has asserted that the SEATO Treaty and correspondence of President Eisenhower with Diem created a binding obligation to defend South Viet-Nam from armed attack. The correspondence does not seem to have involved a legal commitment to use armed force in defense of South Viet-Nam, but rather a United States policy of giving economic and military aid to build up a South Viet-Nam capable of resistance to subversion or aggression.

⁵⁸ See Raskin and Fall 396; 60 A.J.I.L. 580-581 (1966).

⁵⁹ Q. Wright, *The Control of American Foreign Relations* 286 ff., 294 ff., 307 (New York, Macmillan, 1922).

The SEATO agreement provides for consultation among the SEATO states in case one of them or an area covered by the treaty, such as South Viet-Nam, is in danger from action less than armed attack, and for collective defense in a case of armed attack.⁶⁰ There has been no agreement among SEATO Powers to take any form of collective action, and none of these Powers except Australia and New Zealand,⁶¹ which have contributed limited forces, have considered themselves under an obligation to engage in the defense of South Viet-Nam. A resolution in the SEATO meeting of June 29, 1966, endorsed the United States position but with abstention by the French representative and reservation by the Pakistan representative.⁶²

No American President seems to have recognized any legal commitment to use armed force to defend South Viet-Nam prior to 1965. The United States in signing the SEATO Treaty declared that its obligations under the treaty applied only in case of "Communist" aggression, and it stated at the Geneva Conference of 1954 that "it would view any renewal of aggression . . . with grave concern." It appears that American military action in Viet-Nam has been in pursuit of the policy of containing Communism rather than in fulfillment of any legal obligation and, as stated by the Control Commission, South Viet-Nam's acceptance of this action has violated the Geneva Agreement.⁶³

My study of the course of forty-five international conflicts since World War I indicated that the relative magnitude of national interests and present and future capabilities and vulnerabilities involved in the situation as perceived by the decision-makers, and their perceptions of the state of national and world opinion concerning the conflict, have had more influence than legal obligation or commitment in determining the escalation or settlement of these conflicts. The Viet-Nam conflict has been no exception. Applying the formula relating the magnitude of these factors as perceived by the parties, I concluded in the summer of 1965 that:

Hostilities in Vietnam are likely to escalate for a time, but eventually South Vietnam and the United States will win, unless mounting national and world opinion brings about a cease-fire, or unless entry of the Soviet Union or China, or both, initiates World War III.⁶⁴

This conclusion seems applicable a year later.

⁶⁰ Don and Arthur Larson, *Vietnam and Beyond* 17 ff. (Duke University, 1965), printed in Raskin and Fall 99 ff.; text of treaty and protocol in 60 A.J.I.L. 646 (1966).

⁶¹ The Philippines have discussed sending a small force.

⁶² Note 5 above.

⁶³ Note 13 above, and Gettleman 175.

⁶⁴ Q. Wright, "The Escalation of International Conflicts," 9 *Journal of Conflict Resolution* 440 (December, 1965).

EDITORIAL COMMENT

INTERNATIONAL LAW AND THE COMMONWEALTH, 1907-1967

At the time the American Society of International Law came into being, there existed no grouping of independent states exactly resembling the present-day Commonwealth. Even before that time, however, some British statesmen and publicists had the conception of such a grouping. Speaking in 1884, for example, the fifth Lord Rosebery, who was to become British Prime Minister a decade later but who at that time was addressing a private meeting at Adelaide, Australia, used the term "Commonwealth of Nations" to describe the British Empire.¹ In following years the expression was to come into fairly frequent use. Several decades were to pass, however, before conditions exactly fitting such a description were to exist. It was natural that, in the meantime, there should be rather frequent examination of what was called a "Commonwealth" in the light of public international law. That law has proved capable of some adaptation to the changing relationship between the associated states.²

The record is one of much more than a mere changing terminology. It is one of progress toward a co-operative plan ultimately involving completely independent states. For the present purpose the element of international law involved may be viewed without attempt to assess the significance of the law's application by courts in the respective states, important as such decisions unquestionably are. If there is justification for a kind of overview for a period of six decades, a high measure of selectivity is unavoidable. It is relevant to note briefly (1) the international legal unity of the Empire, (2) autonomy under conditions of colonialism, (3) some legal aspects of "dominion" status, (4) types of conferences utilized in the Empire and later Commonwealth, (5) Commonwealth states in relation to public international organizations, and (6) some illustrative working arrangements that remain peculiar to the now independent states composing the Commonwealth.

I

Throughout the first decade of the existence of the American Society of International Law relations between communities collectively comprising the British Empire rested essentially upon constitutional rather than international legal principles. Imperial authority was, in theory, undivided. That authority, as expressed toward Canada in the British

¹ See statement on uses of the term "Commonwealth" in *Commonwealth Relations Office Year Book*, 1966, p. 1.

² Some selected features of the general relationship are examined in Robert R. Wilson (ed.), *The International Law Standard and Commonwealth Developments* (1966), *passim*.

North America Act and toward other communities in later enactments, did not create new legal persons in the ordinary international law sense. Extensive experience in self-government was to facilitate the later emergence of new "international persons."

Adaptation to local situations and needs was apparent in Parliamentary enactments concerning local law—a matter of historical interest to Americans, whose Continental Congress in the eighteenth century had declared in a resolution the colonists' rights to have the common law apply to them.³ During the colonial period the Parliament at Westminster had extended the common law to various overseas territories; in others, the existing system of Roman-Dutch law continued to be the principal base. In the case of either type of territory, statutory enactments could supplement whatever system of private law had existed prior to a territory's coming under the Imperial authority. The question of whether the common law comprised rules of the law of nations was to be a matter of disagreement among publicists in the twentieth century.

It was inevitable that questions should sooner or later arise, particularly in the more advanced units of the Empire, concerning the international legal status of natural persons with respect to their nationality. These questions could be very practical in their nature, although one publicist could express the view that, as far as British subjects going abroad from the British Isles were concerned, British nationality was of little advantage in the overseas Dominions of the Crown.⁴ With respect to naturalization in a dominion, there were judicial holdings during the World-War-I period to the effect that naturalization in Australia would not necessarily change the status of a person concerned as an alien enemy under the law of Great Britain.⁵

Official relations between self-governing communities within the Empire of course existed before attainment of Dominion status. As early as 1846, for example, there was appointment (for certain purposes) of "Her Majesty's High Commissioner at the Cape of Good Hope."⁶ In the 1880's there came to be a system of Canadian representation in Great Britain.⁷

³ Volume cited in note 8 below, p. 187.

⁴ A. B. Keith, *Imperial Unity and the Dominions* 175, 299 (1916).

⁵ *Ex parte Markwald*, [1918] 1 K.B. 617; *Ex parte Lan You Fat*, 9 N.S.W. Rep. 269. See criticism of such rulings, in E. F. W. Gey van Pittius, *Nationality within the British Commonwealth of Nations* 207, 210 (1930). On the policy involved, see also Paul Knaplund, *The British Empire, 1815-1939* at 715 (1942).

⁶ See W. P. M. Kennedy and H. J. Scholsberg, *The Law and Custom of the South African Constitution* 39 (1935). The authors point out that the office of High Commissioner in and for South Africa was created by letters patent in 1873, and that in the following year there was an appointment of a second high commissioner, who was assigned to South Eastern Africa, the assignment including Zululand. The commission is in *Command Papers*, 1881, Vol. 66, p. 137.

⁷ Sir Alexander Galt, High Commissioner from Canada to England, had been designated by the Canadian Government, with the consent of the Imperial Government, as High Commissioner and Representative Agent. He was apparently empowered to discuss with the Imperial authorities legal questions relative to the defenses and territory. See Alpheus Todd, *Parliamentary Government in the British Colonies* 234-238

One of the best-known devices of the Empire was the system of appeals from decisions of colonial courts to the King in Council, a system which has not entirely disappeared even with the evolution to the present-day Commonwealth.

Large questions of foreign policy (especially those of war and peace) continued to be within the authority of the British Government. A declaration of war by the central government had the legal effect of putting all parts of the Empire on a war basis. Forms of judicial assistance that were operative reflected the theory of an undivided Empire. The rendition of accused persons, for example, proceeded upon the idea, as incorporated in the Fugitive Offenders Act, 1881, that there should be rendition of persons accused of crime, and without exception for "political" offenders, under the theory that the far-flung Empire was a unity for the purpose of apprehending accused persons and bringing them to trial under the authority of the Crown.⁸

The theory of legal unity of the Empire in the international legal sense did not preclude the practice of self-government in local, provincial and larger units of the system. The further development of self-government was to affect markedly the pace of progress toward a system of completely independent but associated states.

II

Toward the end of the first decade here under review, a writer whose name has come to be associated with the transformation of Empire into Commonwealth observed that even those who were "most British in their blood and traditions," if forced to choose between the Commonwealth and self-government, would renounce the former rather than the latter; he referred to their belief that the Commonwealth was the "greatest institution in the world for enabling men to realize the duty of governing themselves."⁹ At least from the time of Lord Durham's *Report on the Affairs of British North America*, there had been a process of deciding what matters properly fell within the authority of non-sovereign entities within the system. One field in which there was to be diversity was that of immigration control. In the central unit of the Commonwealth there was to be, until well into the 1960's, no policy of restriction with respect to migration from other units within the Commonwealth, but this was not true of some of the other self-governing units, whose policies became a cause of friction within the Commonwealth. International law has traditionally left it to each state to decide who should become its residents, and within the Commonwealth system the practice was no more favorable to states which might normally have desired opportunities for their people to emigrate.

(2nd ed., 1894). On the subject of representation, see also New Zealand, Parl. Pap., Sess. II, 1879, D. 3.

⁸ On some recent developments with respect to the substitution of a more modern system of rendition, see W. B. Hamilton, Kenneth Robinson and C. D. W. Goodwin (eds.), *A Decade of the Commonwealth, 1955-1964*, pp. 185-186 (1965).

⁹ Lionel Curtis, *The Problem of the Commonwealth* 4 (1916).

With foreign states, of course, Great Britain could conclude treaties containing entry and establishment provisions affecting the separate communities within the Empire.

Another field in which customary international law allows wide discretion to be exercised by individual states is that of commercial relations. In the Commonwealth, even before full independence of its members, there came to be considerable leeway within which constituent parts could influence policy. In an effort to justify Great Britain's allowing wide autonomy in this area, one view expressed was that by its nature the Commonwealth was different from the collectivity of states that might comprise a federal system, and that in tariff matters autonomy could be allowed to members without its resulting in a break-up of the Commonwealth. It was perhaps inevitable that there should come to be preferential tariffs within the system of associated states which, even before they were full states in the international legal sense, were in a large measure interdependent.

Constitution-making for separate units of the Commonwealth could proceed with considerable local self-determination, although the form might be an Act of the Imperial Parliament. The latter body could reflect the will of the particular communities involved.

Mere matters of terminology have never seemed to be serious impediments to Commonwealth progress. Australia itself is a "Commonwealth." The latter term was reportedly not used very commonly in New Zealand, at least before 1927.¹⁰ Canada could adopt for itself in 1952 the descriptive title of "Realm." That mere terminology would not necessarily assume major importance for the great body of the citizenry is suggested by the result of a poll in Great Britain in 1949.¹¹ The very term "dominion," however, had a degree of importance in the evolution of the Commonwealth which would seem to merit more than a passing mention.

III

At the outbreak of the First World War the Dominions then existent had not attained statehood in the full international law sense. Their peoples came to be in a state of war not by virtue of individual declarations but on the basis of Great Britain's declaration. Quite apart from the practical consideration of dependence upon British naval power, it would have been less natural for the dominions to exercise individual judgments in this sphere than it was for them to have a large measure of control of their commercial and other peacetime policies.

The term "dominion" was to have significance, for practical purposes, for a relatively short period of time. A resolution of the Imperial War

¹⁰ J. B. Condliffe, "The Attitude of New Zealand on Imperial and Foreign Affairs," in *Great Britain and the Dominions*, Harris Foundation Lectures, 1927, at pp. 364-365.

¹¹ "Cross-questioning of a representative section of the population then showed that over half were unable to recall one single colony by name, that three-quarters did not know the difference between colonial and dominion status, and that 3 per cent thought America was still a colony." *The Times* (London), June 22, 1949, p. 4.

Conference in April, 1917, set forth that the dominions were fully recognized as autonomous units of the Imperial Commonwealth. The British Empire, as General Smuts described it, was "more than a State," it was, he said, "a system of nations, a community of States." In contrast to empires that had been known in the past, he said, it did not stand for standardization, but for "the more various life of all nations that are comprised in it."¹² Apparently there was still no legal definition of "Commonwealth," although the term appeared in such an Act of Parliament as the Irish Free State (Agreement) Act, 1922.¹³

The Balfour formula of 1926 and the Statute of Westminster, 1931, seemed to rest upon the concept of substantial autonomy but, as the term "dominion" itself perhaps suggested a status less than independent states would have in the international law sense, it was not to remain for very long as the central descriptive word.¹⁴ A well-known treatise on international law has noted, however, an element of irrelevance in the contention that "the British Commonwealth of Nations provides an instructive example to be followed for the purpose of a more general or even universal association of states."¹⁵

The having of a monarchical form of government was not to be a permanent requisite for Commonwealth membership. Ireland, upon adopting a republican form, ceased officially to be a member, but citizens of Eire retain many of the advantages which they would have if Eire were a member of the Commonwealth. Within a few years there were to be a number of republics as members. A community that was formerly a part of the Empire may elect not to join, as did Burma; optionality of continued membership is indicated in South Africa's withdrawal in 1961. Nomenclature has changed to accord with changing relationships. The Colonial Office gave place in 1947 to a Commonwealth Relations Office; in 1965 a Commonwealth Secretariat, with members drawn from various Commonwealth states, came into being. In 1966 the Commonwealth Relations Office and the Colonial Office were merged into a new Commonwealth Relations Office. Newly-emergent states become members of an association that is no longer labeled "British."

Between member states are applicable, in place of the older system of *inter se* rules, the ordinary rules of international law.¹⁶ This does not

¹² Address to the two Houses of the British Parliament, May 15, 1917. See also V. Kenneth Johnston, "Dominion Status in International Law," 21 A.J.I.L. 481-489 (1927).

¹³ 12 & 13 Geo. 5, c. 4, p. 1.

¹⁴ On the elasticity of conventions and the use of old forms under new conditions, see W. M. Hughes, *The Splendid Adventure* 47, 48 (1929).

On some of the new factors with which new African states are identified as Commonwealth members, see C. W. Newberry, *The West African Commonwealth, passim* (1964).

¹⁵ L. Oppenheim, *International Law* 211 (8th ed., 1955). There is reference (p. 212) to the utility of British practice, but as a matter of constitutional and national importance rather than of wider utility.

¹⁶ See J. E. S. Fawcett, *The Inter Se Doctrine in Commonwealth Relations* (1958), and the same writer's discussion of changes from such rules in *The British Common-*

preclude such arrangements as have continued in the sterling area.¹⁷ As to nationality, there is leeway within which each of the associated states may regulate the acquisition and loss of its own nationality, while the possibility is left open of any state's recognizing a Commonwealth citizenship, the latter being comparable with what had been the status of British subject.¹⁸ What was once identifiable as "dominion" status, however, seems to have become a matter of essentially historical interest and importance.

IV

One of the striking usages of the Commonwealth has been the utilization of conferences. In the form of these there has been adaptation to changing situations with respect to self-government and the replacement of colonialism with new nationalism. The meetings have provided opportunity for periodical consideration of mutual needs and interests, as well as reflection upon status, including legal status.¹⁹

First in chronological order for the period under consideration were the colonial conferences. Historically, these have presented more questions of constitutional law and practice than of international legal rights, and ceremonialism seems to have had considerable emphasis.

The so-called "colonial conferences" came at intervals from 1881 through the first decade of the twentieth century. The one in 1907, the first year of the period here under review, lasted from April 15 to 26 and provided occasion for emphasis upon the essential nature of the meetings and the type of questions that might properly be considered. Topics on the agenda touched immigration, naturalization, double taxation of incomes, a decimal system of currency, a metric system, an imperial court of appeals, preferential trade, commercial treaties, and fisheries. The Prime Minister of the United Kingdom said, in part, at the opening meeting:

We have no power here in this room . . . to arrive at any binding decisions. His Majesty's Government cannot go behind the declared opinions of this country and of our Parliament. No more can you go beyond the opinions and wishes of your communities and Parliaments; but, subject to this governing limitation, there remain . . . many matters of great moment in which there is room for arrangement and advance. These Conferences were formerly more or less identified

wealth and International Law (1963). In the latter volume the author emphasizes, *inter alia*, that non-discrimination in racial matters has come to be a requisite for Commonwealth membership.

¹⁷ See, generally, Brinley Thomas, "The Evolution of the Sterling Area and Its Prospects," in Nicholas Mansergh *et al.*, *Commonwealth Perspectives* 175-207 (1958); and J. S. G. Wilson, "The Changing Role of Sterling," in volume cited in note 8 above, pp. 503-526.

¹⁸ Robert R. Wilson and Robert E. Clute, "Commonwealth Citizenship and Common Status," 57 A.J.I.L. 566-587 (1963).

¹⁹ On the first two types of conferences to be mentioned in the present comment, see the three-volume compilation by Maurice Ollivier (ed.), *The Colonial and Imperial Conferences from 1887 to 1937* (1954).

with great ceremonial occasions. This is, I believe, the first that has been specifically summoned for the purpose of business.²⁰

The Canadian Prime Minister (Laurier) expressed his personal view that the gathering was not simply a conference of prime ministers of the self-governing colonies meeting with the Secretary of State, but was a conference between the Imperial Government and the self-governing colonies of England.²¹ That questions of constitutional right which at the same time touched the Empire's external relations were not to be excluded from discussion was suggested by the reaction to the idea of the Empire's agreeing to arbitration of matters in which some of the represented colonies had special interests, as, for example, in fisheries. Thus a spokesman for Canada (Bond) at one stage in the discussion said:

If . . . it is intended to submit Colonial statutes to arbitration, then I respectfully contend that it would be derogatory to the Crown, and in direct contravention to the constitutional right of the self-governing Colonies, to submit their statutes to the arbitrament of any foreign Power or of any person or body of men.²²

"Colonial" conferences, such as those of 1887, 1894, 1902 and 1907, were to be followed, toward the end of the first decade of the twentieth century, by "Imperial" conferences. Held at intervals between 1909 and 1937, these were in addition to specialized conferences, such as the Imperial War Conference in the period of the First World War,²³ the Imperial Economic Conference at Ottawa in 1932, and the British Commonwealth Scientific Conference at London in 1936.

Of the "Imperial" Conferences, that of 1926 seems to have attracted special attention because of the report of the (Balfour) Committee on Inter-Imperial Relations. In language that has subsequently been much quoted, the report described Great Britain and the Dominions as

autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.²⁴

The Imperial Conference of 1930 considered and approved the Report of the Conference on the Operation of Overseas Legislation. In the following year the British Parliament enacted the Statute of Westminster, which is commonly regarded as a "landmark" in the evolution of the British community. The Imperial Conference of 1937 met amid growing uneasiness in view of what Neville Chamberlain described (perhaps in an understatement) as "deterioration in the international situation."²⁵

²⁰ Cd. 3404, p. 5.

²¹ *Ibid.*, p. 6.

²² Cd. 3523, p. 600.

²³ Cd. 8566. On the point in development that had been reached by the early post-war period, see Hughes' speech at the (1921) Conference on status of the dominions, Cmd. 1474, at pp. 22-23. A discussion of the nature and utility of conferences is in the same document at pp. 11-39.

²⁴ Cmd. 2768, at p. 14.

²⁵ For a brief comment on matters considered at this conference, see 32 A.J.I.L. 335-339 (1938).

Since 1937 the principal gatherings of states that are associated in the Commonwealth have been the Prime Ministers' Conferences. The states that have preferred republican to monarchical government (and that recognize the Queen as the "Head of the Commonwealth" rather than as sovereign) send Presidents or other executive officers. During the period of World War II there were apparently efforts looking to general conference discussions by Commonwealth leaders. From a meeting in May, 1944, there came a declaration by the Prime Ministers of five Commonwealth states affirming intention to achieve victory over the common enemy.²⁶ There was anticipation of postwar effort looking to an international organization with the objective of preventing aggression. In the period immediately following the cessation of hostilities there was more urgent need for relieving Great Britain's economic distress than for immediate resumption of the prewar conference effort within the Commonwealth.²⁷

In the fifth and sixth decades of the existence of the American Society of International Law, meetings of Commonwealth Prime Ministers' Conferences have come with relative frequency. There has been a rapid increase in the number of independent states represented. An assertive new nationalism, denunciation of colonialism and of racial discrimination and, in the recent past, some resort to sanctions have marked relations between communities in the Commonwealth. By the time of the first general conference in the postwar period (that of 1948), India, Pakistan and Ceylon had emerged as independent states. The agenda for this (1948) conference was a lengthy one; action taken included support of Ceylon's application for admission to the United Nations and approval of India's remaining in the Commonwealth after her change from a monarchical to a republican form of government.

In the 1950's, Prime Ministers' Conferences welcomed a number of new members and some of the topics which came under discussion touched upon matters of wide international importance. The 1951 meeting, for example, gave attention to peace settlements in the Far East, the growing danger from development of nuclear weapons, and commitments of two of the Commonwealth states by reason of their membership in the North Atlantic Treaty Organization. At their 1953 meeting the Prime Ministers considered, among other matters, the international importance of the Suez Canal in relation to peace and security in the Middle East. Discussion at the 1955 conference touched, *inter alia*, upon tensions in the Far East, the acceptance of the Federal Republic of Germany into the community of Western nations, and Pakistan's continuance (as a republic) in the Commonwealth fold. The problem of Cyprus also came under discussion in this period. At the 1957 conference Ghana had representation for the first time as an independent state; the Prime Ministers also took notice of Malaya's progress toward independence.

²⁶ See statement in Commonwealth Relations Office List, 1955, at p. 76.

²⁷ On the situation in Great Britain at the beginning of the launching of the Marshall Plan, see Robert H. Ferrell, George C. Marshall as Secretary of State 100 (1966).

The final decade of the period here under consideration has seen a great increase in the number of members (Asian, African and Caribbean) in the Commonwealth, the withdrawal of South Africa (a move which may have precluded that state's expulsion from the group because of its racial policies), and anticipation of the emergence of still other independent states which will presumably become Commonwealth members.²⁸ More novel from the point of view of Commonwealth solidarity has been action by two African states of the Commonwealth in breaking off diplomatic relations with the United Kingdom because of the latter state's failure to carry out more speedily (specifically, by December 15, 1965) drastic action against the ruling regime in Rhodesia. Following this has been a reported statement of President Kaunda of Zambia (in May of 1966) that he would propose Britain's expulsion from the Commonwealth if she did not bring down the regime in Rhodesia before the next Prime Ministers' meeting.²⁹

V

Leaders of Commonwealth states may not have been in complete agreement as to the legal implications of their respective states' becoming separate signatories of peace treaties at the end of World War I.³⁰ There was soon to be evidence, however, of these states' influence upon action taken through the League of Nations.³¹ In the matter of commitments for the keeping of the peace, such a state as Canada could urge that geography should be considered when states were called upon to assist in peace-enforcement action. Before their legal status had been given the definition which the Balfour Declaration and the Statute of Westminster supplied, the Dominions had recognized the need for their own separate nationality statutes when there was to be an election of judges for the new Permanent Court of International Justice. On such substantive matters as the concept of "domestic jurisdiction" in the League Covenant and in the later United Nations Charter, Commonwealth states were to have a very considerable influence.³²

Under the United Nations Charter the Commonwealth states have comprised a distinct group which has figured in such matters as the choice of non-permanent members of the Security Council. There has been opportunity for these states to compare views through meetings of their own group, for which meetings the chairmanship has reportedly rotated among

²⁸ See list of these as reported at the Prime Ministers' Conference of 1964, British Information Service, Final Communiqué, Reference and Library Division T. 18 (July 16, 1964), and comment in 59 A.J.I.L. 570-573 (1965).

²⁹ New York Times, May 23, 1966, p. 10.

³⁰ Illustrated in Prime Minister Massey's describing as "absolute nonsense" the view that in signing the Peace Treaty the Dominions became independent nations. New Zealand, Parl. Deb., Vol. 196 (Aug. 3-Sept. 12, 1922), pp. 480-481.

³¹ See, generally, C. A. W. Manning, *The Policies of the British Dominions in the League of Nations* (1932).

³² See John M. Howell, in volume referred to in note 2 above, Ch. VIII.

the member states. This does not imply common voting, and Commonwealth ties have not, for example, prevented African and Asian members from registering, on occasion, their opposition to the United Kingdom. Thus in a General Assembly discussion in 1965, representatives of Commonwealth states in Mediterranean, Asian, African and Caribbean areas (with the exception of Malawi) reportedly left the room when Prime Minister Wilson began to speak on British policy concerning Rhodesia.³³ The British resolution on peacekeeping was shelved by a vote of 48 to 27. On another occasion in 1965 when a crucial legal question concerning the Commonwealth state of Cyprus was under consideration,³⁴ specifically the question of whether that state was "entitled to enjoy and did enjoy full sovereignty and complete independence without any foreign intervention or interference," the Commonwealth states were sharply divided.³⁵

In the Western Hemisphere there has been a continuing question as to the possible entry of Commonwealth states into the Organization of American States. Canada, although included within the geographical area which the associated American republics are committed to protect against aggression, remains a non-member. The two Caribbean Commonwealth states also remain out of the regional organization; there has been some speculation as to whether old boundary disputes involving Great Britain may have influenced decisions by these two states in this matter.³⁶

To a Commonwealth (Canadian) statesman is usually ascribed credit for proposing the United Nations Emergency Force at the time of the Suez crisis—a crisis in which Commonwealth states were ranged on different sides. From a Commonwealth state (India) came the first commander of the United Nations peacekeeping force in Cyprus.³⁷ As to defense problems in the Commonwealth in general, there has been warning against complacent suggestion of Great Britain's capacity to provide adequate aid to her Commonwealth partners in a situation of serious aggression.³⁸

Nothing in the commitments which Commonwealth states accept as toward each other precludes individual members from following the policy

³³ See discussion in Valentine Blakeney, "The Commonwealth in the United Nations," 9 *Commonwealth Journal* 11-12, 24 (1966).

³⁴ On the background, including the 1960 agreements, see Thomas Ehrlich, "Cyprus, the 'Warlike Isle': Origins and Elements of the Current Crisis," 18 *Stanford Law Review* 1021-1077 (May, 1966).

³⁵ The resolution (A/6166) was passed on Dec. 18, 1965, by a vote of 47 for (including, in addition to Cyprus, twelve Commonwealth states, all of them being in Asia, Africa, or the Caribbean) to 5 (including Pakistan), with 54 abstaining (including the United Kingdom, Canada, Australia, New Zealand and Malawi).

³⁶ On Canada's position with respect to the Organization of American States, see W. R. Irwin, "Should Canada Join the Organization of American States?" 72 *Queens Quarterly* 289-303 (1965); and for an opposing view, David Edward Smith, in 73 *ibid.* 100-114 (1966).

³⁷ On possible advantage of Commonwealth co-operation in this field, see Alastair Buchan, in volume cited in note 8 above, at p. 206.

³⁸ Alastair Buchan, "Military Fabrics of the Commonwealth," 7 *Commonwealth Journal* 251-258 (December, 1964).

which Australia and New Zealand have chosen in their limited assistance to the United States in the latter country's military effort in South Viet-Nam. On the other hand, there is nothing in the design of the Commonwealth that is incompatible with the step taken in 1965 at the Prime Ministers' Conference when it appointed from its body a peace mission with a view of assisting toward re-establishment of peace in Viet-Nam. Appointed on behalf of the Commonwealth as a whole, and with officials of Britain, Ghana, Nigeria, and of Trinidad and Tobago composing it, the mission achieved no immediate success. Its second published statement (as of June 24, 1965), included the following paragraph:

The Commonwealth as such is in no way committed to either side of the conflict in Vietnam and has formed no collective view except on the urgency of re-establishing conditions in which the people of Vietnam may be able to live in peace. Although within the Commonwealth there is diversity of opinion on the Vietnam problem, there is complete unanimity as to the need to find a peaceful solution.³⁹

VI

It seems clear that the great body of legal relationships existing between member states of the Commonwealth now rest upon international law.⁴⁰ In areas wherein there are no prohibiting rules of customary international law, these states continue to follow procedures (and to transact certain types of business) with each other in a manner not inconsistent with international law. Illustrative of this is the system of trade preferences, the benefits of which have come increasingly into question when Britain's policy with respect to the European Common Market is under consideration.⁴¹ There is no rule of customary international law that requires a state to accord non-discriminatory treatment to every other state, either in commercial matters or in most establishment matters, however desirable a more general practice of non-discrimination would seem to be in the general interest.

In certain other areas of international relations the members of the Commonwealth continue to follow procedures with each other which they (or some of them) do not follow with non-Commonwealth states. These areas are ones in which states may follow different policies without violation of customary international law. In the matter of extradition there would seem to be a trend toward placing rendition upon the generally customary basis which makes a distinction between "political" and other offenses. Commonwealth states have, through agreement to which Commonwealth states or provinces thereof may accede, made considerable progress toward a system for the recognition and enforcement of foreign judgments.⁴²

³⁹ Statement as reproduced in the Year Book cited in note 1 above at p. 24.

⁴⁰ See studies cited in note 16 above.

⁴¹ Cf. Herman Walker in Ch. VII of volume cited in note 2 above.

⁴² See Don C. Piper in Ch. IX of volume cited in note 2 above.

In fields such as nationality and immigration, Commonwealth states, and states generally, regulate on the basis of policy considerations without encountering restraints of international law. That law does not prohibit discriminatory treatment in these matters. Nor does it prevent a state from according to citizens of other Commonwealth states, in various educational, cultural and employment fields, treatment more favorable than that accorded persons from non-Commonwealth states. The latter may, of course, invoke for their nationals such rights of establishment as treaties with individual Commonwealth states provide. Some effective plans for co-operation within the Commonwealth, such as the Colombo Plan, have not precluded participation by non-Commonwealth states.

The point reached in Commonwealth relations with respect to official representation in other states enables Commonwealth members to exchange high commissioners with other Commonwealth states while recognizing that the rights and duties involved are substantially the same as those of diplomatic missions sent to or received from non-Commonwealth states.⁴³ The purpose served for all the Commonwealth states by the recently created Commonwealth Secretariat implies no departure from the substantive rules of international law with respect to diplomatic privileges and immunities. The first Secretary to the Commonwealth has described the latter as comprising "a whole series of channels for influence, understanding and adjustment and for *ad hoc* cooperation"; he regards the Commonwealth as a reminder that the national sovereignties involved are "inevitably and inextricably bound up with those of others throughout the world."⁴⁴

To conclude that Commonwealth practice in general has had some effect upon the development of international law, or at least upon certain of its rules, is not to minimize the problems which now confront the multi-racial group of states that compose the Commonwealth. These problems have seemed to some observers to threaten the continued existence of this association of states. Mere sentiment concerning the Commonwealth is less likely to command respect than the belief that such ties as exist may conceivably enhance respect for law in the greater society of states. The evolution of the Empire-Commonwealth over the past six decades would seem to suggest that a grouping of co-operating states such as those composing the Commonwealth need not hinder and may in some ways promote the rule of law between states in general. The better understanding, the critical re-examination and the strengthening of that law remain as basic objectives of the American Society of International Law as it enters upon its seventh decade.

ROBERT R. WILSON

⁴³ See, for example, Canadian Government practice as described in 1 External Affairs (1949) and reproduced in J. G. Castel (ed.), *International Law Chiefly as Interpreted and Applied in Canada*, at 708, 710-711 (1965).

⁴⁴ Arnold Smith, "The Commonwealth and Its Global Purpose," 9 *Commonwealth Journal* 53-58, at 58 (April, 1966).

ON THE QUASI-LEGISLATIVE COMPETENCE OF THE GENERAL ASSEMBLY*

I

The processes of law-creation in international society have never been very clearly understood by international lawyers. It has been traditional to associate the creation of international law with "the sources of international law" contained in Article 38 of the Statute of the International Court of Justice. Such an approach distorts inquiry by conceiving of law-creation exclusively from the perspective of the rules applicable in this one centralized, judicial institution,¹ an institution that expresses the positivistic assumption that international legal obligations must always be shown to rest upon some tangible evidence of consent on the part of the state that is bound.² The expansion of international society to include the active participation of the Afro-Asian states and the growth of a global consciousness has produced a situation that calls for a more sociologically grounded re-interpretation of the basis of obligation in international law. One way to attempt this re-interpretation is to complicate the relationship between state sovereignty and the growth of international law by examining the argument that the General Assembly is endowed with, and actually exercises, a limited legislative competence.

The idea of attributing quasi-legislative force to resolutions of the General Assembly expresses a middle position between a formally difficult affirmation of true legislative status and a formalistic denial of law-creating rôle and impact. To affirm the legislative competence of the General Assembly in qualified terms is thus expressive of a certain well-founded uneasiness about how to give an account of the jurisprudential basis for General Assembly competence to develop new law and repeal old law.³ I propose to consider, first, the jurisprudential basis for at-

* It is a pleasure to thank Gabriella Rosner Lande, a colleague at the Center of International Studies of Princeton University, for advice and assistance, always graciously given and gratefully received, in preparing this comment. My thinking was stimulated by the opportunity to present in the Spring of 1966 an earlier version to a distinguished study group convened by the Carnegie Endowment for International Peace to consider problems associated with the work of the United Nations.

¹ Such a perspective overlooks the rôle of unilateral claims to act posited by nation-states and community prescriptions about action laid down by non-judicial international institutions. For a critical reinterpretation of "the sources of international law" see Parry, *The Sources and Evidences of International Law* (1965). On the interaction between traditional sources and U.N. resolutions as a source of international law, see Gross, "The United Nations and the Role of Law," 19 *International Organization* 537, 555-558 (1965).

² But see H. Lauterpacht, *The Development of International Law by the International Court of Justice* 155-223 (1958).

³ The distinction between the *declaration*, *development*, *creation*, and *repudiation* of rules of international law is not clear-cut. The decentralized quality of international society emphasizes the importance of the self-determined status of legal rules by various national actors. These acts of self-determination may be mutually inconsistent to varying degrees and, in the absence of stronger central institutions, there is no assured way to obtain an authoritative interpretation of the relationship between an "existing" rule and a formulation of a rule in a resolution of the General Assembly.

tributing a limited legislative status to those resolutions of the Assembly that are supported by a consensus of the membership, and, second, some examples of areas wherein this exercise of quasi-legislative competence has made and might continue to make a contribution to world legal order.

In 1945 at San Francisco the Philippines Delegation made the following proposal to endow the General Assembly with legislative authority:

The General Assembly should be vested with the legislative authority to enact rules of international law which should become effective and binding upon the members of the Organization after such rules have been approved by a majority vote of the Security Council. Should the Security Council fail to act on any of such rules within a period of thirty (30) days after submission thereof to the Security Council, the same should become effective and binding as if approved by the Security Council.⁴

The Philippine proposal was decisively rejected by a vote of 26-1 at a drafting session of Commission II.⁵ If Charter intent is decisive and strictly construed, it becomes impossible to attribute binding legal force to resolutions of the General Assembly or to consider that the Assembly is in any sense an active, potential, or partial legislative organ. This conclusion has been recently reaffirmed by scholarly observers.⁶

But this formally persuasive denial of legislative status is not nearly so relevant to patterns of practice and expectation as one might be inclined to suppose. Increasingly in other legal contexts the characterization of a norm as *formally binding* is not very significantly connected with its *functional operation as law*.⁷ A few examples may clarify this assertion. In the Japanese case of *Shimoda and others v. Japan*, the Tokyo District Court was trying to assess the extent to which the atomic bombings of Hiroshima and Nagasaki violated international law.⁸ In reasoning to a conclusion, the court made virtually interchangeable use of rules contained in fully binding international treaties (Hague Rules of Land Warfare) and those contained in draft rules (Draft Rules of Air Warfare). In the *Shimoda* setting, then, draft rules had the same (or at least an indistinguishable) rôle as did treaty rules in supporting the result. In a similar vein, the Japanese court refrained from inquiring whether the United States was, in fact, bound to observe treaty rules widely adhered to on the subject of poison gas. The elaborately pondered American decision to refrain from ratification of the Protocol Prohibiting in War the Use of Asphyxiating, Poisonous, or other Gases, and of Bacteriological

⁴ 9 UNCIO Docs. 316 (1945).

⁵ *Ibid.* 70.

⁶ J. S. De Yturriaga, "Non-Self-Governing Territories," 1964 Yearbook of World Affairs 178-212, esp. 209-212. For general treatment of these issues see selections, citations, and comments in Falk and Mendlovitz (eds.), *The Strategy of World Order*, Vol. 3: *The United Nations*, pp. 37-122, 227-248 (1966).

⁷ By "functional operation as law" is meant a perceptible relevance to expectations about the permissibility of behavior, including a reference to the use of legal rhetoric to protest a violation of these expectations.

⁸ For the text of the *Shimoda* decision, see the Japanese Annual of International Law, 1964, pp. 212-252; for an interpretation, see Falk, "The Shimoda Case," 59 A.J.I.L. 759 (1965).

Methods of Warfare (1925) did not exert any influence on the assumption by the Japanese court of an American obligation to comply.⁹

Another example of this tendency to view non-binding undertakings as binding is presented by the moratorium on nuclear testing entered into by the United States and the Soviet Union. Although it was made clear that neither country had renounced its right to test, the resumption of Soviet testing in 1961 was treated in many respects as similar to a violation of a legal duty.¹⁰

The outcome of the financing controversy has been widely interpreted as undermining or, at least, as diminishing the authority of the International Court of Justice because its analysis of the controversy in the *Expenses* case has been cast aside in the process of searching for a settlement. The neglect by the parties in dispute of the "judgment" has not been considered much less significant because the Court handed down an advisory opinion, and not a decision in a contentious case.

These examples are drawn from recent practice of legal institutions to call attention to the rather indefinite line that separates *binding* from *non-binding* norms governing international behavior. Thus the formal limitations of status, often stressed by international lawyers, may not prevent resolutions of the General Assembly, or certain of them, from acquiring a normative status in international life.¹¹

The nature of legal obligation in international relations underlies any inquiry into the status of General Assembly resolutions. This subject is complex and controversial. Some distinguished writers have started to emphasize the will of the international community as the fundamental law-creating energy.¹² Such an emphasis contrasts with the more traditionalist assumption that all obligations in international law can be traced directly (via explicit agreement) or indirectly (via state practice) to the consent of the sovereign state or to some system of natural rights and duties that is valid in all places for all time.¹³ The Permanent Court of International Justice lent the weight of its authority to this consensual view of law-creation in the famous majority opinion in the *Lotus* case:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.¹⁴

France, the Soviet Union, and South Africa continue to insist upon a sovereignty-centered conception of obligation in international relations,

⁹ *Loc. cit.* at 241-242.

¹⁰ See, e.g., Arthur Dean's testimony before the Senate Foreign Relations Committee, Hearings, Nuclear Test Ban, Exec. M, 88th Cong., 1st Sess., pp. 824-825, August, 1963.

¹¹ See citations in note 4.

¹² C. W. Jenks, *Law, Welfare and Freedom* 83-100 (1963).

¹³ See, e.g., Brierly, *The Basis of Obligation in International Law* 1-62 (1958).

¹⁴ P.C.I.J., Ser. A, No. 10, p. 19 (1927).

but there is discernible a trend from consent to consensus as the basis of international legal obligations. This trend reflects an adjustment to the altered condition of international society, especially the growing perception of social and economic interdependence, the increased numbers of states participating in international affairs, the growth of international institutions as focal points for the implementation of the will of the international community and the diminishing willingness to insulate internationally important activity from international legal control by deference to the dogma of domestic jurisdiction. In a world fraught with conflict and instability there is a widely felt need to find ways to adapt the international legal order to the changing character of social and political demands, to develop techniques of peaceful change as an alternative to violence and warfare. This need is given dramatic urgency by the tendency of civil wars to serve as the main arena for international conflict. If international society is to function effectively, it requires a limited legislative authority, at minimum, to translate an overriding consensus among states into rules of order and norms of obligation despite the opposition of one or more sovereign states.¹⁵

Even the United States Supreme Court recently found occasion in the *Sabbatino* case to rely upon the notion of consensus in the course of assessing the reality of an international legal obligation.¹⁶ In that controversial decision the Court held, *inter alia*, that traditional rules of international law imposing a duty upon an expropriating government to pay an alien investor "prompt, adequate, and effective compensation" were no longer supported by a consensus of sovereign states and, as a result, the validity of such rules was in sufficient doubt as to make them inapplicable to the dispute.¹⁷

Rosalyn Higgins, in her important study, *The Development of International Law Through the Political Organs of the United Nations*, properly emphasizes the extent to which an assessment of the legal status of General Assembly resolutions is associated with the over-all character of the law-creating process applicable to customary international law:

Resolutions of the Assembly are not *per se* binding: though those rules of general international law which they may embody are binding on member states, with or without the help of the resolutions. But the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provide a rich source of evidence.¹⁸

Mrs. Higgins also calls attention to the inherent discretion enabling the drafters of a resolution to *develop* new rules of law in the guise of

¹⁵ This argument is central to the presentation in Falk and Mendlovitz, "Towards a Warless World: One Legal Formula to Active Transition," 73 Yale Law J. 399 (1964).

¹⁶ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 58 A.J.I.L. 779 (1964); for interpretation, see Falk, "The Complexity of Sabbatino," 58 A.J.I.L. 935 (1964).

¹⁷ It must be noted, however, that the validity of these traditional rules has been rehabilitated, at least within the confines of the United States, by legislative action. Foreign Assistance Act of 1964, § 301 (d) (4), 78 Stat 1013, 22 U.S.C. § 2370 (e) (2) (1964), 59 A.J.I.L. 368 (1965); see also Cardozo, "Congress vs. Sabbatino: Constitutional Considerations," 4 Columbia Journal of Transnational Law 297 (1966).

¹⁸ P. 5 (1963).

declaring old rules. If declaratory language is used in the resolution, then the problem of acknowledging the formal absence of legislative competence is more or less solved and at the same time the legislative character of the claim is maintained.

In a social system without effective central institutions of government, it is almost always difficult, in the absence of a formal agreement, to determine when a rule of law *exists*. It is a matter of degree and reflects the expectations of states toward what is permissible and impermissible. Certainly norm-declaring resolutions are legal data that will be taken into account in legal argument among and within states. A main function of international law is to establish an agreed system for the communication of claims and counterclaims between international actors and thereby to structure argument in diplomatic settings. In the search for bases of *justification or objection* it is clear that the resolutions of the Assembly play a crucial rôle—one independent of whether their status is to generate binding legal rules or to embody mere recommendations. The degree of authoritativeness that a *particular* resolution will acquire depends upon a number of contextual factors, including the expectations governing the extent of permissible behavior, the extent and quality of the consensus, and the degree to which effective power is mobilized to implement the claims posited in a resolution. The degree of authoritativeness that the *process* of law-creating by Assembly action comes to enjoy depends upon the extent to which particular resolutions influence behavior and gain notoriety in legal circles and the extent to which this process is incorporated into the developing framework of an evolving system and science of international law. Part of the authoritativeness of this process of law-creation is its acknowledgment and serious empirical study by international lawyers.

II

The jurisprudential basis for attributing legislative force to Assembly resolutions is quite distinct from determining the effective limits of Assembly competence to influence behavior through resolutions. To assess the rôle of quasi-legislative competence in Assembly action is a complicated task and only some general directions of inquiry can be stated here.

✓It is, first of all, essential to classify as accurately as possible the nature of the legislative claim; that is, to identify the claim that is being made and what must be done by whom to comply. In making this assessment, the language of the resolution must be carefully analyzed to see whether it formulates specific duties to be discharged by specific actors. It is also necessary to describe the rights and duties of states in the absence of the resolution. What, in other words, is added by the directive contained in the resolution? In the same respect it is necessary to obtain some insight into the varying objectives pursued by those who supported or opposed the resolution to get a better image of its anticipated impact. The objectives, for instance, of the United States, of the Soviet Union, and of the African states are very different from each other with regard to the

implementation of resolutions "declaring" *apartheid* "illegal," and calling upon states to take appropriate sanctioning action.

It is also essential to clarify the conditions surrounding the vote on a resolution as they bear upon the accuracy of attributing legislative status to it. If the resolution enters a political process that looks toward implementation, then the legislative nature of the claim is more clear-cut, that is, there seems to be some explicit connection between the status of the claim as legislative and the prospects for *effective* implementation: the better the prospects, the more appropriate the label "legislative."

But a certain caution is needed here. One of the main contributions of the General Assembly in the war/peace area is to help establish a climate of opinion that is favorable to the growth of world order. This contribution cannot be assessed by any measurable impact or by any evidence of specific intent. However, it does not seem extravagant to contend that Assembly resolutions on the subject of nuclear testing and non-proliferation dramatized a global concern that may, at least, have helped keep the nuclear Powers at Geneva, despite a widespread sense of discouragement about the prospects for agreement. Perhaps, one could describe these efforts as creating a "weak" legislative norm that operates to influence marginal decisions about nuclear testing and proliferation. An interesting, more ambitious, attempt to use the Assembly in the war/peace area is *Resolution 1653 (XVI)* that declares that the use of nuclear weapons would constitute "a direct violation of the Charter of the United Nations," "is contrary to the rules of international law and to the laws of humanity," and that "(a)ny State using nuclear and thermonuclear weapons" is "acting contrary to the laws of humanity" and is "committing a crime against mankind and civilization."¹⁹ Such a resolution is a legal datum available to those arguing against the legality of nuclear weapons. The negative votes of several powerful states and abstention of several others suggests the absence of the sort of consensus that is found in the area of racial discrimination or decolonization, but the objective of *Resolution 1653 (XVI)* is to influence public opinion by positing a weak legislative claim. In the event that nuclear weapons are ever used, one would suppose that the resolution will be invoked by those protesting the use if only to serve as an instrument of persuasion. In the interim the resolution to an imperceptible degree joins with other tendencies that together create some legal basis for the argument that an obligation exists to use nuclear weapons, if at all, only as a reprisal against a state that uses them first (as is the generally accepted status of the use of poison gas). The legislative process at work here can be analogized in some respects to the growth of law in the common law tradition, and the impact of a particular resolution is impossible to anticipate, as its particular effects are so contingent upon unintended consequences.

If we inquire as to the substantive areas wherein quasi-legislative development might be most fruitfully undertaken by the General Assembly,

¹⁹ U. N. General Assembly Res. 1653 (XVI), Nov. 28, 1961.

then we confront an initial limiting factor—the radical split in the world community created by the Cold War.²⁰ Each side in this struggle has enough strength to resist the claims of the other. That is, unless the consensus formulated in the claim to govern national action transcends the fissures of the Cold War and finds a basis for agreement among the principal states, it does not satisfy the preconditions for legislative action in the United Nations setting. A belated understanding of this precondition may be the most positive legacy of the financing crisis, and the abortive attempt by the United States to impose a binding obligation on states through the exercise of authority by the General Assembly backed up by Article 19. If law is to be effective, its growth must be conjoined with the distribution of effective power, especially to the extent that a legislative claim is posited. International society remains too decentralized to suppose that a voting majority of two-thirds can by itself satisfy the preconditions for quasi-legislative action in the event that either the Soviet Union or the United States is in the dissenting minority. To this extent the veto in the Security Council is expressive of the quality of a *political* consensus needed to support a quasi-legislative claim. To overlook this necessity for a *political*, as well as a parliamentary, consensus is to undermine the authority of the Assembly by over-extending it, and thereby engendering skepticism about its law-creating rôle. Although the ingredients of a politically relevant consensus cannot be laid down usefully in the form of mechanical requirements specifying the requisite quality and quantity of voting support, Resolution 1653 (XVI), for instance, may come to acquire a legislative rôle in restraining recourse to nuclear weapons, even if at the time of its formulation the United States was part of the dissenting minority. [Also the need for a political consensus is less important when the objective of a resolution is to promote *in general* the evolution of legislative standards rather than to posit a *specific* legislative claim directed at prohibiting action of a particular nation-state.

To recall earlier points, the limits upon quasi-legislative competence of the Assembly are less a reflection of the absence of the *formal competence* to legislate than they are a consequence of certain *political constraints* arising from the general requirement of mobilizing effective community power in support of legislative claims. In international society this mobilization can normally only take place in the event of converging interests on the part of powerful states, although the convergence may express varying degrees of agreement as to carrying forth the policy designed to influence behavior. It is also relevant—and complicates any interpretation of the locus of effective action on the part of the Assembly that relies too heavily on power as the chief explanatory factor—to take note of the rôle of African and Asian states in providing the formal majority and often the

²⁰ The continuing reality of intense conflict between the United States and the Soviet Union in the Cold War is now subject to debate. The point remains, however, that a policy disagreement among the super-Powers prevents the assertion by the organs of the United Nations of effective claims to control international behavior.

political impetus for the assertion of legislative claims by the Assembly. It is the Afro-Asian group of states, much more evidently even than the Socialist states, that seek revision in the structure of international order as part of an over-all demand for retribution in the post-colonial period. However, in situations in which either of the super-Powers are not in accord, in terms of policies and practice, with the will of the Afro-Asian group, then the drive toward a legislative solution is often blunted by a very abstract, operationally irrelevant resolution. An example is the celebrated Resolution on Permanent Sovereignty over Natural Resources, in which broad principles are formulated in such a way as to solicit an affirmative vote from all states, but no attempt is made to legislate a solution of a real dispute going on in international society.²¹ In the context of Resolution 1803 (XVII) the real dispute concerned the duties of the expropriating states to compensate alien investors. The resolution refers to the duty to pay "appropriate compensation" as determined by international law, but it also refers "the question of compensation" to "national jurisdiction." Interpretations from every ideological angle are possible; conservative United States international lawyers tirelessly point out that even the new states and the Socialist states have now accepted the principle of compensation according to international law. Revisionist international lawyers argue that the resolution was drafted in terms of "appropriate compensation," thereby acknowledging that it was no longer necessary to pay "prompt, adequate, and effective compensation," but that it becomes possible to take account of such factors as the previous unjust enrichment of the investors in assessing the obligations of the expropriator. Furthermore, the reference to settlement via national jurisdiction is said to affirm the argument that the issue of compensation is a matter exclusively within domestic jurisdiction, an interpretation favorable to the views of the new states. Resolution 1803 (XVII), then, provides a way of organizing legal arguments in the setting of a legislative dispute, but it does very little by way of settlement. In this sense it is quite different from Resolution 1653 (XVI), which, however ineffective in direct terms, clearly does try to resolve the dispute about the legality of nuclear weapons as instruments of warfare by taking a definite stand on the controverted issues.

Resolution 1653 (XVI) lacks Great-Power consensus, whereas Resolution 1884 (XVIII), calling upon all nations not to station in outer space "any objects carrying nuclear weapons or any other kinds of weapons of mass destruction," enjoyed the active backing of both the Soviet Union and the United States—the states whose policy most obviously was curtailed by the legislative claim. The resolution served to formalize an agreement, and the obligation it imposes has been referred to by government officials as one of the major steps taken in the area of arms control.²²

²¹ U.N. General Assembly Res. 1803 (XVII), Dec. 14, 1962.

²² Cf., e.g., A. S. Fisher, "Arms Control and Disarmament in International Law," 50 *Virginia Law Review* 1200 (1964).

The binding quality of the obligation has been questioned, however, by at least one eminent authority.²³

Big-Power consensus joins with a strong Afro-Asian commitment in the context of proscribing the practice of *apartheid* in South Africa. A series of resolutions has "declared" in increasingly specific terms that *apartheid* is incompatible with the obligations imposed by the Charter and threatens international peace and security. The crystallization of the anti-*apartheid* consensus in these terms constitutes part of the legislative background of the *South West Africa Cases* recently decided by the International Court of Justice.²⁴ Here quasi-legislative action by the Assembly may contribute to a political process the immediate outcome of which is to provide a firm legal basis for the eventual organization of serious sanctions against South Africa. Without this firm legal basis, the United States and the United Kingdom are unlikely to proceed much beyond the stage of a verbal condemnation of *apartheid*. Thus the Assembly indirectly may contribute to a process of norm-creation that improves the chances for norm-implementation.

The assessment of the possibilities for quasi-legislative action by the Assembly cannot be dealt with in general terms. It is necessary to examine the specifics of the context, especially to determine the relation between the sponsoring majority, the intended and possibly unintended objectives of the resolutions, and the distribution of power in international society. But inquiry cannot even be content with achieving a sophistication about the relevance of power to legislative effectiveness. In certain settings, for instance the status of nuclear weapons, a consensus among the less powerful may create an international atmosphere that exerts an eventual, if indirect, influence on the more powerful. It does not, however, seem extravagant to claim that the Assembly is in a position to play a crucial rôle on a selective basis in adapting international law to a changing political environment; that is, to participate in the essence of the legislative process at work in rudimentary form in international society. But it is artificial to confine the analysis of the legislative role of resolutions of the General Assembly to traditional processes of law-creation (*i.e.*, those premising the validity of the legal prescription upon the evidence of national consent) in international society. The continuous growth of international law has been achieved as a result of "legislative" pressures exerted by such diverse phenomena as war and morality. Even the traditional sources contain a disguised non-consensual element. The legislative content of customary international law is the most dramatic area wherein the myth of consent is frequently supplanted by the reality of an inferred consensus. Professors McDougal and Burke have demonstrated in *The Public Order of the Oceans* that the dominant mode of law-creation in the law of the sea has been of a legislative character.²⁵ In this crucial respect, the attribu-

²³ J. C. Cooper, "The Manned Orbiting Laboratory: A Major Legal and Political Decision," 51 American Bar Association Journal 1137 (1965).

²⁴ Judgment in *South West Africa Cases*, July 18, 1966, [1966] I.C.J. Rep. 6.

²⁵ McDougal and Burke, *The Public Order of the Oceans* (1962).

tion of a limited legislative competence to the formal action of the General Assembly is but a special case of the more pervasive processes by which the formation and decay of legal standards have always taken place in international society. The saliency of the General Assembly and its mode of operation by way of norm-positing resolutions merely makes an implicit legislative energy explicit. To take account of this legislative energy and to relate it to other less visible legislative forms is a major creative task confronting international lawyers of our era.

RICHARD A. FALK

NOTES AND COMMENTS

THE UNITED NATIONS' DOUBLE STANDARD ON HUMAN RIGHTS COMPLAINTS

The Developing Paradox

In the early years of the United Nations a "paradox" was noticed in the relative standing of individual human rights complainants depending on their nationality. It was stated that persons under Trusteeship "... had the right to petition the Trusteeship Council, whereas the citizens of the administering countries did not possess that right."¹ Standing to petition the Trusteeship Council arose from Article 87 of the U.N. Charter, which allows "The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions [to] . . . b. accept petitions and examine them in consultation with the administering authority."

The jurisdictional limits imposed by the language of the Charter have been outgrown in recent years. The acceptance by U.N. bodies of petitions as well as the hearing of petitioners on various subjects, including the denial of human rights, has expanded from the trust territories contemplated by Article 87 (b) to non-self-governing territories and even to one independent state, South Africa.²

There still remains a paradox. Persons complaining about South Africa may petition the United Nations in writing, charging that government with denials of human rights, receive a hearing and have both their written and oral testimony mimeographed and circulated to 117 Member States and nearly 200 libraries in various countries. All other persons complaining of human rights violations by their own government rather than by a foreign or colonial government are told the United Nations cannot help them. The difference in treatment reflects a double standard, which was noted at the eighteenth (January, 1966) session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, when

One member contrasted the frequent publication by United Nations bodies of human rights complaints regarding dependent areas and South Africa with the private treatment of complaints regarding other areas.³

¹ U.N. General Assembly, 3rd Sess., Official Records, Pt. I, 3rd Comm. ¶. 699 (U.N. Doc. A/C.3/SR. 158) (1948). The French representative was credited by the Belgian with having "clearly stated the paradox."

² General Assembly action respecting apartheid and the human rights aspects of colonialism have been noted in Gardner, *In Pursuit of World Order* 243 (1965), and Buerghenthal, "The United Nations and the Development of Rules Relating to Human Rights," 1965 Proceedings of the American Society of International Law 132.

³ U.N. Doc. E/CN.4/903-E/CN.4/Sub.2/268, p. 61 (the U. S. member is referred to).

The Prevailing Standard

Most of the hundreds of communications arriving each year at the United Nations in which the writers complain of human rights violations by their own governments are given scant attention. In spite of the fact that Article 62, paragraph 2, of the Charter authorizes the Economic and Social Council to "... make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all," ECOSOC has since 1947 ruled that its relevant subordinate body, the Commission on Human Rights, has no power to take action on individual human rights complaints. Accordingly the Secretariat, at ECOSOC's request, simply prepares for the Commission a non-confidential summary of communications dealing with human rights "principles" and a confidential summary of "other communications concerning human rights."⁴ The latter category includes individual complaints. In either case the author's name is not given without his consent, and he is told that "the Commission has no power to take any action in regard to any complaint concerning human rights." Member States named in communications are given copies which do not identify the sender and may send comments to the Commission, but the Commission may not see an actual communication if it contains a complaint instead of a discussion of "principles."

This treatment of communications has been described by Bilder as not providing "... any generally applicable and systematic international procedures or institutional machinery for actually receiving and investigating complaints of specific violations of human rights and taking appropriate steps to remedy them."⁵ He also called attention to the absence of "... even the minimal function of exposing the facts of such situations before the international community, thus helping to bring the weight of world public opinion to bear on the governments concerned."

Objections to such restrictive treatment of individual human rights complaints have borne no fruit. Secretary General Trygve Lie suggested in 1949 that the Human Rights Commission be allowed by ECOSOC "to make recommendations to it on matters which have been brought to the Commission's notice in the course of its examination of communications concerning human rights."⁶ While a right of petition in human rights

⁴ The procedures are now embodied in ECOSOC Res. 728 F (XXVIII) of 1959. For an example of the non-confidential summary, see U.N. Doc. E/CN.4/CR.35. The Commission on the Status of Women also receives a "Non-Confidential List of Communications" (Doc. E/CN.6/CR.18), as does the Sub-Commission on Prevention of Discrimination and Protection of Minorities (U.N. Doc. E/CN.4/Sub.2/CR.10). The General Assembly and Security Council publish their own lists of communications received. See respectively U.N. Docs. A/INF/112 and Add. 1-4 and S/NC/179.

⁵ Bilder, "The International Promotion of Human Rights: a Current Assessment," 58 A.J.I.L. 728, 731 (1964).

⁶ U.N. Doc. E/CN.4/165, p. 7. At the 18th (January, 1966) session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, to which the Secretary General presented confidential and non-confidential lists of communications, "... various members expressed deep uneasiness about the existing practice in

cases was later held by Professor Lauterpacht to be "implied in the Charter as the very minimum" means of safeguarding human rights,⁷ and Professors McDougal and Bebr have urged that the General Assembly reverse ECOSOC's restrictive rule,⁸ another view has cautioned that

. . . an international authority, empowered to deal with complaints of individuals and groups of individuals against their own government, must be built on stronger promises [*sic*] than on a contested interpretation of a provision of the Charter, which tends to be ambiguous.⁹

A possible trend towards eventual hearing of human rights complaints against the complainant's own government, other than in the case of South Africa, is seen in current discussions on creation of a U.N. High Commissioner for Human Rights, a proposal supported by the United States as ". . . a move to establish [the] increased executive capacity" which "the United Nations needs . . . in the field of human rights."¹⁰ The proposal was added to the agenda of the Twentieth Session of the General Assembly by Costa Rica, whose draft resolution would direct the proposed official to ". . . seek to secure the observance of the Universal Declaration of Human Rights."¹¹ Costa Rica's accompanying explanation appears to contemplate investigation of individual complaints in asserting that ". . . the existence of a High Commissioner would make it possible for violations of human rights to be considered at the higher level

relation to those communications. These members considered that they were placed in an impossible position when they were made aware of the existence of complaints in fields within their expert province but were denied a sight of the text of the complaints or an opportunity to discuss them." *Op. cit.* note 3 above.

⁷ H. Lauterpacht, *International Law and Human Rights* 244 (1950).

⁸ "Human Rights in the United Nations," 58 A.J.I.L. 603, 640 (1964).

⁹ Breugel, "The Right to Petition an International Authority," 2 *Int. and Comp. Law Q.* 542, 547 (1953). The agenda of the 22nd (March-April, 1966) session of the Commission on Human Rights included (U.N. Doc. E/CN.4/894, p. 13) the matter of a resolution adopted on June 18, 1965, by the Special Committee on Colonialism drawing the Commission's attention ". . . to the evidence submitted by the petitioners respecting the violations of human rights committed in the Territories under Portuguese administration, in South West Africa, and in Southern Rhodesia." U.N. Doc. A/AC.109/128/Rev. 1, p. 3.

¹⁰ 54 Dept. of State Bulletin 178 (Jan. 3, 1966). Similar proposals had been made by Uruguay in 1951 (U.N. Doc. A/C.3/564), and 1955 (U.N. Doc. A/2929 at 84-85), and in December, 1963, by Mr. Jacob Blaustein in a Dag Hammarskjöld Memorial Lecture at Columbia University.

¹¹ U.N. Doc. A/5963, p. 6. Costa Rica had put a similar item on the agenda of the 21st (March-April, 1965) session of the Commission on Human Rights, at which time the matter was not reached. A U.N. High Commissioner was recommended by several participants at the U.N. human rights seminar on the multi-national society held in June, 1965, in Yugoslavia (U.N. Press Release Soc/HR/130, p. 2) and by the U.K. at the ECOSOC meeting in July (U.N. Press Release ECOSOC/2108, p. 2). The High Commissioner proposal was referred by General Assembly Res. 2062 (XX) for consideration by the Commission on Human Rights at its 22nd (March-April, 1966) session.

of the United Nations. . . .” However, a gloomy prognosis was made by Professor Richard N. Gardner while Deputy Assistant Secretary of State that

most members of the United Nations would not be prepared to have such a Commissioner hold hearings, make on-the-spot investigations, or solicit additional information from them beyond what they voluntarily supplied in their periodic reports.¹²

If this unhopeful view of states’ willingness to have the United Nations scrutinize their treatment of their own people be correct, there seems little chance of their permitting any “executive” arm of the United Nations even to make public human rights complaints submitted to it, let alone more fully investigate or remedy them. Such is not the case with South Africa, where an exceptional standard is applied through the activities of a special committee of the General Assembly.

The Exceptional Standard

As noted, specific human rights complaints against a non-colonial government are in the single instance of South Africa given wide publicity, if not more full investigation or relief. The technique employed, the use of a General Assembly Special Committee rather than the Human Rights Commission or any “executive” body like the proposed High Commissioner, had its origins in the process inherited from the League of Nations and developed in the United Nations, particularly since 1960.

Prior to 1960 the Trusteeship Council was using well-established methods for handling petitions. Besides accepting and examining them as explicitly authorized by Article 87 (b) of the Charter, the Council that year granted oral hearings in several cases,¹³ as did the Fourth Committee of the General Assembly.¹⁴ The latter body took the step in 1961 of granting hearings to petitioners not only from Trust Territories but also from Portuguese Guinea, concerning which Portugal had refused to supply information, as called for by Article 73, because it considered this area to be part of Portugal rather than a separate and “non-self-governing” territory. The argument in the Fourth Committee preceding this decision

¹² Gardner, *op. cit.* note 2 above, p. 261. Representatives of Sweden, Argentina, and the International Confederation of Free Trade Unions all indicated in the debate on March 25, 1966, in the Commission on Human Rights that they did not believe the High Commissioner proposal then before the Commission would authorize him to receive complaints (U.N. Press Release SOC/HR/199). The U.S.S.R. on March 28, 1966, denounced the proposal as calling for a “fantastic institute” and a “supreme judge” above governments (U.N. Press Release SOC/HR/202). The Commission adopted a resolution establishing a working group “to study all relevant questions” and requesting the Secretary General “to prepare an analytic and technical study” on the proposal (U.N. Press Release SOC/HR/207).

¹³ U.N. General Assembly, 15th Sess., Official Records, Supp. No. 4, at 6 (Doc. A/4404) (1960).

¹⁴ *Ibid.*, Annexes, Agenda Items Nos. 13 and 47, at 32 (Doc. A/4737), 45-46 (Doc. A/4738) (1961).

stressed that Article 73, unlike Article 87, does not even mention petitions, let alone hearings.¹⁵

The extension in 1961 of the petition-and-hearing process to other than Trust Territories breached the dike. The following year the Fourth Committee swept aside legal objections by Britain and Spain to hearing petitioners from areas agreed by their rulers to be "non-self-governing" but on which those Powers had not refused reports. By 1963, when Captain Galvão, whom Portugal was seeking for the seizure of the vessel, *Santa Maria*, sought to testify before the Fourth Committee, the only objection to hearing petitioners from other than Trust Territories was made by Spain, which declined to press the point.¹⁶ Other members made it clear they considered any such distinction to have vanished. The United Arab Republic, in the language of the summary record, referred to "... the right of petition in relation to Trust and Non-Self-Governing Territories, as provided for in the Charter and developed by the General Assembly and the Trusteeship Council. . . ." ¹⁷ Ceylon conceded that "... invitations to petitioners did not fall under any of the provisions of the Charter [but] in order to carry out [their] functions, the Assembly, the Fourth Committee and the Special Committees had recognized the right to hear petitioners." ¹⁸

The Special Committees referred to by Ceylon must have been those on Colonialism and on Apartheid in South Africa. The former was hearing complaints against foreign colonial governments, while the latter heard petitioners attack a government which, however much hated, was locally selected rather than foreign. Thus the Apartheid Committee was doing as to one state what ECOSOC has prevented the Human Rights Commission from even approaching as to states in general. From the victim's viewpoint it might be said that a South African possessed a unique if still ineffectual procedural advantage in relation to his own government.

The first of the Special Committees doubtless referred to by Ceylon, that on Colonialism, was established with seventeen members in 1961, to check on implementation of General Assembly Resolution 1514 (XV) of

¹⁵ U.N. General Assembly, 16th Sess., Official Records, 4th Comm., pp. 322-326 (Doc. A/C.4/SR.1208) (1961).

¹⁶ U.N. Doc. A/C.4/SR. 1481, p. 10. However, South Africa stated two years later respecting South West Africa that it did not recognize the right of the Committee to hear petitioners except in the case of Trust Territories. U.N. Doc. A/C.4/SR.1568, p. 12.

¹⁷ U.N. Doc. A/C.4/SR.1479, p. 2. See also U.S.S.R., *ibid.*, p. 4; Ghana, *ibid.*, p. 9; Yugoslavia, U.N. Doc. A/C.4/SR.1481, p. 3.

¹⁸ U.N. Doc. A/C.4/SR.1480, p. 13. The Fourth Committee was praised by its Chairman in September, 1965, for its having "... been able to bring about a gradual and almost imperceptible readjustment of certain provisions of the Charter so that it might remain, as far as possible, a reflection of the progress and the major currents of our day. A significant illustration of this continuous process of empirical adaptation of the Charter to a rapidly and constantly changing world lies in the way in which it was possible gradually to change the centre of gravity of United Nations anti-colonial action from the Trusteeship Council to the Committee of Twenty-Four known as the Decolonization Committee." U.N. Doc. A/C.4/640, pars. 12-13.

1960, calling for "immediate steps . . . to transfer all powers" to colonial peoples, and asserting "the need for . . . universal respect for, and observance of, human rights." The Committee pursued its investigative function, submitting a questionnaire for governments to answer, and hearing individual petitioners.¹⁹ These methods were approved by the Assembly in 1962, when it enlarged the Committee to twenty-four members and transferred to the Committee's jurisdiction supervisory functions with respect to South West Africa. The transfer lent further support to the Committee's petition-and-hearing practice, since the General Assembly asked the Committee to carry on the work of earlier special committees in examining petitions "as far as possible in accordance with the Mandates procedure of the League of Nations."²⁰ It will be recalled that South Africa had acquired authority over South West Africa by a League Mandate.

The Committee of 24 lost no time in taking on its new task of investigating conditions in South West Africa. By November, 1963, it had examined ninety-four petitions on that area and had granted hearings to fourteen petitioners.²¹ The next month the Assembly ". . . endorse[d] its methods and procedures" without dissent.²² Then the Committee's jurisdiction was further enlarged and in such a way as to encourage its petition-and-hearing procedures. To it were given the duties of the long-standing Committee on Information from Non-Self-Governing Territories. "Recalling its approval of the Special Committee's methods and procedures," the Assembly requested it "to undertake any special study and prepare any special report it may consider necessary. . . ." ²³

Many of the petitions recently received and circulated by the Committee of 24 have charged human rights violations, frequently naming the victims. For example, a complaint addressed to U Thant by the World Federation of Trade Unions in 1965 charged various "brutal acts of re-

¹⁹ U.N. General Assembly, 17th Sess., Official Records, Annexes, Addendum to Agenda Item No. 25 (Doc. A/5238, at 18-19) (1962).

²⁰ Res. 1804 (XVII). The Committee of 24 was thereby given functions previously assigned to the Special Committee for South West Africa, formed in 1961 to take over from the Committee on South West Africa, which in 1953 had replaced an *ad hoc* petition-examining Committee dating back to 1950, the year of the International Court of Justice advisory opinion affirming South Africa's duty to report annually on South West Africa and transmit petitions to the U.N., [1950] I.C.J. Rep. 128. The Court gave two later advisory opinions on the procedures established by the U.N., one on voting, [1955] I.C.J. Rep. 67, and the other upholding the Assembly's authorization to the Committee on South West Africa to grant hearings to petitioners, [1956] I.C.J. Rep. 23. In the latest I.C.J. action, Ethiopia and Liberia asked the Court to adjudge that South Africa has illegally failed to transmit petitions to the General Assembly. U.N. Press Release I.C.J./243, June 1, 1965, p. 3. See [1966] I.C.J. Rep. 6.

²¹ Res. 1900 (XVIII); Report of Special Committee, Doc. A/5446 and Add. 1-4.

²² Res. 1958 (XVIII). France, South Africa, Spain, the United Kingdom, Belgium and the United States abstained.

²³ Res. 1970 (XVIII). Two years later the General Assembly "Notes with appreciation the work accomplished by the Special Committee . . . , Requests the Special Committee to continue to perform its task. . . ." Res. 2105 (XX).

pression" and attached a list of eighteen Southern Rhodesian trade union leaders who were stated to have been arrested in 1964.²⁴ Like hundreds of other petitions, this one was mimeographed and circulated as an official U.N. document, in marked contrast to the restrictive treatment it would have received had it not fallen within the Special Committee's geographical jurisdiction.

While Southern Rhodesia, prior to its November, 1965, independence declaration, was asserted by the Committee of 24 to be in colonial status,²⁵ so that human rights complaints relating to its people were considered as aimed at a foreign government just like most complaints to the Committee, the same is not the case with another Special Committee, that on South African Apartheid. Although some have suggested that the very nature of *apartheid* makes it a colonial manifestation,²⁶ human rights complaints by South Africans against their government in essence resemble human rights complaints by residents of any state against the government of that state. Yet the latter's complaints are, as described above, merely filed with the Secretariat and summarized for the Human Rights Commission, while the former are publicized through the same procedures employed by the Colonialism Committee.

The Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa began receiving and circulating petitions soon after it was organized in 1962. Details were set forth on political trials, detentions without trial, banning orders, house arrests, and torture of prisoners.²⁷ Publicity has been an avowed purpose. Costa Rica in March, 1965, "... associated itself with the Committee's further effort

²⁴ U.N. Doc. A/AC.109/PET.374.

²⁵ Shortly before the declaration by the Ian Smith regime, Mauritania told the Fourth Committee "... that Southern Rhodesia was still under colonial rule—no longer that of United Kingdom officials perhaps, but of settlers installed by the United Kingdom." U.N. Doc. A/C.4/SR.1544, p. 12.

²⁶ Mr. A. B. Ngcobo of the Pan-Africanist Congress of South Africa told the Colonialism Committee on June 8, 1965, at Dar es Salaam, Tanzania, that South Africa is "ruled by a foreign minority. . . . He therefore could not agree with the Special Committee that it was not competent to hear the nationalist leaders of South Africa." U.N. Doc. A/AC.109/SR.358, pp. 14–15. On the other hand, the National Unity Democratic Organization has stated that South African Prime Minister "Verwoerd is not Salazar, who can retire to Portugal, or Smith [of Southern Rhodesia] who can retreat to England." U.N. Doc. A/AC.109/PET.371/Add.4, p. 4. The Government of The Netherlands, from which Verwoerd came like the ancestors of many of his white fellow-countrymen, in June, 1965, pledged Dfl. 100,000 "for the relief and assistance to persons persecuted for their opposition to the policies of apartheid." U.N. Doc. A/AC.115/L.134. South Africa lodged an official protest at this (U.N. Doc. A/AC.115/SR.64, p. 7). A Netherlands representative in December, 1965, told the U.N. Special Political Committee that "it was distressing for his country to realize that apartheid was practised by a people who traced their origin in part to the Netherlands, where that line of thinking was rejected as being contrary to the innermost convictions of its people and more important than any ties of kinship." U.N. Doc. A/SPC/SR.480, p. 7. Costa Rica has stated the view that, "although the fight against apartheid had some political aspects, it primarily reflected a desire to ensure respect for fundamental human rights." U.N. Doc. E/CN.4/AC.19/SR.2, p. 3.

²⁷ See, for example, U.N. Docs. A/5825/Add.1–S/6073/Add.1.

to arouse World public opinion and to bring its message home to the South African Government.”²⁸ This view, expressed by the sponsor of the High Commissioner plan, may have shown what is envisaged as one function of that official. His bringing public opinion to bear on all the world’s human rights complaints would help to cure the present double standard.

The Racial Discrimination Convention—Still A Double Standard

Until December, 1965, the U.N.’s double standard on human rights complaints meant simply that individuals’ complaints could be publicly lodged with a United Nations body only when directed against colonial governments or against the South African Government, and not when directed by persons generally against their own domestic governments.²⁹ The double standard was extended at the end of 1965 in the racial discrimination field. A new body was provided for in a U.N. draft convention, with power to receive in confidence complaints against colonial governments without their consent, but against complainants’ own governments only with such governments’ prior consent. While Guinea surmised in the Third Committee debate that even South Africa would feel free to ratify the new measure,³⁰ the United Kingdom found the new double standard objectionable.

The December, 1965, measure was the International Convention on the Elimination of All Forms of Racial Discrimination,³¹ hailed by Belgium because of its complaints provisions as the most important achievement of the General Assembly’s Twentieth Session,³² by Panama as ranking with the U.N. Charter and the Universal Declaration of Human Rights,³³ and

²⁸ U.N. Doc. A/AC.115/SR.55, p. 7. The Apartheid Committee Chairman later urged that foreign activities “. . . which encouraged the apartheid regime should be given the greatest publicity and mercilessly denounced.” U.N. Doc. A/AC.115/SR.62, p. 7. General Assembly Res. 2054 (XX), which increased the Committee’s membership by six, “Requests the Secretary-General, in consultation with the Special Committee, to take appropriate measures for the widest possible dissemination of information on the policies of *apartheid* of the Government of South Africa and on United Nations efforts to deal with the situation. . . .” In March, 1966, the Special Committee published a ten-page “Review of Recent Political Trials in South Africa” (U.N. Doc. A/AC.115/L.164), updating its earlier report of August, 1965.

²⁹ When Iraq objected in January, 1966, on the floor of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Secretariat’s descriptions in a published document (U.N. Doc. E/CN.4/Sub.2/259) of allegations made in 1963 of genocide by Iraq against the Kurdish People, the descriptions were deleted. U.N. Doc. E/CN.4/Sub.2/259/Rev. 1. I.L.O.’s March, 1966, request (U.N. Doc. E/CN.4/909 and Add.1) that the Commission on Human Rights investigate alleged mass executions in Burundi was withdrawn by I.L.O. after Burundi agreed to co-operate in an I.L.O. investigation. U.N. Press Release ILO/1482, March 28, 1966.

³⁰ U.N. Doc. A/C.3/SR.1374, p. 13. The Convention was opened for signature on March 7, 1966. Nine states signed that day, including the U.S.S.R., Byelorussia, Ukraine, and Poland.

³¹ Adopted by Assembly Res. 2106 (XX); reprinted in 60 A.J.I.L. 650 (1966).

³² U.N. Doc. A/C.3/SR.1374, p. 9.

³³ *Ibid.* 14.

by the United States as "a truly notable stride forward," of "pioneering quality," because of its "historic procedure whereby a state that is a party to this convention can be called to account . . ." ³⁴ The Convention was unanimously adopted in the Third Committee and the General Assembly plenary session. ³⁵

The Convention provides for an 18-expert Committee on the Elimination of Racial Discrimination, to consider reports from states parties, to hear and conciliate state-to-state complaints with the help of *ad hoc* commissions, and to consider certain complaints of individuals. ³⁶ A compromise on the complaints of individuals resulted in the rule in Article 14 that "no communication shall be received by the Committee if it concerns a State Party which has not made . . . a declaration" so authorizing the Committee. The double standard resulted from the direction in Article 15 that the Committee, without requiring any such declaration,

. . . receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories, and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies.

Besides the Convention, the Assembly, on the recommendation of the Third Committee, adopted a resolution requesting the Secretary General to make available to the new Committee "all information in his possession relevant to Article 15" and requesting the Colonialism Committee to send to it "copies of petitions . . . relevant to the Convention." ³⁷

Lady Gaitskell of the United Kingdom described the new double standard as discriminatory in that a higher standard of human rights was created in colonial territories than in the territories of states recognized as fully independent. ³⁸ Her view that the Committee's scrutiny of petitions from dependent territories imposed obligations on states without their consent in violation of the law of treaties ³⁹ was disputed by Italy, which agreed that the arrangements discriminated in favor of states with

³⁴ 54 Dept. of State Bulletin 215 (1966).

³⁵ Mexico voted in the plenary session for adoption, after first abstaining (U.N. Doc. A/P.V. 1406, pp. 31-40), because of the reservations provision, which was added by a vote of 82-4-21 to the Third Committee's draft, from which a different reservations clause had been deleted by a 25-19-62 vote.

³⁶ Much discussion was devoted in the Third Committee to the relative meanings of "complaints," "petitions," and "communications." U.N. Docs. A/C.3/SR.1353, pp. 5-11; SR. 1362, p. 5. Another article (Art. 22) provides for compulsory jurisdiction of the International Court of Justice to settle disputes over the interpretation or application of the Convention.

³⁷ No mention was made of the Special Committee on South African Apartheid, which could also supply many petitions relevant to racial discrimination.

³⁸ U.N. Docs. A/C.3/SR.1373, p. 19; SR.1363, p. 11.

³⁹ U.N. Doc. A/C.3/SR.1368, p. 11.

no dependent territories, but denied that scrutiny by the Committee⁴⁰ imposed obligations on the state scrutinized.⁴¹

Curing The Double Standard

The Convention on Racial Discrimination proposes a new forum for complaints against colonial governments, additional to the existing Special Committee on Colonialism. The new provisions for complaints against one's own government will add very little to the present opportunity for South Africans to petition the Special Committee on Apartheid⁴² and, outside South Africa, will permit such petitions only to the extent that states give their consent. Even with the Convention and its complaints machinery in effect, there would remain a double standard on human rights complaints to the extent that less than all independent states both ratified the Convention and consented to complaints, and in that complaints on racial discrimination alone among all human rights would be provided for.

Rather than waiting for ratifications and consents to provide only a partial solution of the double standard, the General Assembly could move forward and establish equal protection in regard to human rights complaints, both as to persons who can complain and as to violations complained of. Using as bricks and mortar the procedure for petitions that it has developed, particularly in the Special Committees on Colonialism and Apartheid, the Assembly could build upon the new foundation, laid by the Racial Discrimination Convention, of acceptance in principle of individuals' petitions against their own governments. New Zealand suggested how this could be done during the debates in the Third Committee:

If it was desired to establish a committee having competence in relation to all States Members of the United Nations, that must be done by other appropriate means within the context of the United Nations, i.e., by establishing a subsidiary organ of the United Nations and giving it powers consistent with the Charter, as interpreted by the practice of the United Nations.⁴³

What sort of organ should be established, and how it should proceed, are questions requiring study. Even accepting the Dutch view that "... the right of individual petition [is] the most effective means of giving effect to human rights in general and the present [Racial Discrimination] Convention in particular,"⁴⁴ there still remains the question of when com-

⁴⁰ U.N. Docs. A/C.3/SR.1364, p. 7; SR.1368, p. 19.

⁴¹ An additional legal problem raised by New Zealand, The Netherlands, and the U. S. concerned what Ambassador Goldberg described as "the attempt made in this article [15] to extend the provisions of this convention to territories of States not parties to [the Convention]." U.N. Docs. A/C.3/SR.1364, p. 9; SR.1368, p. 12; USUN Press Release 4752.

⁴² Presumably South Africa would not consent under Art. 14 to complaints against itself in view of its stand that U.N. Charter Article 2(7) precludes U.N. consideration of *apartheid*. See U.N. Doc. A/SPC/SR.480, par. 17.

⁴³ U.N. Doc. A/C.3/SR.1364, p. 10.

⁴⁴ U.N. Doc. A/C.3/SR.1355, p. 11. The Dutch urged not only that "... fact-finding was one of the most effective means of dealing with violations of human

plaints can best be handled by a group of government representatives (*e.g.*, the Special Committees on Colonialism and Apartheid or the 1963 Mission to Viet-Nam), by a group of uninstructed experts (*e.g.*, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities⁴⁵ or the Committee established under the Convention on Racial Discrimination), or by a single official (*e.g.*, the proposed U.N. High Commissioner for Human Rights⁴⁶ or the Special Rapporteur on Slavery).⁴⁷ There also remains the question of the reliability of petitions in comparison with hearings, periodic reports,⁴⁸ visits to the scene, and other

rights" (U.N. Doc. A/C.3/SR.1344, p. 16), but also that fact-finding should be employed as a means of peaceful settlement of disputes (U.N. Doc. A/C.6/L.580). In the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities the view had been expressed with respect to genocide that "... the urgent need was not so much for an international criminal organ as for an international body which would endeavor to prevent the crime . . . , such a body . . . to investigate and to assess allegations of genocide. . . ." U.N. Doc. E/CN.4/Sub.2/259, p. 3. The Sub-Commission in Res. 8 (XVII) and 7 (XVIII) has asked the Commission "to give consideration to further measures that are required to reinforce the prevention and punishment of the crime of genocide and to give wider effect to the Convention."

⁴⁵ One Sub-Commission member (Pierre Juvigny, France) stated in January, 1966, that he "... felt that the Sub-Commission could perform a function similar to that of the ILO Committee of Experts, by evaluating the progress made in implementing the human rights proclaimed in the United Nations declarations and conventions." U.N. Doc. E/CN.4/903-E/CN.4/Sub.2/263, p. 56. I.L.O. experience in handling non-governmental complaints was described in detail to the Third Committee during its consideration of measures of implementation for the Convention on Racial Discrimination. U.N. Doc. A/C.3/SR.1349, pp. 6-10. Pursuant to ECOSOC Res. 1075 (XXXIX), reports on "Organizational and Procedural Arrangements for the Implementation of Conventions and Recommendations in the Field of Human Rights" were completed at the end of 1965 by UNESCO (U.N. Doc. E/4133); I.L.O. (U.N. Doc. E/4144); and the U.N. Secretary General (U.N. Doc. E/4143).

⁴⁶ Dr. John P. Humphrey, Director of the U.N. Human Rights Division, has stated that "had there been in existence at that time an Office of the High Commission for Human Rights, it is conceivable that the Government of South Viet Nam might have preferred to have the investigation carried on by such an international personality acting under the authority of the General Assembly rather than a mission made up of ambassadors representing particular states." Humphrey, "The United Nations and Human Rights," 11 Howard L. J. 373, 378 (1965). Although the High Commissioner proposal of Costa Rica was deferred at the Assembly's 20th Session, pending comment from the Human Rights Commission, it evidently influenced the singular action of Cyprus in declaring its willingness to accept for a time "... by way of international guarantee . . . the presence in Cyprus of a United Nations Commissioner" to protect the Turkish minority community (U.N. Doc. A/6039); see Cyprus' explanation, U.N. Doc. A/C.1/P.V.1141, p. 71.

⁴⁷ See U.N. Docs. E/4056 and Add. 1-3; E/4168 and Add. 1-4.

⁴⁸ Under ECOSOC Res. 1074 (XXXIX) periodic reports are being received from governments, specialized agencies, and non-governmental organizations on a three-year cycle. Reports on civil and political rights began arriving in late 1965, with reports on economic, social and cultural rights scheduled for arrival a year later and those on freedom of information a year after that. There is substantial agreement that governmental reports alone are not an adequate source of information on local conditions, but must be supplemented with information from private sources. See U.N. Doc.

sources of information.⁴⁹ Such questions should be explored in detail before the International Conference on Human Rights scheduled for 1968, in order that the Conference may better fulfill its assignment to "evaluate the effectiveness of the methods used by the United Nations in the field of human rights, especially with respect to the elimination of all forms of racial discrimination and the practice of the policy of apartheid."⁵⁰

JOHN CAREY

Of the New York Bar

THE EXTRAORDINARY SESSION OF THE HAGUE CONFERENCE
ON PRIVATE INTERNATIONAL LAW

At the Tenth Session of The Hague Conference on Private International Law, held in October, 1964,¹ work was not completed on one topic on the crowded agenda, the draft of a convention on recognition of foreign money-judgments. Differences had developed on a preliminary question, whether to prepare a model for bilateral conventions or a multilateral convention. Most of the delegations appeared to favor a multilateral convention but only if the parties to the convention remained free to select their partners. A Special Committee was appointed to report on the issue and it was agreed

E/CN.4/AC.20/L.5, p. 10. The U.S.S.R. has agreed with this view where non-self-governing territories are concerned. U.N. Doc. A/6000/Add.7, p. 190.

⁴⁹ Numerous objections have been made to the rudimentary fact-finding methods employed by the Assembly and its Committees. For example, the U.K. complained at the June 8, 1965, meeting of the Colonialism Committee that "... the Committee was not competent in either legal or practical terms to judge complaints ... or to ascertain the facts." The Soviet Union retorted that the U.K. "... had not put forward a single concrete fact to refute the allegations of the petitioners. That being so, the Committee had no choice but to accept the veracity of the petitioners' statements." U.N. Doc. A/AC.109/SR.358, pp. 9, 11. In March, 1966, the Colonialism Committee, upon receipt of three telegrams (U.N. Docs. A/AC.109/PET. 443-445), adopted over British objections a resolution (U.N. Doc. A/AC.109/153) deploring the U.K.'s "effecting mass arrests" in Aden. See also objections of South Africa concerning "groundless charges" in an Assembly resolution which it claimed had been refuted before the International Court of Justice in the South West Africa proceedings (U.N. Doc. A/6219); similar objections in U.N. Doc. E/4167.

⁵⁰ Assembly Res. 2081 (XX). At ECOSOC's urgent request, the Commission on Human Rights at its 22nd (March-April, 1966) session considered "... the question of the violation of human rights and fundamental freedoms including policies of racial discrimination and segregation and of apartheid in all countries with particular reference to colonial and other dependent countries. ..." The Commission was also asked for "... its recommendations on measures to halt those violations." The United States introduced in the Commission an amendment to a U.S.S.R. draft resolution "Recognizing that the procedures in the United Nations for obtaining and considering information relating to violations of human rights in dependent Territories are highly developed, and that such procedures in connexion with violations of human rights in other areas are still embryonic." U.N. Doc. E/CN.4/L.825.

¹ See Amram, "Report on the Tenth Session of The Hague Conference on Private International Law," 59 A.J.I.L. 87 (1965); Nadelmann, "The United States Joins The Hague Conference on Private International Law," 30 Law and Contemporary Problems 291, 308 (1965).

to call an extraordinary session of the Conference to complete work on the draft.

The Extraordinary Session was held from April 13 to April 26, 1966. The Special Committee had reported in favor of a multilateral convention requiring bilateral agreements to become effective between individual states. Deviations from the contents of the multilateral convention would be permitted only to the extent allowed by the convention.

Of the twenty-three member governments of The Hague Conference, all but Ireland and Yugoslavia were represented. Large delegations came from a number of countries, including the United States,² the United Kingdom, and France. Agreement was easily reached on preparation of a multilateral convention with the bilateralization feature. However, disagreement developed over another issue and, for some time, prospects for conclusion of the work appeared dim. Thanks to a compromise worked out in the early morning hours of the last day, a draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters was approved at the closing session.³ A Special Committee is to search for a solution of the remaining difficulty which involves local use of so-called "jurisdictionally improper fora."⁴ Meanwhile the convention will not be opened for signature.

Except for the bilateralization feature, which is perhaps a "first" in treaty law, the draft convention has all the features to be expected of a convention regulating recognition and enforcement of foreign money-judgments. The court which rendered the judgment must have had "jurisdiction" within the meaning of the convention and notice must have been given to the defendant. A limited number of challenges, primarily violation of public policy or of due process, and fraud, are admitted. Article 10 lists bases for assumption of jurisdiction which will be recognized. Through a saving clause, still other bases recognized under recognition practice of the court addressed may be accepted. A few provisions deal with enforcement of judgments entitled to recognition.

Deviations in the supplementary agreements from the rules of the convention must be authorized by the convention. Article 23, which has twenty-two headings, collects the permissions given for definitions, addenda, and deviations. Many are of limited interest but some are on important issues over which views are divided or which do not lend themselves to uniform treatment in relation to all countries. Even if many of the permitted deviations are used, a large degree of uniformity of law will have been secured by the convention.

² The Delegation was composed of Richard D. Kearney, Deputy Legal Adviser, Department of State; Joe C. Barrett, Past President, National Conference of Commissioners on Uniform State Laws, of Jonesboro, Arkansas; and Kurt E. Nadelmann and Arthur T. von Mehren, of Cambridge, Massachusetts.

³ Text in 5 Int. Legal Materials 636 (1966).

⁴ See Nadelmann, "Jurisdictionally Improper Fora," in XXth Century Comparative and Conflicts Law—Legal Essays in Honor of Hessel E. Yntema 321 (Nadelmann, von Mehren, and Hazard, eds., 1961).

Certain delegations pressed strongly for inclusion in the convention of an article that would permit contracting states to conclude, in certain defined circumstances, bilateral or regional agreements that would not need to conform in any way to the convention. Unenthusiastically, the Conference obliged. The convention provides that the contracting states may not conclude such separate agreements "unless they consider it necessary, in particular, because of economic ties or of particular aspects of their legal systems." The question then arose whether such separate agreements could discriminate against classes of persons without a special connection with the parties to the agreement. For example, could such a separate agreement provide for use of jurisdictionally improper fora solely against non-residents of the parties to the agreement? Among such improper bases, it may be recalled, are nationality or domicile of the plaintiff, presence of assets for grant of a judgment *in personam*, and personal service on a person only transiently present in the jurisdiction. Use of such bases has interfered greatly with international co-operation.⁵ Nonetheless, such bases still survive, and the risk of their further extension through separate agreements cannot be ruled out.⁶ Discussion of the issue led to the crisis already mentioned.

Under the compromise reached at the last moment, a Special Committee will endeavor to elaborate a protocol with a solution for the recognition problem created by judgments rendered on a jurisdictionally improper basis. The convention will not be opened for signature until either an additional protocol has been agreed upon or until the conclusion of the next plenary session of The Hague Conference (October, 1968), whichever comes first.

Hope must be expressed for a satisfactory solution of the remaining problem. Experience in the United States, gained from Supreme Court rulings in the matter of the Constitutional full faith and credit requirement for judgments rendered by courts of sister States,⁷ indicates the

⁵ One of the difficulties arising with the Convention of 1964 relating to a Uniform Law on the International Sale of Goods comes from the use of jurisdictionally improper fora. See Nadelmann, "The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglio," 74 Yale Law J. 449 (1965).

⁶ See Nadelmann, "Common Market Assimilation of Laws and the Outer World," 58 A.J.I.L. 724 (1964). According to a reading given the Common Market draft of a Convention on Recognition of Judgments, judgments rendered in the Common Market states at jurisdictionally improper fora against non-residents of the Common Market will be enforceable in all Common Market states. See Arnold, "Der Entwurf eines Gerichtsstands- und Vollstreckungsabkommens für die Europäische Wirtschaftsgemeinschaft," 15 Aussenwirtschaftsdienst des Betriebs-Beraters 321, 323 (1965); Bellet, "L'élaboration d'une convention sur la reconnaissance des jugements dans le cadre du Marché Commun," 92 Journal du Droit International 833, 853 (1965); Bülow, "Vereinheitlichtes Internationales Zivilprozessrecht in der Europäischen Wirtschaftsgemeinschaft," 29 Rabels Zeitschrift 473, 482 (1965). The point is not covered in Weser, "Some Reflections on the Draft Treaty on Execution of Judgments in the E.E.C.," 1965 University of Illinois Law Forum 771.

⁷ U. S. Constitution, Art. IV, § 1. Cf. *Pennoyer v. Neff*, 95 U. S. 714, 729 (1878).

possibility of a satisfactory solution within due process limits.⁸ Interest is great in a solution for practical and idealistic reasons. As a matter of policy, many foreign countries do not recognize foreign judgments in the absence of a treaty, or impose conditions, "reciprocity" for example, difficult to establish when recognition is sought.⁹ Considerable improvement of international recognition and enforcement practices can follow from the availability of an acceptable multilateral convention which may be used bilaterally. This is not the place for an analysis of the substantive provisions of the new convention, but the view may be advanced by two students of the draft that, when read together with the permitted deviations, addenda, and definitions, generally speaking, the convention well reflects current thinking here¹⁰ and abroad¹¹ on sound rules for recognition and enforcement of foreign money-judgments.

KURT H. NADELMANN and
ARTHUR T. VON MEHREN *

THE NEW ODECA

1. *Entry into Force of the New Charter.* On March 30, 1965, the new Charter of the Organization of Central American States (ODECA), signed in Panama on December 12, 1962, came into force with the deposit of the fifth instrument of ratification by Costa Rica with the Secretary General of the Organization.¹ As pointed out in an earlier note,² the new Charter provides for a more elaborate structure of ODECA with a number of new organs: it changed the name of the "supreme" organ from "Occasional Meeting of Presidents" to "Meeting of Heads of State" and of

⁸ Generally speaking, against non-residents protection of local interests can be secured fully by exercise of quasi-in-rem jurisdiction, that is jurisdiction limited to the value of the assets within the jurisdiction. See the materials collected in von Mehren and Trautman, *The Law of Multistate Problems* 675 *et seq.* (1965). For criticism of an unnecessary use of this jurisdiction, see von Mehren and Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis," 79 *Harvard Law Rev.* 1121, 1141, 1177-1178 (1966).

⁹ See Nadelmann, "Non-Recognition of American Money-Judgments Abroad and What to Do About It," 42 *Iowa Law Rev.* 236 (1957). For a recent development see Nadelmann, "French Courts Recognize Foreign Money Judgments," 18 *A. J. Comp. Law* 72 (1964).

¹⁰ Representative is the Uniform Foreign Money-Judgments Recognition Act, prepared in 1962, Documents, 11 *A. J. Comp. Law* 412 (1962); 9(B) *Uniform Laws Ann.*, [1965] Pocket Part 28. Presently enacted in Illinois, Maryland, and Oklahoma.

¹¹ The numerous bilateral treaties concluded recently by European nations, including the United Kingdom, were taken into account in the drafting work.

* Views expressed by the writers are their personal views and do not necessarily represent the views of the Department of State or of any other member of the Delegation to the Extraordinary Session.

¹ The four other members of ODECA had already deposited their instruments of ratification in 1963: Guatemala on July 29, El Salvador and Honduras on August 23, and Nicaragua on November 19, 1963. The Charter was registered with the Secretariat of the United Nations on January 24, 1966 (under No. 8048) by ODECA, acting on behalf of the Contracting Parties. See U.N. Statement of Treaties and International Agreements Registered . . . with the Secretariat during January 1966, p. 9.

² 58 *A.J.I.L.* 127-138 at 128-132 (1964).

the "principal" organ from "Meeting of Ministers of Foreign Affairs" to "Conference of Ministers of Foreign Affairs"; both organs are to meet more often than their predecessors. It changed the composition of the Economic Council and provides for a Cultural and Educational Council and a Defense Council, which the old Charter did not. However, a Cultural and Educational Council had already been set up in 1955 by the Meeting of Ministers of Foreign Affairs and there had already been meetings of Ministers of Defense. It created a new "permanent" organ, the Executive Council, a new Legislative Council, and a new Central American Court of Justice.

2. *First Special Conference of Foreign Ministers.* The above-mentioned deposit of the last instrument of ratification occurred during the First Special Conference of Ministers of Foreign Affairs of Central America, held in San Salvador from March 29 to April 2, 1965. The Conference had been prepared at an informal meeting of the Foreign Ministers in Managua, February 22 to 25, 1965.³ It took, *inter alia*, the following decisions:

(a) It created two subsidiary organs of ODECA: the Labor and Social Welfare Council and the Council for Tourism.⁴

(b) It charged the new Executive Council to prepare a Draft Agreement on the "Central American Community" to be presented to the next Conference of Ministers of Foreign Affairs for their consideration. The Council took up the Draft at its eleventh session in San Salvador on September 8, 1965, and decided to submit it to the next Foreign Ministers' Conference. The latter, in turn, at its first regular conference held in Guatemala from October 25 to 30, 1965, referred it to the member governments for further study.⁵

(c) It also charged the Executive Council to consider a proposal for the recognition of Central American citizenship, and to present it to a forthcoming Meeting of the Heads of State, the "supreme" organ of ODECA.⁶

(d) It recognized the incorporation into ODECA of all the organs of Central American Economic Integration created by the General Treaty on Central American Economic Integration of December 13, 1960.⁷

3. *First Session of the Executive Council.* On the occasion of the

³ See Newsletter No. 41, Permanent Secretariat of Central American Economic Integration, Guatemala, March 12, 1965, pp. 2-3, and ODECA, Boletín Informativo No. 33, pp. 1-12.

⁴ *Ibid.*, pp. 16-18, and Newsletter No. 42, April 12, 1965, p. 2. For the Rules of the two Councils, see Boletín Informativo No. 35, pp. 4-7, 26-27.

⁵ *Ibid.*, No. 33, p. 17; No. 35, pp. 23-24; Newsletter No. 42, p. 2, and No. 47, Sept. 12, 1965, p. 6. At the same meeting the Executive Council also discussed the Draft Rules of the new Central American Court of Justice and decided to forward them to the Presidents of the Central American Courts of Justice for their consideration at their first session. *Ibid.*, p. 7.

⁶ *Ibid.*, No. 42, p. 3.

⁷ Felix Fernández-Shaw, *La Integración de Centroamérica* 1022 (Madrid, 1965); reviewed below, p. 885.

First Special Foreign Ministers' Conference the new "permanent" organ of ODECA, the Executive Council, was constituted. It will be remembered that this Council is composed of the Ministers of Foreign Affairs (or their specially accredited representatives). The Council, at its first session, on April 1, 1965, appointed Albino Román y Vega of Nicaragua as its Secretary.⁸ On February 15, 1964, the latter had been named Acting Secretary General of ODECA at the Seventh Special Meeting of the Ministers of Foreign Affairs, succeeding Marco Tulio Zeledón of Costa Rica, and pending the entry into force of the new Charter.⁹ On April 1, 1965, the Executive Council also adopted its own Rules as well as those concerning the General Secretariat of ODECA.¹⁰ Both Rules answer questions concerning these two organs raised in the earlier note: the voting conditions in the Executive Council and the continuation of the Central American Bureau and the Secretary General.¹¹ With regard to the former, the Council's Rules provide that the absolute majority of its members constitutes a quorum (Article 6) and that its decisions are taken with the affirmative vote of the same majority (Article 14 (2)).¹² With regard to the second question, the Rules of the General Secretariat provide for the continued existence of both organs. The Bureau is the General Secretariat of the Organization and is under the responsibility of the Secretary General of ODECA, whose highest official he is (Articles 1 and 2). The Secretary General is appointed and dismissed by the Executive Council (Articles 3 and 5), and he acts in this capacity at all meetings of the Conference of Ministers of Foreign Affairs and of the Executive Council as well as of the other organs upon their request (Article 8 (a)).¹³

4. *Panama and ODECA.* Panama was represented at the Special Conference of Foreign Ministers by an observer, Foreign Minister Fernando Elea, who made the following formal declaration:

The Government of the Republic of Panama will continue to promote the extension to the other countries of the Central American Isthmus of the indirect benefits of . . . a new Panama Canal Treaty. . . . This objective is pursued . . . as evidence of a regional feeling. . . . The Canal does not constitute for our Government an end in itself but a means to a higher end. . . . We must make of the Canal, present and future, a part and a function of an even vaster goal, of a broader destiny for the Republic of Panama which we may already qualify as of a regional character. So ends a traditional . . . stand in the sense of national boundaries, and we therefore pursue our destiny as part of a greater economic and political entity.¹⁴

⁸ Newsletter No. 42, *op. cit.*, p. 5; Boletín Informativo No. 33, p. 21.

⁹ Fernández-Shaw, *op. cit.* 87-88, 1023.

¹⁰ *Ibid.* 1023 and Newsletter No. 42, *loc. cit.*

¹¹ 58 A.J.I.L. 129 (1964).

¹² For the full text of the Council's Rules, see Boletín Informativo No. 33, pp. 23-25; and Fernández-Shaw, *op. cit.* 1024-1027.

¹³ For the full text of the General Secretariat's Rules, see *ibid.* 1028-1032, and Boletín Informativo No. 33, pp. 25-27.

¹⁴ Fernández-Shaw, *op. cit.* 1020, note 3; Boletín Informativo No. 33, p. 18; and Newsletter No. 42, *op. cit.*, pp. 3-4.

Compared with the welcoming address by Panama's Foreign Minister Galileo Solís quoted in the earlier note,¹⁵ the Eleta declaration is much more positive with regard to Panama's readiness to join ODECA. However, even the efforts to integrate this country into the Central American Common Market still have not passed the study and discussion stage.¹⁶ Our earlier conclusion as to the unlikelihood of imminent Panamanian membership in ODECA thus still seems to hold.¹⁷

5. *Central American Council of Public Health*. The creation of this new subsidiary organ was the main achievement of the First Regular Conference of Ministers of Foreign Affairs of October, 1965, mentioned above.¹⁸

SALO ENGEL

THE DOMINICAN CASE: UNILATERAL INTERVENTION

Dr. Charles G. Fenwick's strong defense of the actions of the United States and his presentation of the actions of the Organization of American States in the Dominican case¹ is interesting as a defense of political policy, but disturbing in what it shows of the possibilities for the misuse of international law as an instrument for the self-righteous justification of illegal acts.

The first distortion is the assertion that the original intervention of the United States was an act of self-defense, since the U. S. Ambassador had claimed that shots fired in Santo Domingo were endangering the lives of foreigners in the area. Every student of international law learns that the right of self-defense applies only in case of "*real and immediate*" danger to the *State*.² Surely the shots fired in the streets of Santo Domingo did not constitute a real or immediate threat to the United States. The right of a state to self-defense does not enter into the question at all in this regard; it is, rather, a matter of the protection of nationals. Why, then, should self-defense be argued?

*Two reasons are immediately apparent. In the first place, the right of intervention to protect nationals is, particularly in the Americas, a much shakier right than that of self-defense. Second, if we were to accept the position that this is indeed an act of self-defense, it would be easier to accept the dismissal of the treaty obligations of the United States with

¹⁵ 58 A.J.I.L. 133-134 (1964).

¹⁶ See, in particular, Galileo Solís, "Panamá y el Mercado Común Centroamericano," Panama, July, 1965, a mimeographed report by the former Panamanian Foreign Minister to the Panamanian Committee for the Study of the Central American Market. See also James D. Cochrane, "Costa Rica, Panama and Central American Economic Integration," 7 *Journal of Inter-American Studies* 331-344, at 338 ff. (1965); and Miguel S. Wionczek (ed.), *Latin American Integration* 263 ff. (New York, 1965).

¹⁷ 58 A.J.I.L. 134 (1964).

¹⁸ See Acta Final de la Primera Conferencia Ordinaria de Ministros de Relaciones Exteriores de Centroamerica, Boletín Informativo No. 35, pp. 21-29, at pp. 27-28.

¹ C. G. Fenwick, "The Dominican Republic: Intervention or Collective Self-Defense," 60 A.J.I.L. 64 (1966).

² See, for example, Oscar Svarlien, *An Introduction to the Law of Nations*, 124 (1955).

the argument that Article 51 of the United Nations Charter and Article 3 of the Inter-American Treaty of Reciprocal Assistance do not apply. If this were indeed a case of self-defense, this argument might be, though it need not be, acceptable. But even in this case, how could the United States by-pass Article 15 of the Charter of the Organization of American States, which says clearly:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. . . .

or Article 17 of the same document, which says:

The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State . . . on any grounds whatever. . . .

If the absolute language of these articles must bend before the state's right of self-defense from real and immediate dangers, certainly the articles are not to be disregarded on the basis of protection of nationals.

As for the extension of the intervention by the United States, and the support and aid given the intervention by the Organization of American States, Dr. Fenwick takes a somewhat safer ground, avoiding answers to some of his rhetorical questions. Nevertheless, the United States had, legally, little more solid ground on which to stand in taking anticipatory action against the creation of another Cuba than had Germany in World War I in invading Belgium to prevent its invasion by France. The justification advanced by President Johnson³ raises several issues. First, would the creation of another Cuba constitute a real and direct threat to the United States? The United States Government today apparently does not consider the existence of Cuba itself, as a Communist satellite, to be an immediate threat, even if it does consider this a very real future threat. If this is the case, then certainly the Dominican situation—where the Communists were not in power, and where it was not conclusively proven by the United States that the Communist element did in fact dominate the revolutionary movement—cannot be regarded as a matter requiring immediate and unilateral action by the United States for its self-defense.

The argument, then, must be that the action of the United States might be justified on the ground that the spread of Communism itself is a threat to international peace. This position would be justified by the resolution of the Inter-American Conference of 1954. But this resolution simply states that the presence of a Communist-controlled government (or movement to control the government) within the Hemisphere shall be cause for the immediate convocation of a Meeting of Consultation. It does not justify unilateral intervention, nor does it justify the extension of an intervention which is illegitimate in the first place.⁴

³ Quoted in Fenwick, *loc. cit.* 65.

⁴ The question might be raised, of course, as to whether the announcement of the growth of Communist influence is a self-fulfilling prophecy. If it is stated that the

The third question raised by this action is what the position of the Organization of American States should be, assuming that the danger of Communist take-over were proven and that the Organization were willing to take action on this ground. Would this justify the *ex post facto* ratification of a unilateral intervention? The 1962 "blockade" of Cuba does not provide guidelines for the answer to this question, since in that case the Organization had agreed to sponsor and to co-operate in the blockade *before* it was actually instituted.⁵ In the present instance, the matter before the Organization was one of giving approval to actions taken by the United States in direct contradiction to its obligations under the Charter, and without the prior approval of, or even consultation with, the Organization. Were the action of the Meeting of Consultation to be taken under the 1954 resolution, this question would still arise, and would have to be answered as the Organization did not answer it in this case. Even were the Meeting of Consultation to act on this ground, it would not be true to say that "there would have been no legal basis for criticism,"⁶ since the Organization would have failed as far as concerns the Charter, even while justifying itself on the basis of the resolution.

But, as Dr. Fenwick points out, the Meeting of Consultation did not act on this basis. It justified its action on the basis that it was necessary to the promotion of human rights; such an action, while it does not have as strong a documentary basis,⁷ does have a real, though weak, basis in precedent. This would be the continuation of sanctions against the Dominican Republic after the fall of Trujillo, taken to insure the protection of human rights.⁸ But this makes even weaker the position of the Organization in justifying prior intervention by the United States, though it does not make any less valid the use of troops under the O.A.S. For the O.A.S. has already made explicit its right to use sanctions (which, according to the Rio Treaty, may include the use of armed force) in the interest of human rights; but this action makes the action of the United States completely illegitimate. For, while it might be claimed that the introduction of Communism into the Hemisphere presents such a great threat to the peace and security of the other states of the Hemisphere as to become a matter of real and immediate danger to one or more particular states of the Hemisphere, the same claim cannot possibly be made with regard to an endangering of human rights within another state. It is not, therefore, the action of the O.A.S. in imposing sanctions in the form of armed force on the Dominican Republic which is weakened by failing to

only two choices are U. S. intervention and Communist take-over, the position of the Communists is certainly enhanced with those who suffer from the intervention.

⁵ U.N. Security Council Doc. S/5193, Oct. 25, 1962.

⁶ Fenwick, *loc. cit.* 66.

⁷ That is to say, the protection of human rights is listed in the Charter as one of the basic goals of the Organization, but the argument can be, and has in the past been, made that this is not intended to state a basis for collective action. See, for example, the arguments advanced in Antonio Gomez Robledo "Le Crisis Actual del Sistema Interamericana," *Foro Internacional* 176 (January-March, 1963).

⁸ O.A.S. Doc. OEA/Ser. G/II, C-Sq-397, p. 89; O.A.S. Doc. OEA/Ser. G/VII, CE/RC, VI-10, p. 27.

invoke the resolution against Communism, but the action of the United States in intervening and the failure of the Organization to take cognizance of the illegality of this action.

We come, finally, to the question of precedent and meaning. What is the precedent which has been set by this action? The precedent of imposing sanctions on the grounds of protection of human rights may have been reinforced by this action, but such a precedent already existed, even if established only weakly and followed only sporadically. The formation of an Inter-American Force may be advanced as the precedent established, but what in fact occurred was merely the granting of a new name and additional troops to a force already in existence and already engaged in the Dominican Republic. There is no valid reason for assuming that this is the precursor of a permanent force dedicated to the ideals of the O.A.S.; the action is a justifying, rather than a creative, factor in inter-American relations. This is the real precedent which has been established. What the O.A.S. has done is to grant later approval to unilateral intervention by the United States, a return to unilateralism in the Hemisphere. It has, by its action, largely abandoned its rôle as a juridical organization and a force for harmony and law in the Hemisphere.

R. T. BOHAN

TIBET'S DECLARATIONS OF INDEPENDENCE?

Three transactions have been cited in this JOURNAL as "clear and convincing evidence" that Tibet made a "declaration of independence" in 1912 or shortly thereafter. These transactions are called a "decisive turning point" in Tibet's status.¹ It is difficult to understand how any of the transactions mentioned can be fairly viewed as a "declaration of independence," and even more difficult to perceive why, even if Tibet were to be considered to have been legally independent of China in 1912, this would be decisive of any issue related to the Sino-Indian border.

To the reader approaching the question of Tibet's status, the words "declaration of independence" presumably have a meaning drawn from analogy with the United States' declaration of 1776 or the Dutch Republic's Act of Abjuration of 1581. The first of these examples was addressed to the world in general and broadly published. So was the second.² A "declaration" that was kept secret even from the Power whose authority was supposed to be "declared" abrogated would be hard to consider a "declaration of independence" in any sense familiar to the general reader.

Now, the first transaction cited in this JOURNAL as a "declaration of independence" is the Treaty of Urga, ostensibly between the Lhasa authorities of Tibet and the *de facto* rulers of Mongolia³ dated December

¹ 60 A.J.I.L. 369 (1966).

² Motley, *The Rise of the Dutch Republic* (1856), Part VI, Ch. IV (Chandos ed., Vol. III, pp. 492 *et seq.*).

³ The international status of Mongolia at this time was not altogether clear either. G. M. Friters, *Outer Mongolia and its International Position* 72, 163 *et seq.* (London, 1951).

29, 1912. In fact, when asked about this reported Treaty in 1913 by Charles Bell, Lhasa's Prime Minister replied "The Dalai Lama never authorized Dorjief [the reported negotiator] to conclude any treaty with Mongolia." Speaking some years later, another Tibetan of high position stated: "I do not think that there is any treaty between Tibet and Mongolia."⁴ There does not appear to be any record of China having been notified even confidentially of the conclusion of the treaty. Thus, while there exists a text purporting to be a treaty between some Tibetan and Mongolian authorities, there is strong evidence that it was the result of some private intrigue rather than being an expression of the highest authorities in Lhasa. Furthermore, even if the Treaty of Urga were a true expression of the will of the Lhasa authorities of Tibet and the highest authorities of Mongolia, in view of the secrecy and evasiveness surrounding its conclusion, it is difficult to classify it as a "declaration of independence." It might perhaps be added that none of the operative provisions of the Treaty of Urga are reported ever to have been carried out by either side.

The second transaction cited is merely an allusion by a British official to an unspecified occasion on which "Thibet had declared its independence." This seems to be more evidence of what the British official thought (or wanted the reader to think) than of any known transaction. It would be pertinent to know the details of the transaction to which he referred, but this vagueness as to the details underlying asserted conclusions of law or fact is met with in many partisan documents dealing with Tibet. Without the details such "evidence" is of doubtful value.

The third transaction is an opening declaration of the Government of Tibet Delegation from Lhasa to a negotiation that ended with a note exchanged between that delegation and the representatives of British India that it is understood "that Tibet forms part of Chinese territory."⁵ Since this "declaration" was not a complete act in itself but was rather the statement of a bargaining stance which, in fact, did not prevail in the negotiations, it is difficult to agree that it can fairly be called a "declaration of independence."

There are other statements that can be construed by those anxious to examine only one side of the situation as "declarations of independence" by Tibet. The one most often referred to among the few concrete examples actually given by writers mentioning declarations of independence by Tibet is that reported by Bell on page 135 of *Portrait of the Dalai Lama* (London, 1946).⁶ Another is the "declaration" construed by the Dalai Lama on page 69 of *My Land My People* (London, 1962). But it would be tedious in this place to analyze all reported statements of the Dalai Lama in 1912 to show that none can be fairly construed in context to declare Tibetan independence of China.⁷ There was a negotiation

⁴ Bell, *Tibet Past and Present* 229-230 (London, 1924).

⁵ XIV Aitchison, *Treaties, Engagements and Sanads* 38 (Calcutta, 1929).

⁶ A significantly different version of this transaction is given by Bell in "China and Tibet," 36 *Journal of the Royal Central Asian Society* 54 at 55 (1949).

⁷ 59 A.J.I.L. 587, note 7 (1965).

ending in 1914 with an exchange of notes recording the Tibetan view that Tibet forms part of Chinese territory. That same negotiation also defined the McMahon Line border between part of India and Tibet. Since the legal effect of that negotiation with regard to the border hinges upon the right of the Lhasa authorities without Chinese approval to negotiate away rights in the land of Tibet, it is difficult to understand why, regardless of what went on before, a "decisive" point was considered to have been reached by the earlier transactions. Whether or not Tibet became independent of China at another time seems irrelevant to the question of whether or not the McMahon Line is binding on the territory of Tibet as a result of the Simla negotiations ending in 1914.

ALFRED P. RUBIN

FREEDOM OF THE SEA

The catchy phrase "Freedom of the Sea" bespeaks a noble concept, that is, if applied with noble aspirations, but it can be a deceptive cliché if utilized to conceal ignoble motivations.

As is well known, application of the concept was successfully promoted by the great Dutch advocate, Hugo Grotius, and it does not lessen the merit of his contention that he probably was being employed by an aggressive client, the Dutch East Indies Company, to justify the Dutch disregard of the Portuguese claim of the exclusive right to navigate the Indian Ocean with the particular Dutch objective of shattering the Portuguese monopoly of the exceedingly profitable Molucca spice trade.

Regardless of whatever materialistic motives may have inspired Grotius, his able advocacy rendered great and lasting service to humanity at large. Thereafter the concept that all the oceans of the world should be open to free navigation of the peoples of all nations gained practically universal approval.

To be sure, Grotius himself realized that from a practical standpoint people who live adjacent to an ocean shore have a special seaward interest differing from that of others. He did not define this interest, but over the years it gradually developed into recognition of ownership by each coastal nation of a strip of coastal water now called the territorial sea, generally conceded to be at least three miles in width. Even then, however, the advantage of freedom of navigation caused this narrow strip to be subject to the privilege of innocent passage.

In his masterpiece, *Mare Liberum*, though he did not specifically mention the almost monopolistic pursuit by the Dutch of the herring fishing off the British and Scottish coasts, Grotius did refer to ocean fishing generally as if it were analogous to ocean navigation, and it might reasonably be suspected that he had the North Sea situation well in mind. Practical objectives generally do, and for that matter should, have as much place in the development of international law as idealistic theory; so, although Grotius appealed to Heaven in support of the righteousness of his course, obviously it was not immune from mundane motives; hence, not sacrosanct. At that, insofar as fishing was concerned in those days of oars and

sails, it was not unreasonable to have believed that ocean fisheries were inexhaustible and required no protection. Fishery conservation being both unknown and unnecessary, it is not surprising that freedom of the seas was thought to be applicable to fishing.

The wildest imagination in the time of Grotius could not even have conceived of today's mechanical power, refrigeration systems, floating canneries, mid-water trawls, radar, sonar, power blocks, nylon nets, electronic devices and other fishery appliances with their aggregate almost unbelievable efficiency, marvelous when properly utilized, but with terrific potential for the destruction of living resources of the sea when uncontrolled.

The maxim that "when reason ceases the law ceases" may not be applicable to domestic statutory law, but applies appropriately to the unwritten law of nations. This should be true particularly when there is at stake an enormous food resource which may mean survival to millions of human beings.

Ponderous tomes have been written concerning the technical application of the terms "inclusive" and "exclusive" rights in the oceans. Beautifully expressed theories are based on the assumption that, to make the world happy, there must be perfect uniformity throughout the universe. Attractive though this sounds, history unfortunately discloses no such uniformity among peoples, nor among the physical conditions of different parts of the world, nor even among fishes. Just why should Bering Sea, with only two abutting nations, be treated identically with the North Sea with seven abutting nations?

The Japanese have fished the Japan Sea for centuries and it seems illogical that as a result of World War II they were restricted in fishing in that region, but would this justify their sending a hundred trawlers thousands of miles across the Pacific Ocean to scoop up the fishery population of Mexico's Gulf of California? More than conservation is involved; important as that is, there should be some sense of equity and justice. Yet most of the arguments at Geneva in 1958 seemed to be directed either to conservation (although practical results of its compromises in this direction are not obvious) or to the horror of any change in the unrestricted application of "freedom of the sea" as something which should be considered untouchable.

And so the wholly antiquated and illogical tie-up between two fundamentally different problems—freedom of the seas for navigation and the handling of the current ocean fishery situation—thwarted the endeavor to adopt a narrow territorial sea so as to leave the greatest extent of seas for navigation, and at the same time failed adequately to deal with the matter of ruthless exploitation by nationals of one country of the coastal fisheries of others.

Doubt of the effectiveness of the Geneva Fisheries Convention may well have contributed to the fact that it was the last of the four conventions drafted there to receive enough ratifications to be put into effect, and it still represents only a fraction of the nations now Members of the

United Nations. Even the United States attached a reservation to this treaty, and it is not necessarily the last word on the subject.

The American Bar Association has proposed that a new conference be held at which the two divergent problems should receive separate instead of joint consideration, and the United States Senate has recommended a new international conference on conservation of fisheries. It is not surprising that those who prosper from present unrestricted operations should oppose such conferences and fear that the many new nations created since 1958 would join with those at Geneva which sought for more adequate coastal fishery protection and that a rational, not an obsolete, application be made of the otherwise useful phrase "freedom of the sea."

EDWARD W. ALLEN

PRIZES INSTITUTED BY JAMES BROWN SCOTT IN MEMORY
OF HIS MOTHER AND HIS SISTER JEANNETTE SCOTT

The Institute of International Law announces the subject for the Vitoria Prize (2,000 Swiss francs) to be awarded in 1969. The subject is: "International Legal Problems of Economic and Social Development."

The competition is open to anyone except members or associates, or former members or associates, of the Institute.

The essays submitted should be unpublished manuscripts of not less than 150 nor more than 500 pages corresponding to a printed octavo page of the same character as a page of the 1963 volume of the *Annuaire de l'Institut de Droit International*. Essays may be written in English, French, German, Italian or Spanish. They should be sent anonymously in three copies. Each copy must be supplied with two mottoes. The same mottoes should be inscribed on an accompanying envelope containing the surname and first names, the date and the place of birth, the nationality and the address of the author. The essays must be in the hands of the Secretary General of the Institute (Mrs. Paul Bastid, 88, rue de Grenelle, Paris VIIe) not later than December 31, 1968.

The conditions of the Prize will be found in the *Annuaire de l'Institut de Droit International* for 1963, Vol. 50, Tome II, pp. 496-500.

E. H. F.

PROCEDURAL ASPECTS OF INTERNATIONAL LAW INSTITUTE

A Procedural Aspects of International Law Institute has been established under the auspices of the Syracuse University College of Law, Syracuse, New York, to sponsor and conduct research into various areas of procedural international law and to disseminate the results of such research through monographs, articles, meetings, conferences and exchanges. In the belief that, as Mr. Justice Holmes once stated, rights without remedies are no rights at all, the Institute hopes to focus increased attention on the mechanics by which international law is and can be made applicable to the conduct of states and individuals. The Institute plans to function as a clearing house for all research into procedural aspects of international

law, working closely with other interested bodies in this country and abroad to initiate and maintain a wide-ranging research and information program.

The activities of the Institute, which was formed on April 24, 1965, in Washington, D. C., are governed by a distinguished Advisory Council consisting of Hans W. Baade, Richard B. Bilder, Michael H. Cardozo, John Carey, Gordon A. Christenson, Frank G. Dawson, Martin Domke, Richard A. Falk, James N. Hyde, John G. Laylin, Monroe Leigh, Oliver J. Lissitzyn, Andreas F. Lowenfeld, Stanley D. Metzger, Cecil J. Olmstead, Edward D. Re, Sigmund Timberg and Richard Young. Membership in the Institute is open to all practitioners, professors and government personnel here and overseas who are concerned with this area of international law. Persons interested in the Institute's work are urged to contact its Director, Professor Richard B. Lillich, Syracuse University College of Law, Syracuse, New York.

E. H. F.

EAST-WEST TRADE CONFERENCE, STANFORD UNIVERSITY

The American Society of International Law, the International Society of Stanford Law School, and the International Business Club of the Stanford Graduate School of Business sponsored a Conference on East-West Trade at Stanford University on April 15 and 16. The Conference began on the evening of the 15th with a dinner, followed by a speech by Professor Peter Hay of the University of Illinois College of Law. Professor Hay discussed the Common Market countries' approach to trade with Communist nations. He noted the difficulty in achieving the consensus among Common Market countries which he viewed to be an urgent necessity in light of the importance for Western European countries of trade with the Communist bloc. He did not foresee an early development of the multilateral policies which he felt could usefully support a continued bilateral trade structure.

The program on the 16th began with a morning panel discussion on "Business Problems and Economic Aspects of East-West Trade." The panel members were Kenneth Hansen, Vice President of Syntex Corporation; W. B. Saunders, Chief of the Grain Division of Cargill, Incorporated; and Professor Emil Despres of the Stanford Economics Department. Mr. Hansen described limitations imposed on business by present trade-restricting legislation and called for new attitudes and new laws to promote a flexible and co-ordinated approach in expansion of trade with Communist countries. Mr. Saunders outlined the mechanics of the sale of American wheat to the Soviet Union in 1963-1964 and described the interlocking economic and political concerns involved in the wheat deal. In analyzing current United States trade policy, Professor Despres remarked that the discriminatory restrictions on East-West trade serve no useful purpose, and that the efficacy of economic warfare measures has been and will probably continue to be slight. He cautioned against exaggerating the

short-run opportunities of East-West trade, but viewed the case for normalization of trade to be a strong one.

Following the morning panel discussion, Robert B. Wright, Director of the Office of East-West Trade of the Department of State, delivered a luncheon address in which he outlined the State Department's views on trade with Communist countries. Remarking that trade policy must be examined in the context of total United States policy toward international Communism, Mr. Wright described the policy of differentiating, for political purposes, among the various Communist countries through trade regulations. He stated that the Administration was seriously considering a proposal that the President be given authority to grant or withdraw most-favored-nation tariff treatment to individual Communist countries when he determines it to be in the national interest. Mr. Wright stated it to be in this country's interest, at the same time as it is halting Communist aggression in Viet-Nam, to show a willingness to engage in peaceful trade and to demonstrate that the Soviets' true interests lie in engaging in such trade.

In the afternoon, a second panel discussed "Legal and Political Aspects of East-West Trade." The panel members were Rauer Meyer, Director of the Office of Export Control of the Department of Commerce; Professor Milorad Drachkovitch of Stanford University's Hoover Institution; Professor Harold Berman of Harvard Law School; and Professor Hay. Mr. Meyer described the legislative scheme of export control and the policy considerations involved in granting or denying licenses for export of goods. He remarked that in his view the controls established did not have a major detrimental effect on the over-all, rather minimal, value of United States trade with Communist countries. Professor Drachkovitch recalled Lenin's view that trade could be used as a political weapon, and he warned against supposing there has been a qualitative change in Communist regimes since Lenin's time. He recommended conditioning expansion in trade with Communist nations upon their giving of economic and political concessions. Professor Berman noted that all of the Communist countries wish to expand their trade with non-Communist countries and that in fact autarchy is no longer workable. He suggested that national interests and economic pressures for collaboration are stronger than ideological forces of division. Sketching the Communist countries' foreign trade system and the problems which planned economy poses for international trade, Professor Berman anticipated development of legal institutions which might provide a framework for trade between Communist and non-Communist countries, which in turn might help to unify mankind. Professor Hay briefly summarized his remarks of the previous night. After a short question period, participants and guests adjourned to an informal dinner which concluded the Conference.

A copy of the proceedings of the Conference may be obtained from the International Society, Stanford Law School, Stanford, California.

JONN I. LAUN

INTER-AMERICAN BAR ASSOCIATION

The Executive Committee and Council of the Inter-American Bar Association met in Asunción, Paraguay, on April 28 and 29, 1966, to consider committee reports and to make plans for the 15th Conference of the Association to be held in San José, Costa Rica, April 10-15, 1967. The Colegio de Abogados of Paraguay was host to the meeting, for which arrangements were made by Dr. Raimundo Paniagua, President of that organization, and Dr. Sigfrido Gross Brown of Asunción.

Special attention was given to the further activities of Committee XII on Legal Education with respect to the meeting of Deans of Law Schools of the Americas at San José, in accordance with the resolution adopted at the 14th Conference of the Inter-American Bar Association,¹ which set up a permanent Committee of Deans to study ways and means to promote exchanges of professors and students of law and provided for a symposium of deans and professors at future conferences. Dean Miguel de Capriles of New York University Law School and Dean David M. Helfeld of the Law School of the University of Puerto Rico have considered plans for carrying out the resolution. Dean Helfeld has visited most of the law schools in South America in promoting the project.

The Council also gave consideration to future action to be taken concerning the resolution of the 14th Conference establishing the Judicial Conference of the Americas, of which Chief Justice Luis Negrón Fernández of Puerto Rico is Chairman.

Taking note of the Communist threat to the security of the American states expressed in the speeches and resolutions adopted at the First Tri-continental Conference held in Havana, Cuba, January 3-15, 1966, the Council authorized the publication and distribution in the Association's Newsletter to all the members of the Inter-American Bar Association of excerpts from a study prepared by the Special Consultative Committee on Security of the Organization of American States, issued by the Pan American Union (Doc. OEA/Ser.L/X/II.12, Corr., April 2, 1966).

The Committee on the Future of the Inter-American Bar Association, established by the 14th Conference, of which the Honorable Herbert Brownell is Chairman, met in Asunción on April 27 to consider a draft report, prepared by Mr. William Braithwaite of the American Bar Foundation, based on a study made through conferences with officers and members of the Inter-American Bar Association and government officials in various American countries. His studies included a review of the Association's activities and publications since it was founded 26 years ago on May 16, 1940. The report was presented to the Executive Council and discussed by it in detail. A revised report taking into account the comments received has been distributed to Council members and other interested persons for their comments. The final report will be considered by the Council at its meeting in Caracas, Venezuela, November 10-13, 1966.

¹ See note on 14th Conference in 60 A.J.I.L. 80 (1966).

Dr. Pedro J. Mantellini and Dr. Felipe S. Casanova are in charge of plans for this meeting.

The Council at the Asunción meeting adopted as the theme of the forthcoming conference in San José "Legal Aspects of Economic Development and Integration in the Americas." It also made some changes in the committee structure for the conference. A new Section C—Study of Problems of Economic Development and Integration—was added to Committee XI on Social, Economic and Foreign Investment. Dr. Guillermo Lousteau of Buenos Aires was appointed chairman of the section. Dr. Sigfrido Gross Brown of Asunción was appointed co-chairman of Committee XI.

The Military Law Section (D) of Committee I on Public International Law was made a separate Committee XVII.

A new Committee XVIII on Civil Service Law was established under the chairmanship of Conrad D. Philos of Washington, D. C., former President of the Federal Bar Association. The committee will make a comparative study of laws of each country with respect to civil service personnel.

The Costa Rican Bar Association has established an Organizing Committee, under the chairmanship of IABA President Fernando Fournier, to complete preparations for the 15th Conference. Members of the committee are: the Honorable Gonzalo Retana, Judge of the City of San José; Fernando del Castillo, Director of the Income Tax Department of the Costa Rican Government; Rafael Angel Rojas, an attorney and economist; Manuel Emilio Rodríguez, chief legal counselor for Banco Anglo-Costarriense; and Rodolfo Yglesias, an attorney, who will be in charge of the organizational details.

Officials of the Costa Rican Government are also co-operating in arrangements for the conference. Additional information can be obtained from the Headquarters office, 1815 H Street, N. W., Washington, D. C. 20006.

ELEANOR H. FINCH

FIRST ANNUAL SUMMER CONFERENCE OF THE LAW OF THE SEA INSTITUTE

The First Annual Summer Conference of the Law of the Sea Institute was held from June 27 to July 1, 1966, on the campus of the University of Rhode Island in Kingston, Rhode Island. The general topic of the conference was "Offshore Boundaries and Zones." An interesting program of subjects was presented by a large group of distinguished experts in the field.

On Monday, June 27, the present status of the law of the sea was considered. The session was opened at 10:00 o'clock a.m. with welcoming addresses by Francis H. Horn, President of the University of Rhode Island, and the Honorable Claiborne Pell, United States Senator from Rhode Island. Professor Myres S. McDougal of Yale University Law School delivered an address on "International Law and the Law of the Sea."

On Monday afternoon the subject of discussion was "The Geneva Conference: What Was Accomplished?" William C. Herrington, Special Assistant for Fisheries and Wildlife to the Under Secretary of State, discussed the Convention on Fisheries and Conservation of Living Resources. William R. Neblett, Executive Director of the National Shrimp Congress, discussed the Conventions on the Territorial Sea and Contiguous Zone, the High Seas, and the Continental Shelf. Papers were presented on the subjects of "National Attitudes and the Formulation of International Law" by Professor Robert L. Friedheim of Purdue University, and "Offshore Claims of the World" by Professor Lewis M. Alexander of the Department of Geography of the University of Rhode Island. Following the afternoon session a reception and buffet were held at the Dunes Club, Narragansett Pier.

On Tuesday, June 28, the use of offshore waters was considered. At the morning session papers were delivered by Professor Dennis H. O'Connor of New York University School of Law on "Offshore Zones and Limited Hostilities"; Wilbert M. Chapman of the Van Camp Sea Food Company on "Fisheries Resources in Offshore Waters"; and by Francis T. Christy, Jr., of Resources for the Future, Inc., on "Fisheries Conservation Problems."

On Tuesday afternoon a panel discussion was held on "National Interests in Coastal Waters," in which the participants were Messrs. Chapman and Christy, Richard R. Baxter of Harvard Law School, Edward W. Allen of Seattle, Washington, and Giulio Pontecorvo of Columbia University.

On Wednesday, June 29, the subject of discussion was the continental shelf. At the morning session papers were delivered on "The Geology of the Continental Shelf" by K. O. Emery of the Woods Hole Oceanographic Institution; "Mining of the Sea" by Willard Bascom of Ocean Science and Engineering, Inc.; "Offshore Oil and Gas Technology" by J. R. Dozier, and "Legal Aspects of Offshore Oil and Gas Production" by O. L. Stone, both of Shell Oil Company.

In the afternoon a panel discussion on the limits and conflicting uses of the continental shelf was held. Participants were Professor William T. Burke of Ohio State University School of Law; Northcutt Ely of the District of Columbia Bar; Richard Young of the New York Bar; Professor Bernard E. Jacob of the School of Law of the University of California at Los Angeles; and Commander Larry Parks, Special Assistant on Law of the Sea, Office of the Judge Advocate General, U. S. Navy.

Special problems of offshore control were considered on Thursday, June 30. At the morning session Commander Parks presented a paper on "Freedom of Navigation." Gerard E. Sullivan of the Interagency Committee on Oceanography spoke on "Control of Communication and Scientific Equipment" and Professor Burke discussed "The Law and New Technologies."

The Thursday afternoon session consisted of a workshop on boundary problems and delimitation. F. J. Hortig of the California State Lands

Commission discussed California's offshore boundaries, and A. Joseph Wraight of the U. S. Coast and Geodetic Survey discussed intra-State boundary problems. He also conducted a map demonstration of New England's offshore boundaries and a field trip to the shoreline to demonstrate delimitation techniques.

At 7:00 o'clock p.m. on June 30 a banquet was held at the Lighthouse Inn, Point Judith. The Honorable Arthur H. Dean delivered an address on "The Law of the Sea Conference, 1958-1960, and Its Aftermath."

On Friday morning, July 1, a panel discussion was held on the Geneva Conventions on the Law of the Sea and the need for future modifications. Participants were Professor Henry Reiff of St. Lawrence University; Professor Ralph W. Johnson of the University of Washington; Professor L. F. E. Goldie of Loyola University, Los Angeles; John L. Mero of Ocean Resources, Inc.; and Professor Alexander Melamid of New York University. The panel was followed by discussion of the future activities of the Law of the Sea Institute.

The Institute was established at the University of Rhode Island in February, 1965, to bring together lawyers, marine scientists, businessmen, government officials and other professionals for the exchange of information and ideas on the legal problems involved in efforts to exploit the resources of the oceans.* It will serve as a forum for discussion of such problems and as a publisher of papers and symposia. The costs of the first conference were provided in part by a grant from the Environmental Science Services Administration, the U. S. Fish and Wildlife Service, and the Office of Naval Research.

ELEANOR H. FINCH

ON *FESTSCHRIFTEN* AND BOOK REVIEWS

A recent book review in this JOURNAL on a recently published *Festschrift* written by an angry young man from Princeton,¹ whose tone is not exactly princely, and which otherwise does not deserve any comment, raises several questions of general importance which I would like to bring to the attention of our readers.

(1) The reviewer distinguishes between *Festschriften* which (a) are more of the nature of "testimonials by . . . friends and notables" comprising contributions "at hand for a private presentation at a ceremonial dinner," and (b) those which are for "public distribution" and which "must stand as a coherent whole" either because they contain a "comprehensive treatment of the individual's contribution" or because they treat a "theme in a systematic fashion and . . . (are) then merely dedicated to the individual." It is not clear, however, why testimonials should be restricted to contributions at hand and why they should be presented privately at a ceremonial dinner. One would rather expect a testimonial

* See note in 59 A.J.I.L. 597 (1965).

¹ Law, State, and International Legal Order. Essays in Honor of Hans Kelsen. Edited by Salo Engel with the co-operation of Rudolf A. Métall. Reviewed by Richard A. Falk, 50 A.J.I.L. 132-133 (1966).

to be written *ad hoc*; if it is worthy of presentation it should also be worthy of publication, and if it does not deserve the latter² it is also not worthy to be presented even privately. It is easy to make neat distinctions in theory but, for a variety of reasons, less ideal solutions often impose themselves in practice which are not necessarily indicative of "editorial sloth" or of a lack of "editorial discipline."

(2) The same is true of the arrangement of the different contributions. It is easy to devise neat categories and headings and to force the essays into the system so devised, but not every editor finds it absolutely necessary to show of what brilliant distinctions he is capable and, again for a variety of reasons, he may content himself with a mere alphabetical order of the contributors' names—even at the risk of being accused of lack of "imagination." He may prefer this to too much imagination.

(3) Translations into English of original contributions in other languages may be indicated in the case of languages other than French, German, or Spanish but seem hardly indispensable for these world languages. International lawyers, in particular, are not presumed to be able to read only English—even if English is now considered *the* international language. Summaries are of limited value, and where space is a scarce item, it is better to reserve it for original contributions than to waste it for translations or summaries.

(4) This applies also to the necessity of a general introduction into the thought of the honored scholar. Where the latter is a universally known personality whose theories are equally well known, it may still be nice to have such an introduction, but there are self-denying editors who, under such circumstances, prefer to give others a chance to say what they have to say rather than to write an introduction or to contribute an essay of their own.

(5) Admittedly, an Index is always useful but that a book "could only take on lasting value if a reader could check parallel treatments of central issues" and that only an Index enables him to do this, suggests a very poor opinion of the reader's intelligence and interest.

(6) A reviewer is, of course, entitled to his opinion. *De gustibus non est disputandum*, or of values.³ Facts, however, are another matter. Even the poorest author and editor is entitled to be judged *en pleine connaissance de cause*. I was surprised to find in this JOURNAL such a collection of personally offensive unsubstantiated insinuations. As Goethe has said: *Im Auslegen seid frisch und munter! Legt ihr's nicht aus, so legt was unter.*

SALO ENGEL

² As in the case of old *Ladenhüter* which their authors had kept in their drawers and had not been able to publish elsewhere.

³ Mr. Falk's taste and values seem to differ from those of all other reviewers of the *Festschrift* in question, which in less than two years since its publication is out of print.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section is compiled by Charles I. Bevans, Assistant Legal Adviser, Department of State. Alfred P. Rubin, of the Office of the General Counsel, Department of Defense, and Bruno A. Ristau, of the Department of Justice, provide material originating in their respective Departments.

AMITY AND ECONOMIC RELATIONS

Treaty with the Togolese Republic

On April 8, 1966, the President transmitted to the Senate for approval, and on September 28, 1966, the Senate approved, a treaty of amity and economic relations between the United States and the Togolese Republic, signed at Lomé on February 8, 1966. The report of the Secretary of State, which was transmitted for the information of the Senate, reads in part as follows:

. . . This treaty is another in the series of treaties of friendship, commerce, and navigation, the purpose of which is to assure protection for American citizens and their property and interests abroad, in return for like protection in this country for nationals of the country with which the treaty is made. It is designed to provide a long-term basis for the development of economic and other relations between the two countries . . .

The treaty with Togo contains the usual provisions covering such subjects as entry and sojourn, personal freedoms, access to courts, just compensation in the event of expropriation, rights with respect to carrying on business activities, property rights, taxation, exchange controls, treatment of imports and exports, treatment of shipping, and other matters affecting the status and activities of citizens and enterprises of one country within the territories of the other.

The treaty does not contain the provisions, found in recent treaties of friendship, commerce, and navigation, relating to workmen's compensation and social security. . . .

(Sen. Exec. E, 89th Cong., 2d Sess.)

AVIATION

U. S. to Continue Adherence to Warsaw Convention

On May 13, 1966, the Department of State issued the following announcement:

The Department of State, in consultation and with the concurrence of the Civil Aeronautics Board, the Federal Aviation Agency, the Department of Commerce, and the Department of Defense, has concluded that the interests of the United States traveling public and of inter-

national civil aviation would be best served by continuing within the framework of the Warsaw Convention under a plan the essential features of which are:

First. The limits of international carrier liability for passengers will be increased from \$8,300 to \$75,000 per person. Those travelers who wish to carry greater protection will be free to take out additional insurance to cover their needs. There will be no limit on liability where the carrier is guilty of willful misconduct.

Second. Airlines in international travel will be absolutely liable up to \$75,000 per passenger regardless of any fault or negligence. Recovery by those who need it most will thus be maximized and expedited. Long and costly lawsuits will be unnecessary in many cases.

Third. International airlines carrying well over 90 percent of Americans in international travel are participating in the plan. The recommendation of the Senate Foreign Relations Committee that no airline operating within the United States remain outside the plan has been substantially complied with. Those United States airlines which initially declined to come within the plan have now indicated their agreement to accept an increase in liability from \$8,300 to \$75,000.

Fourth. This is an interim arrangement terminable on 12 months' notice. In the months ahead public hearings will be held for the purpose of determining the definitive United States position in preparation for further international discussions concerning the Warsaw Convention.

Fifth. The international carriers who have notified the Civil Aeronautics Board of their acceptance of the interim arrangements are: Aeronaves, Air Canada, Air France, Air India, Aer Lingus, Alitalia, BEA, BOAC, Canadian Pacific, CMA, El Al, Icelandic, Iberia, Japan Air Lines, KLM, Lufthansa, Olympic, Philippine Airlines, Qantas, Sabena, SAS, Swissair, Varig, and VIASA; American, Braniff, Continental, Eastern, Northeast, Northwest, Pan American, Panagra, TWA, and Western. The following U. S. airlines mainly engaged in domestic carriage which have accepted the increased limits of liability but not the feature of absolute liability are: Delta, National, and United. It is expected that other carriers will join the plan.

Sixth. Those guilty of sabotage and persons claiming on their behalf will not be entitled to recover any damages.

By acceptance of the plan the United States and all of the other participating countries have assured the continuation of the uniform system of law governing airlines, shippers, and passengers and have demonstrated again the viability of the system of international co-operation in civil aviation and in international law.

(Dept. of State Press Release No. 110, May 13, 1966;
54 Dept. of State Bulletin 955 (1966).)

*Withdrawal of Denunciation**

May 14, 1966

EXCELLENCY: I have the honor, on instructions from my Government, to give formal notification to the Government of the Polish People's Republic of the withdrawal by the United States of America of the notice of denunciation submitted on November 15, 1965 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air and the Additional Protocol relating thereto signed at Warsaw on October 12, 1929.

At the time the notice under Article 39 was submitted, the United States Government stated that that action was taken solely because of dissatisfaction with the low limits of liability for death or personal injury provided in the Convention, even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955. Since that time, intensive negotiations among carriers and among governments have succeeded in establishing a new interim arrangement in accordance with Article 22(1) of the Convention, whereby participating carriers have agreed, in cases of the death, wounding, or other bodily injury of a passenger, to limits of liability of \$75,000 per passenger inclusive of legal fees and costs (or \$58,000 exclusive of legal fees and costs in case of a claim brought in a State where provision is made for separate award of legal fees and costs) and have agreed not to avail themselves in any such cases of any defense under Article 20(1) of the Convention, or the Convention as amended by the Hague Protocol. This arrangement is applicable to all international transportation by the carrier as defined in the Convention or the Convention as amended by the Hague Protocol which according to the contract of carriage includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.

In view of the acceptance of this arrangement by the great majority of the world's international airlines, including all principal carriers serving the United States, the conditions which led the United States to serve its notice of November 15 have substantially changed. Accordingly, the United States of America believes that its continuing objectives of uniformity of international law and adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention. The United States of America looks forward to participation by all carriers and governments in the provisional arrangement described above and to its acceptance on a world-wide basis. Further, the Government of the United States looks forward to continued discussions looking to an up-to-date and permanent international agreement on the important issues dealt with in the Warsaw Convention.

My Government would appreciate it if the Government of the Polish

* Note addressed to the Minister of Foreign Affairs of Poland by the Chargé d'Affaires ad interim of the U. S. Embassy at Warsaw.

People's Republic would inform the Government of each of the High Contracting Parties to the Convention of this notification.

(Dept. of State Press Release No. 111, May 14, 1966;
54 Dept. of State Bulletin 956 (1966).)

CUSTOMS

Temporary duty-free entry of goods—carnet system

On June 30, 1966, the President transmitted to the Senate for approval four customs conventions. The report of the Secretary of State, which was transmitted for the information of the Senate, states in part as follows:

. . . I have the honor to submit to you, with a view to the transmission thereof to the Senate for its advice and consent to accession, copies of the following conventions:

(1) Customs convention on the temporary importation of professional equipment, done at Brussels on June 8, 1961;

(2) Customs convention on the ATA carnet for the temporary admission of goods, done at Brussels on December 6, 1961;

(3) Customs convention regarding ECS carnets for commercial samples, with protocol of signature, done at Brussels on March 1, 1956, as amended by the recommendation of the Customs Cooperation Council, dated June 15, 1960;

(4) Customs convention on the international transport of goods under cover of TIR carnets, with protocol of signature, done at Geneva on January 15, 1959, and modification of article 5 of annex 3 which modification entered into force on November 19, 1963. . . .

The four conventions are now in force with respect to certain countries and are no longer open for signature, but remain open for accession. The United States may become a party by accession.

The convention on the temporary importation of professional equipment, which entered into force on July 1, 1962, provides for temporary (normally no more than 6 months) duty-free entry of such articles as equipment for the press and for sound or television broadcasting, cinematographic equipment, and scientific equipment of various types. Its purpose is to facilitate the carrying on of business and professional activities by the nationals of one participating country within other participating countries. At such time as the United States accedes to the convention, it is proposed also to give notification, pursuant to article 15, paragraph 5, of the convention, that the United States declares itself bound in respect of the annexes to the convention, which annexes specify in general the type of equipment concerned.

The other three conventions provide the basis for a system whereby the payment of duties and other charges on the importation of specified classes of goods may be guaranteed by private associations, such as

chambers of commerce. These conventions provide for the importation of such goods under cover of an international customs document known as "carnet." The object is to expedite the customs clearance of the covered goods, especially through avoidance of the necessity for posting individual bond.

The convention on the ATA carnet, which entered into force on July 30, 1963, is a companion instrument to the professional-equipment convention, since it would extend the carnet system to the goods dealt with in the former convention. It would, in addition, however, provide for recognition of carnets for the importation of any goods temporarily admitted free by virtue of another convention to which a contracting government is a party, or of the national law. The initials ATA stand for the combined English and French words: Admission Temporaire—Temporary Admission.

The ECS carnet convention, which entered into force on March 1, 1956, is a companion convention to the International Convention to Facilitate the Importation of Commercial Samples and Advertising Material (8 UST 1636; TIAS 3920), to which the United States is a party. The initials ECS stand for the combined English and French words: Echantillons Commerciaux—Commercial Samples. . . .

The TIR carnet convention, which entered into force on January 7, 1960, establishes a carnet system for importation of goods in containers (such as lift-vans). It was designed to facilitate international transportation by road. The initials TIR stand for: Transport International Routier (international road transport). . . .

Each of the listed conventions is of interest to one or more business or professional groups in the United States. . . .

Accession to the conventions will not involve any very significant changes in U. S. law. . . .

Upon approval of the conventions by the Senate, the Department expects to submit legislation to the Congress to provide for the necessary amendments, and to await enactment of the legislation before depositing instruments of accession by the United States. . . .

(Sen. Execs. K to N inclusive, 89th Cong., 2d Sess.)

Temporary duty-free entry of containers

On June 30, 1966, the President transmitted to the Senate for approval a customs convention on containers. The report of the Secretary of State, which was transmitted for the information of the Senate, states in part as follows:

I have the honor to submit to you a copy of the customs convention on containers, together with the protocol of signature which forms an integral part thereof, done at Geneva on May 18, 1956. I recommend that the convention be transmitted to the Senate for its advice and consent to accession.

The convention, which was formulated by states members of the United Nations Economic Commission for Europe (ECE), entered

into force on August 4, 1959. It is now in force with respect to 24 countries, including a number of the principal European trading countries such as the United Kingdom, France, the Federal Republic of Germany, and Italy. Though the convention is no longer open for signature, the United States may become a party by accession.

The principal articles of the convention provide for temporary (normally no more than 3 months) duty-free entry of containers, either loaded or empty, having an internal volume of 1 cubic meter or more, such as lift-vans, movable tanks, or other similar structures. Any country, such as the United States, which "applies a system of transport of containers under Customs seal" would be required to accept containers which meet the specifications set forth in annex 1 and which are documented or marked in accordance with the approval procedures set forth in annex 2.

One of the most noteworthy recent developments in international trade is the increase in shipments of goods in containers. This development offers great advantages in reduction of costs of transportation and protection of goods in transit. The development of container traffic is also helping to facilitate the desired expansion of U. S. exports.

The increasing interest of the transportation industry in container traffic gave rise to the recommendation which has been made that the 1959 customs convention on the international transport of goods under cover of TIR (Transport International Routier) carnets be submitted to the Senate. The transportation industry views the present basic container convention as an important companion piece to the TIR carnet convention. . . .

The customs treatment of containers provided for in the convention is, in fact, somewhat more liberal in some respects than U. S. customs law provides. It will be necessary to provide for minor amendment of the tariff schedules of the United States before the convention can be made effective. It is proposed to undertake drafting of needed legislation immediately for submission to the Congress. . . .

(Sen. Exec. J, 89th Cong., 2d Sess.)

FISHERIES

Protocols to the International Convention for the Northwest Atlantic Fisheries

On August 16, 1966, the United States deposited instruments of ratification of two protocols to the International Convention for the Northwest Atlantic Fisheries. The President's message of June 27, 1966, transmitting the protocols to the Senate for approval, which approval was given on July 19, 1966, reads in part as follows:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a certified copy of each of the following two protocols:

Protocol to the International Convention for the Northwest Atlantic Fisheries, Relating to Measures of Control; and

Protocol to the International Convention for the Northwest Atlantic Fisheries, Relating to Entry Into Force of Proposals
Adopted by the Commission.

The protocols are dated November 29, 1965, and were open for signature at Washington from November 29, 1965, through December 13, 1965, on behalf of the 13 governments parties to the International Convention for the Northwest Atlantic Fisheries signed at Washington under date of February 8, 1949 (1 UST 477; TIAS 2089). During that period they were signed for all 13 of those governments, including the United States of America. . . .

The protocol on measures of control would amend the convention to expressly permit the International Commission for the Northwest Atlantic Fisheries established thereunder to make proposals related to measures of control to insure the application of the convention and regulations adopted thereunder. At present, each contracting government is required to enforce the terms of the convention and the regulations adopted thereunder with respect to its own nationals. The protocol would permit a system of international inspection or enforcement to be adopted under the terms of regulations proposed by the Commission and approved by contracting governments. This will permit more efficient and uniform enforcement of Commission regulations designed to conserve the stocks of fish in the convention area in the northwest Atlantic, a part of which convention area lies off the coast of the United States.

The protocol on entry into force of regulations was initiated by the United States, and is designed to expedite the procedure for adoption of regulations proposed by the Commission. Under the present terms of the convention, each government participating in the panel of the convention subarea to which a proposal applies must take affirmative action to signify its approval thereof before a proposal may enter into force. There have been long delays in the entry into force of Commission proposals, apparently in large part because of inertia in taking the required action, particularly on the part of countries whose fishermen are little affected one way or the other by the proposals. The protocol would substitute a form of approval under which a government would be deemed to have approved a proposal unless it objected within a specified period. Adequate safeguards are included in the proposal to protect the rights and interests of the contracting governments and their fishermen. The aims of the convention will be achieved more fully if a more expeditious system of bringing necessary regulations into force is adopted. The new procedure, if adopted, would also apply to the entry into force of regulations relating to measures of control if the first protocol is also adopted. . . .

(Sen. Exec. I, 89th Cong., 2d Sess.)

U.S. 12-Mile Fishery Zone

DEPARTMENT OF STATE,
Washington, May 18, 1966.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: Your letter of June 30, 1965, enclosed copies of S. 2218,* introduced by Senator Bartlett, and S. 2225, introduced by Senator Magnuson, on which the Department of State's comments were requested.

The purpose of the proposed legislation is to establish for the United States a 12-mile exclusive fisheries zone measured from the baseline from which the breadth of the territorial sea is measured but subject to the continuation of such traditional fishing by foreign states and their nationals as may be recognized by the U.S. Government.

Although the Geneva Conference of 1958 adopted four conventions on the law of the sea, it was recognized that the conventions left unresolved the twin questions of the width of the territorial sea and the extent to which a coastal state could claim exclusive fishing rights in the high seas off its coast. The Conference adopted a resolution suggesting that the United Nations call a second conference to deal with these unresolved problems, which the United Nations did. At the second conference, which was held in 1960, the United States and Canada put forward a compromise proposal for a 6-mile territorial sea, plus a 6-mile exclusive fisheries zone (12 miles of exclusive fisheries jurisdiction in all) subject to the continuation for 10 years of traditional fishing by other states in the outer 6 miles. This compromise proposal failed by one vote to obtain the two-thirds vote necessary for adoption.

Since the 1960 Law of the Sea Conference there has been a trend toward the establishment of a 12-mile fisheries rule in international practice. Many states acting individually or in concert with other states have extended or are in the process of extending their fisheries limits to 12 miles. Such actions have no doubt been accelerated by the support for the proposals made at the Geneva Law of the Sea Conferences in 1958 and 1960, of a fisheries zone totaling 12 miles as part of a package designed to achieve international agreement on the territorial sea.

In view of the recent developments in international practice, action by the United States at this time to establish an exclusive fisheries zone extending 9 miles beyond the territorial sea would not be contrary to international law. It should be emphasized that such action would not extend the territorial sea beyond our traditional 3-mile limit and would not affect such traditional freedoms of the sea as freedom of navigation or of overflight. With one or two possible exceptions, it is not likely that such action would be unfavorably received by other governments in view of the provision for recognition of traditional fishing, which the Department regards as a desirable provision.

* Passed by Congress and signed by the President on October 14, 1966.

In the above circumstances, the Department has no objection from the standpoint of U.S. foreign relations to establishing a 12-mile exclusive fisheries zone subject to the continuation of such traditional fishing by foreign states as may be recognized by the U.S. Government.

Whether the establishment at this time of a 12-mile exclusive fisheries zone would serve the longer term economic interests of the United States and the U.S. fishing industry is, of course, a separate question which is discussed in a report prepared by the Department of the Interior. Inasmuch as U.S. establishment of a 12-mile exclusive fisheries zone would tend to support the trend already referred to, the passage of the proposed legislation would make it more difficult, from the standpoint of international law, to extend the zone beyond 12 miles in the future.

Time has not permitted the Department to obtain the advice of the Bureau of the Budget with respect to this report.

Sincerely yours,

DOUGLAS MACARTHUR II,
Assistant Secretary for Congressional Relations
 (For the Secretary of State).

Breadth of fishery jurisdiction claimed by coastal nations †

3 miles	3 to 12 miles	12 miles		Beyond 12 miles
*Australia	Cameroon (6)	Albania	Indonesia	*South Africa
China	*Finland (4)	Algeria	Iran	Spain
Cuba	Greece (6)	Belgium	Iraq	Sudan
Ivory Coast	*Haiti (6)	Brazil	Ireland	Sweden
Japan	Honduras (6)	Bulgaria	Italy	Syria
*Jamaica	Israel (6)	Burma	Libya	Tanzania
Jordan	Lebanon (6)	Canada	*Malagasy	Thailand
Kenya	Maldives	*Colombia	Republic	Togo
Liberia	Island (6)	Cyprus	Mauritania	Turkey
Malaysia	Mexico (9)	Dahomey	Morocco	Ukrainian
Malta	Yugoslavia	Denmark	*Netherlands	S.S.R.
Poland	(10)	Ethiopia	New	U.S.S.R.
The Gambia		France	Zealand	United Arab
Trinidad		Germany	Norway	Republic
*United States		Guatemala	*Portugal	*United
		Iceland	Romania	Kingdom
			Saudi Arabia	Uruguay
			*Senegal	*Venezuela
			*Sierra Leone	Vietnam
				Argentina
				(OS)
				*Cambodia
				(OS)
				Ceylon (100)
				Chile (200)
				Costa Rica
				(200)
				*Dominican
				Republic
				(15)
				Ecuador
				(200)
				El Salvador
				(200)
				Ghana (100)
				Guinea (130)
				India (100)
				Korea (200)
				Nicaragua
				(200)
				Pakistan
				(100)
				Panama (CS)
				Peru (200)
				Tunisia (65)

† The information in the table, up to date as of June 1, 1966, was provided to the U.S. Senate Committee on Commerce by the Department of State.

NOTES

1. 23 nations that are members of United Nations have no coast.
2. As of June 1, 1966, Department of State had incomplete information on fishery jurisdiction claims of 8 coastal nations—Congo (Brazzaville), Congo (Léopoldville), Gabon, Kuwait, *Nigeria (3-mile territorial sea, fishery jurisdiction uncertain), Philippines (expansive use of straight base lines, fishery jurisdiction uncertain), Somali Republic, and Yemen.
3. Numbers in parentheses indicate approximate number of miles claimed; "CS" means continental shelf.
4. The nature of the claims of several nations beyond 12 miles is uncertain.
5. "*" indicates nations that have ratified the 1958 Convention on Fishing and Conservation of the Living Resources of the Sea.

(Senate Report No. 1280, 89th Cong., 2d Sess. (June 15, 1966), pp. 12-13, and p. 5, reproduced in 5 International Legal Materials, No. 4, pp. 616-618 (July, 1966).)

LABOR

Convention concerning employment policy

On June 2, 1966, the President transmitted to the Senate for advice and consent to ratification a convention concerning employment policy. The President's message reads as follows:

With a view to receiving the advice and consent of the Senate to ratification of the convention (No. 122) concerning employment policy, adopted by the International Labor Conference at its 48th session, at Geneva, on July 9, 1964, I transmit herewith a certified copy of that convention. I transmit also a certified copy of the recommendation (No. 122) on the same subject adopted by the International Labor Conference, which suggests measures for carrying out the employment policy enunciated in the convention. No action is called for on the recommendation.

The report of the Secretary of State and a letter from the Secretary of Labor concerning both instruments are enclosed.

I heartily endorse the general principles and objectives of a full employment policy as set forth in this convention. The United States is engaged in a mighty effort to eradicate poverty. To achieve this goal we are pursuing an active manpower policy aimed at promoting full, productive and freely chosen employment. We are striving to afford the fullest possible opportunity to every worker to use his skills in a job for which he is well suited, without discrimination based on race, color, sex, religion, or national extraction. These are the stated objectives of the ILO convention on employment policy.

Our country has, in a sense, anticipated the ILO convention by such legislation as the Employment Act of 1946, the Manpower Development and Training Act of 1962, as amended, the Economic Opportunity Act of 1964, as amended, the Civil Rights Act of 1964, and the Public Works and Economic Development Act of 1965

Under existing legislation and institutional arrangements we are already in full compliance with the obligations of the convention.

I urge that we demonstrate to the remainder of the world our support for the principles of this convention and the international advancement of human rights to which it contributes. I therefore recommend that the Senate of the United States advise and consent to its ratification.

(Sen. Exec. G, 89th Cong., 2d Sess.)

OUTER SPACE

Exploration of the moon and other celestial bodies

Following is the text of a statement by President Johnson which was read to news correspondents at San Antonio, Texas, on May 7 by the White House Deputy Press Secretary, together with the text of a letter from Arthur J. Goldberg, U. S. Representative to the United Nations, to Kurt Waldheim, Chairman of the U.N. Committee on the Peaceful Uses of Outer Space. Negotiations have since taken place in Geneva, beginning in July, and in New York in September. The United States has submitted the text of a treaty to the 21st Assembly of the United Nations.

Statement by President Johnson

Just as the United States is striving to help achieve peace on earth, we want to do what we can to insure that explorations of the moon and other celestial bodies will be for peaceful purposes only. We want to be sure that our astronauts and those of other nations can freely conduct scientific investigations of the moon. We want the results of these activities to be available for all mankind.

We want to take action now to attain these goals. In my view, we need a treaty laying down rules and procedures for the exploration of celestial bodies. The essential elements of such a treaty would be as follows:

The moon and other celestial bodies should be free for exploration and use by all countries. No country should be permitted to advance a claim of sovereignty.

There should be freedom of scientific investigation, and all countries should cooperate in scientific activities relating to celestial bodies.

Studies should be made to avoid harmful contamination.

Astronauts of one country should give any necessary help to astronauts of another country.

No country should be permitted to station weapons of mass destruction on a celestial body. Weapons tests and military maneuvers should be forbidden.

I am convinced that we should do what we can—not only for our generation, but for future generations—to see to it that serious political conflicts do not arise as a result of space activities. I believe that the time is ripe for action. We should not lose time.

I am asking Ambassador Goldberg, in New York, to seek early discussions of such a treaty in the appropriate United Nations body.

*Letter from Ambassador Goldberg **

MAY 9, 1966

EXCELLENCY: I have the honor to bring to your attention the following announcement by President Johnson on the need for a treaty governing the exploration of the moon and other celestial bodies:

[Text of President Johnson's statement of May 7.]

This proposal of my Government is based on our long-standing concern with the peaceful uses of outer space. You may recall that over seven years ago the United States inscribed the first item to appear on the General Assembly's agenda concerning the peaceful uses of outer space and introduced a draft resolution¹ sponsored by 20 States. This became the first outer space action taken by the Assembly. It was introduced in the First Committee by the then Majority Leader of the United States Senate, Senator Lyndon B. Johnson of Texas.²

Action since that time has been heartening to all of those who believe in the role of the United Nations as a source of international law and peaceful development. Resolution 1721,³ of December 20, 1961, set forth the essential legal principles applicable to outer space in an enlightened fashion that has no precedent in any previous age of exploration. One of these principles was that international law, including the Charter of the United Nations, applies to outer space. Another principle is that outer space and celestial bodies are free for exploration and use by all States in conformity with international law, and are not subject to national appropriation. Building on this foundation, Resolution 1962,⁴ approved by the Assembly on December 13, 1963, set forth a number of additional points that will be remembered gratefully centuries from now.

Our current proposal for a treaty is designed to be another great step forward in the cooperative development of outer space for peaceful uses. Because of its significance and urgency, I would greatly appreciate your taking the necessary steps for an early convening of the Legal Subcommittee of the Committee on Outer Space.

I should like to take this occasion, Excellency, to express our continued appreciation for the admirable way in which you have presided over the work of this most important Committee and to assure you of our continued desire to extend the utmost cooperation in this field which is so important to the future of mankind.

ARTHUR J. GOLDBERG

(54 Dept. of State Bulletin 900 (1966).)

* U. S./U.N. Press Release No. 4851.

¹ For text, see BULLETIN of Jan. 5, 1959, p. 32.

² *Ibid.*, Dec. 15, 1958, p. 977.

³ For text, see *ibid.*, Jan. 29, 1962, p. 185; 56 A.J.I.L. 946 (1962).

⁴ For text, see BULLETIN, Dec. 30, 1963, p. 1005; 58 A.J.I.L. 477 (1964).

SEAS

International Council for the Exploration of the Sea

On June 20, 1966, the President transmitted to the Senate for advice and consent to ratification the Convention for the International Council for the Exploration of the Sea. The President's message reads in part as follows:

With a view to receiving the advice and consent of the Senate to accession, I transmit herewith a certified copy of the Convention for the International Council for the Exploration of the Sea, signed at Copenhagen under date of September 12, 1964. The Convention was signed by the 16 European governments which are presently members of the Council, but not by the United States of America which is not now a member. . . .

The International Council for the Exploration of the Sea is the oldest and most respected international organization dealing with the marine sciences, and particularly with fisheries. It was established at Copenhagen in 1902 as a result of conferences held in Stockholm in 1899 and in Christiania (now Oslo) in 1901. Since that time the Council has operated under an instrument entitled "Statutes of the Council," not a treaty. The present convention would replace the statutes and enlarge the scope of the work of the organization.

The United States became a member of the Council on July 22, 1912, but allowed its membership to lapse during World War I. American scientists have maintained informal liaison with the Council over the years, however. With the Council expanding its scope and activities, and with the growing concern in the United States regarding the oceanic sciences, it is considered important that the United States reestablish its formal ties to the Council.

I noted in my message of March 2, 1965, that "our view of the seas has had to undergo a drastic change. We have always considered them as barriers to invasion; we now must see them as links, not only between peoples, but to a vast new untapped resource." Membership in the International Council for the Exploration of the Sea will strengthen those links.

There is a broad community of interests in Atlantic fisheries and oceanography between the present European members of the Council and the United States. Eleven of the 16 members are also members of the International Commission for the Northwest Atlantic Fisheries, with Canada and the United States. Fourteen of the 16 members are also members of the Intergovernmental Oceanographic Commission, with the United States and 39 other countries. Fifteen of the 16 members are also members of the Food and Agricultural Organization and participate in the work of its Fisheries Department, with the United States and 94 other countries. Fourteen of the 16 members are also members of the Northeast Atlantic Fisheries Commission, and the Council serves as scientific advisory body to that Commission.

Scientifically, the Council has great importance. Its scientific committees draw a multitude of distinguished scientists to their annual

meetings. Scientific symposia are also held on a variety of subjects, and its scientific journals are known throughout the world. The Council's work and influence, which reach far beyond European coastal waters, are intimately related to much of our own activity in this field. . . .

(Sen. Exec. H, 89th Cong., 2d Sess.)

TAXATION

Supplementary protocol amending the 1945 income tax convention with the United Kingdom

On September 9, 1966, the date of exchange of ratifications, there entered into force the supplementary protocol, signed at London on March 17, 1966, between the United States and the United Kingdom, amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Washington on April 16, 1945, as modified by supplementary protocols signed at Washington on June 6, 1946, May 25, 1954, and August 19, 1957. The President's message of April 21, 1966, transmitting the protocol to the Senate for approval, which approval was given on June 21, 1966, reads in part as follows:

. . . The special need for amending the convention with the United Kingdom at this time arises from the fact that a corporation tax has been instituted as a major element of the British tax system by the United Kingdom Finance Act of 1965, applicable with respect to profits earned on or after April 6, 1964.

Except with respect to the general nondiscrimination provisions in article XXI of the convention with the United Kingdom, the convention does not affect the imposition or collection of taxes by the several States or the District of Columbia. As prescribed in article I, the U. S. taxes which are the subject of the convention are the Federal income taxes, including surtaxes.

The new supplementary protocol would effect substantive changes in the existing convention, the major changes being those in regard to the taxation of dividends, interest, royalties, and capital gains. In addition, improvements are made in the provisions relating to credits to be allowed by one of the countries for tax paid to the other country, mutual assistance in collection to prevent the relief granted by the convention from inuring to the benefit of persons not entitled thereto, reciprocal exchange of information necessary for carrying out the provisions of the convention and for the prevention of fraud, consultations for the purpose of avoiding double taxation in the event of taxpayer claims of taxation contrary to the provisions of the convention, and assurances of national treatment (nondiscrimination) to prevent a national of one of the countries resident in the other from being subjected to more burdensome taxes than a national of that other country resident therein. . . .

(Sen. Exec. C, 89th Cong., 2d Sess.)

JUDICIAL DECISIONS

By JOHN R. STEVENSON

*Of the Board of Editors **

Sovereign immunity—action against Republic of Venezuela dismissed by court, upon suggestion of sovereign immunity by Department of State

CHEMICAL NATURAL RESOURCES, INC. v. REPUBLIC OF VENEZUELA. 420 Pa. 134; 215 At. 2d 864.**

Supreme Court of Pennsylvania, Jan. 4, 1966. John C. Bell, Jr., Ch. J.

The Republic of Venezuela¹ (1) took an appeal, pursuant to the Act of March 5, 1925, P.L. 23 (12 P.S. §672 et seq.), from an Order of the Court below which decided it had jurisdiction of plaintiffs' action in assumpsit, commenced by foreign attachment, and (2) filed in this Court an application petitioning this Court to issue a writ of mandamus or prohibition, or both, and dismiss plaintiffs' action against it.

The principal question involved in each case is the legal effect of a Suggestion of Immunity made by the Department of State. The two actions were consolidated here and will be considered together in this Opinion.

FACTS AND AVERMENTS

Chemical Natural Resources, Inc.,² and Venezuelan Sulphur Corporation, C. A.³ sued Venezuela in an action of assumpsit commenced by a writ of foreign attachment which in this case is an action quasi in rem. Chemical is a Delaware Corporation of which not less than 50 percent of its stock is beneficially owned by United States citizens. Sulphur is a corporation organized under the laws of Venezuela and is a wholly owned subsidiary of Chemical.

On October 21, 1963, the plaintiffs (Chemical and Sulphur) commenced their action of assumpsit against Venezuela by filing a (praecipe for a) writ of foreign attachment (together with a complaint) under which writ the sheriff was directed to attach and seize the SS CIUDAD DE VALENCIA, allegedly the property of defendant Venezuela, which was then in the Port of Philadelphia and in the custody of Stockyard Shipping and Terminal Corp.⁴ The complaint demanded damages in the sum of \$116,807,-258.28.

* Assisted by John E. Donnelly and William J. Williams, Jr., of the New York Bar, and Michael H. P. Belknap.

** Excerpted opinion; certain footnotes and citations omitted.

¹ Hereinafter called Venezuela.

² Hereinafter called Chemical.

³ Hereinafter called Sulphur.

⁴ Hereinafter called Stockyard.

On October 22, 1963, the day after the writ was issued, the sheriff attached and seized the steamship and took it into his possession. He also served copies of plaintiffs' complaint on the ship's Master and on Stockyard as garnishee. However, two days later, on October 24, 1963, *the attachment was dissolved without prejudice* upon the order of plaintiffs' attorney.

Plaintiffs' pertinent allegations in its amended complaint may be thus summarized:

In April of 1952 the plaintiffs, acting through Sulphur, purchased all mineral rights and interests or denouncements⁵ located in the Municipality of El Pilar, State of Sucre, Venezuela. Solely by reason of plaintiffs' exploitation, reservoirs of mineral-laden geothermal steam were discovered in El Pilar. Subsequently, plaintiffs through Sulphur entered into several contracts with a department of the Venezuelan Government under which, inter alia, plaintiffs agreed to erect facilities for converting the steam into electrical power and defendant agreed to purchase the resulting power. Plaintiffs expended large sums of money in order to carry out their part of the contract. Thereafter, Venezuela unilaterally and without any justifiable cause cancelled the contract and confiscated plaintiffs' property and property rights with a resulting loss to plaintiffs of over \$116,000,000. Plaintiffs further averred that Venezuela operates its merchant vessels, including the ship which was seized, through a nationalized company wholly owned by Venezuela, and thus was engaged in a commercial and private or proprietary capacity as distinguished from a Governmental or public capacity. Plaintiffs further averred that they could not obtain justice in any Venezuelan Court.

Venezuela has never entered a general appearance in this action, but improperly entered a special appearance for the purpose of challenging the jurisdiction of the Court of Common Pleas. However, Venezuela, more importantly and properly, challenged the jurisdiction of the Court by filing preliminary objections to plaintiffs' complaint and writ of foreign attachment. On December 5, 1963, Venezuela averred in its preliminary objections (a) that plaintiffs did not have a cause of action, and (b) that the Courts of Venezuela are available to the plaintiffs to assert any claim they may have, and (c) that the vessel allegedly operated by the nationalized Company is not, in fact, the property of Venezuela, and (d) that under the principle or doctrine of Sovereign Immunity the Court below could not obtain jurisdiction through an action quasi in rem. Plaintiffs filed an answer which denied virtually all of Venezuela's material averments of fact and conclusions of law.

Venezuela also sought and obtained the intervention of the United States Department of State which, by the United States Attorney for the Eastern District of Pennsylvania acting under orders of the Attorney General of

⁵ *Denouncement* is defined in Black's Law Dictionary, 3d ed., as meaning, in Mexican mining law, "an application to the authorities for a grant of the right to work a mine, either on the ground of new discovery or of forfeiture of the rights of a former owner through abandonment or illegal operation."

the United States, filed a "Suggestion of Immunity," which included a prayer to dismiss plaintiffs' action against Venezuela because of a certification of Sovereign Immunity which was recognized and allowed by the Department of State. The Attorney General acted upon a request received from the Legal Adviser of the State Department dated January 13, 1964—after all parties had been wisely given a hearing by the Legal Adviser both on the facts and the law—reading pertinently:

"The Department recognizes and allows the sovereign immunity of the Republic of Venezuela, defendant in the above suit, from the jurisdiction of the Court of Common Pleas of Philadelphia County, Pennsylvania, and it will be appreciated if appropriate instructions can be issued to the United States Attorney in that jurisdiction to file a suggestion of immunity with the Court."

On December 18, 1964, the Court below entered the following Order:

"In re the Suggestion of Immunity"

AND NOW, this 18th day of December, 1964, in re the Suggestion of Immunity, the motion of the defendant, the Republic of Venezuela, to dismiss the complaint is overruled, with leave to the defendant to file an answer within thirty days from date of this Order.

What the Court apparently intended to do was to deny the State Department's prayer and Venezuela's motion to dismiss (which was contained in its preliminary objections), basing its denial on its determination that Venezuela was not entitled to Sovereign Immunity. Venezuela then took a timely appeal to this Court under Section 3 of the Act of March 5, 1925, *supra*.

Thereafter (on March 8, 1965), Venezuela, we repeat, filed in this Court a petition for a writ of mandamus or, in the alternative, a writ of prohibition, or both, naming as respondents Judges Milner and Ullman. . . .

JURISDICTION RE FOREIGN ATTACHMENT

The Court below undoubtedly acquired jurisdiction by service of the writ of foreign attachment upon the Captain of the vessel, and its jurisdiction was not subsequently divested or lost as a result of plaintiffs' voluntary dissolution of the (foreign) attachment without prejudice. . . .

We shall proceed to discuss the very important and crucial question of Sovereign Immunity which, we repeat, was raised (1) in Venezuela's preliminary objections and (2) also in its petition for a writ of mandamus or prohibition or both, as well as in the State Department's Suggestion of Immunity, and which the parties themselves consider the principal question in these cases.

APPEAL

Venezuela's appeal which . . . challenges the jurisdiction of the lower Court, cannot be sustained and must be quashed. . . .

Sovereign Immunity is in the nature of an affirmative defense; (a) it does not go to jurisdiction and (b) it can be waived. For example, a

Court unquestionably has jurisdiction (1) whenever a foreign Sovereign brings suit, and (2) whenever a foreign Sovereign interposes a set-off or counterclaim: *National City Bank v. Republic of China*, 348 U.S. 356, . . . *Republic of Mexico v. Hoffman*, 324 U.S. 30 . . . *Guaranty Trust Company of New York v. United States*, 304 U.S. 126, . . . In such cases, a Sovereign cannot successfully challenge jurisdiction; indeed, the plea of Sovereign Immunity, even when pleaded by a Sovereign or by one of its corporations or instrumentalities, is not an absolute defense unless accompanied by the State Department's Suggestion of Immunity: *Republic of Mexico v. Hoffman*, *supra* (324 U.S. pp. 34 . . .). As the Supreme Court in those cases (and in a number of other cases) stated, the question is not whether the Court had jurisdiction—which it had—but *whether the jurisdiction which the Court had acquired should be relinquished* for diplomatic reasons in order to promote our foreign relations or to prevent a possible war. . . .

Furthermore, the law is well established that jurisdiction of the subject matter cannot be conferred by waiver or by consent of the parties where no jurisdiction exists. . . .

It is clear, therefore, that in the instant case, the lower Court had jurisdiction. . . .

SOVEREIGN IMMUNITY OF FOREIGN NATIONS

It is a long and well established general rule that *foreign Sovereigns, which are duly recognized by appropriate action by the State Department, and their property are not amenable* without their waiver or consent, *to suit* in the Courts of this Country. This widely accepted National and International diplomatic policy has been established among many civilized non-communist Nations on the principle of comity and for the preservation of International friendships and Peace. In order to preserve this policy of Sovereign Immunity from conflict, confusion, and erosion, and to prevent a breach of friendly relations or a severance of diplomatic relations or a possible war with a foreign nation, the *Supreme Court of the United States* has held that in the realm of Foreign Relations or Foreign Affairs, *a determination of Sovereign Immunity by the Executive branch of our Government*, namely, the State Department, when conveyed to a Court through proper channels or officials, is—in the absence of waiver or consent—*binding and conclusive* upon all our Courts. If and when the State Department concludes that a foreign Nation is entitled to Sovereign immunity that determination, we repeat, is conclusive no matter how unwise or, in a particular case how unfair or unjust the Department's determination appears to be (a) to injured American citizens and (b) to vast numbers of the American people and (c) to our Courts. . . .

Ex Parte Peru, 318 U.S. 578, . . . is factually similar and legally controlling . . . [The court then quoted at length from the opinion in that case and the opinions in *National City Bank v. Republic of China*, 348 U.S. 356 and *F. W. Stone Engineering Co. v. Petroleos Mexicanos*, 352 Pa. 12.]

Chemical and Sulphur (plaintiffs below and appellees here) first contend that *The Schooner Exchange, Ex Parte Peru* and the *Stone* cases are restricted and limited in their effect and do not apply to the case at bar because (1) procedurally those cases arose out of a seizure (by libel or writ of foreign attachment) of property of a foreign Government or of its instrumentality and that through appellees' voluntary dissolution of the attachment without prejudice, this is no longer a "seizure" case and (2) consequently friendly foreign relations cannot be jeopardized by this suit. Appellees further contend that in spite of the release by them of the property seized, jurisdiction over the person of the defendant was obtained and still remains by way of the writ of foreign attachment, as well as by actual service of the writ and the complaint on the captain of Venezuela's ship. Appellees' attempted distinction of the Supreme Court cases previously cited in this opinion, and their aforesaid contentions are devoid of merit.

The principle or doctrine of absolute Sovereign Immunity has been attacked for many years by legal writers, by text authorities and by numerous Judges. The absolute doctrine is recognized by only a few countries in the world. These authorities assert and appellees contend that even when Sovereign Immunity has been recognized and suggested by the State Department, the acceptance or rejection thereof is nevertheless a matter for the Courts—whether the action be in rem, or quasi in rem or in personam—and the Courts in their sole discretion may accept or reject the plea of Sovereign Immunity. They further assert that this principle of absolute Sovereign Immunity should be restricted and should apply only to situations and activities in which the foreign Country is acting or is involved in its national or governmental or public capacity and not in a proprietary or a commercial or private or non-governmental activity or capacity. However, where the State Department has (through appropriate channels) recognized the Sovereign Immunity of the foreign Country which is involved, and that Country has not waived its immunity or consented to the suit, the Supreme Court of the United States has never recognized this proposed *restricted* doctrine.

THE TATE LETTER

More importantly, appellees rely principally upon the so-called Tate Letter,⁶ which they contend (1) is the controlling law, (2) adopts the *restrictive* (foreign) Sovereign Immunity doctrine, and (3) allows American Courts *in every case* to accept or reject a Suggestion (or plea) of Sovereign Immunity by a foreign government (a) acting through the State Department and its appropriate channels or (b) itself raising the issue. [The Court then quotes from the Tate letter]

(1) Does the Tate letter *unqualifiedly* express a new and restrictive policy, practice, and position of the State Department, viz., the Department will no longer recognize the absolute Sovereign Immunity of a foreign

⁶ 1960 A.M.C. 898-901, Dept. of State Bulletin, volume 26, page 984.

Nation, but merely a *restrictive* Sovereign Immunity; and (2) can the State Department privately change or abandon its policy in its sole discretion in each particular case; and (3) is the final determination a matter for the Courts or for the Department?⁷

Although the language of the Tate letter appears to be clear, its exact meaning has caused some confusion. The Tate letter . . . states "For these reasons [the widespread practice on the part of governments of engaging in commercial activities] it will *hereafter* be the Department's policy to follow the *restrictive theory* of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity."

"It is realized that a *shift in policy* by the executive *cannot control* the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so."

The above quoted excerpts state in clear and unmistakable language that the Department has abandoned its long established principle of *absolute* governmental immunity and has *for the hereafter* adopted a new and restricted (restrictive) theory or principle of Sovereign Immunity, viz., absolute immunity does not apply to Governments when they are engaged in commercial activities. Furthermore, the Tate letter certainly implies—if indeed it does not clearly state—that the Department's conclusion and suggestion of sovereign immunity "cannot control" the Courts which are free to make their own determination. This would undoubtedly very substantially change, if not nullify, the prior well settled law of this Country on the subject of Sovereign Immunity. Irrespective of its clear meaning, it appears that the State Department has silently abandoned the "revised and restricted policy" set forth in the Tate letter and has substituted a case by case foreign Sovereign Immunity policy, *i.e.*, the State Department will recognize and suggest, or fail to recognize or grant or suggest Sovereign Immunity *in each case* presented to it, depending (a) upon the foreign and diplomatic relations which our Country has at that particular time with the other Country, and (2) the best interests of our Country at that particular time.

In *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 25-26 (C.C.A. 4, 1961), a Cuban ship had been libeled by an American corporation. In spite of Cuba's hostile attitude and belligerent actions toward our Country, and the fact that the ship was engaged in a commercial enterprise, a Suggestion of Immunity was filed by the United States Attorney General at the request of our State Department. The Circuit Court (for the 4th District) sustained the Suggestion of Immunity and dismissed the libel. The Court rejected all the arguments therein made, which were repeated by appellees in this case, and said (pp. 25, 26):

⁷ It should be noted that in all cases in which the State Department has not advised a Court of its determination of Sovereign Immunity, the determination thereof is properly a matter for the Court in the light of all the facts in that particular case. . . .

"The vessel Bahia de Nipe sailed on August 8, 1961, from Cuba with a cargo of 5,000 bags of sugar destined for a Russian port. * * *

"The libellants argue that before sovereign immunity may be granted they should be heard by the court on whether the foreign government is in fact the owner and possessor of the property in question and, as to the ship, whether she was operated by that government not commercially but in a public capacity.

"Despite these contentions, we conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry. . . . We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion."

Two individual claimants in the Rich case on September 9, 1961, petitioned the Supreme Court of the United States for a stay, on the ground that " * * * the suggestion of immunity had been issued in violation of the State Department's policy as set forth in the Tate letter." In response and in opposition to that application, the Solicitor General filed a Memorandum for the United States and said:

" 'Similarly, the applicants' reliance on the so-called "Tate letter"—dealing with the State Department's policy towards foreign government-owned vessels operated in commercial or mercantile pursuits—is misplaced. That letter does set forth the considerations which the Department will take into account in determining whether or not to recognize a claim of immunity by a foreign sovereign. *But it is wholly and solely a guide to the State Department's own policy, not the declaration of a rule of law or even of an unalterable policy position*; and, in addition, it sets forth only some of the governing considerations and does not purport to be all-inclusive or exclusive. Here, the State Department has, in fact, recognized Cuba's claim to immunity, after taking into account all pertinent factors * * *

On September 11, 1961, Chief Justice Warren denied the application for a stay. . . .

It would appear from the Solicitor General's aforesaid memorandum or brief and the aforesaid Order of Chief Justice Warren, that *Ex Parte Peru* and *Republic of Mexico* are still the law and that Sovereign Immunity when properly presented and not waived, is a matter for the *conclusive* determination of the State Department and not a matter for the Courts.

It is our conclusion, therefore, (1) that Sovereign Immunity of foreign Governments is a matter for determination in the first instance by the Executive Branch of the Government, namely, the State Department; and (2) if and when that Department's determination has been made and has been appropriately presented to the Courts, the Department's determination is binding and conclusive up the Courts.

.

[The court rejected an argument based on the Sabbatino Amendment to the Foreign Assistance Act of October 7, 1964, 22 U.S.C.A. §2370 (e).]

We believe that the decisions of the Supreme Court of the United States and of this Court which are hereinabove quoted or cited control

this case, and require this Court to grant the writ of prohibition prayed for by Venezuela.

Appeal of Venezuela quashed. A writ of prohibition is issued, directed to the Judges of the lower Court dissolving plaintiffs' attachment and dismissing plaintiffs' complaint.

[Separate opinions of Roberts (concurring and dissenting) and of Jones (concurring) omitted.]

MUSMANNO, Justice (dissenting).

BRIEF STATEMENT ON SCOPE OF DISSENTING OPINION

Involved in this case is an expropriation of the property of American citizens by the Venezuelan government not only without fair compensation as required by International Law but with an accompanying arrogant refusal to even enter into any settlement negotiations. Moreover, the role of our State Department is most puzzling and inconsistent with its own expressed policy.

The plaintiff began its lawsuit after the State Department tried unsuccessfully to bring the Venezuelan Government to a conference discussion. After the action was filed, the State Department scheduled a hearing and received briefs to determine whether—as a *matter of law, not policy*—the Venezuelan Government was immune from suit under the Sovereign Immunity doctrine. The legal advisor of the Secretary of State decided as a *legal* matter that the Sovereign Immunity doctrine should be invoked and filed such a plea in behalf of the Venezuelan government. In so doing the State Department obviously invaded the jurisdiction of the Courts and for that reason alone the judiciary must approach the problem as if the State Department had not intervened at all.

Moreover, even if the State Department had decided to intervene because of some urgent policy considerations and not on the basis of the legal issues, the case is nevertheless subject to a judicial examination which quite conclusively demonstrates that the circumstances in this case do not warrant invocation of the Sovereign Immunity doctrine. At the outset we are instructed by the Supreme Court of the United States in the *Republic of China* case that the doctrine is not one which emanates from the Executive Department. On the contrary, the Court emphasized that it was judicially created, and, as such, is subject to judicial modification or even elimination, as changing times and circumstances require.

Indeed, even before the official proclamation of the Department of State in the form of the Tate Bulletin there had been a gradual erosion of the doctrine so that courts were loath to invoke the doctrine except under the most compelling circumstances. The Tate Proclamation was by its own terms expressly intended to change the policy and leave the determination of the applicability of the policy to the courts. It specifically declared that the Department's policy, thenceforth, would be "to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity."

The Tate proclamation was rendered in 1952 and, therefore follows, in date, the decisions relied on by the Majority. The *Republic of China* case, the last expression of the Supreme Court on the subject, recognizes and points up this fact, giving express approval to the restrictive theory and the recognition of it in the Tate proclamation. The Supreme Court's decision makes it quite clear, therefore, that the present policy of the United States Government is to follow the restrictive theory of sovereign immunity, and that the doctrine of absolute sovereign immunity should not be invoked except under the most compelling circumstances, as where national security is involved. Such is not remotely involved here.

.

EXECUTIVE DEPARTMENT NOT SUPREME

Surveying and appraising what has been done by Venezuela here, it would be difficult to conjure up a more flagrant violation of the property rights of American citizens who are being urged, in the interest of the Good Neighbor Policy, to invest in Latin America. The Majority Opinion says that no matter how unjust or unfair Venezuela has been to American citizens, to the American people, or even to our judicial system, this Court is powerless to protect Americans once the State Department hints Foreign Sovereign Immunity.

I believe that the Majority, in asserting such helplessness, not only does a great injustice to the plaintiff in this case but it works, in addition, an incalculable harm to the fundamental concept of our American form of government, namely, that each of its three departments acts independently of the other two and none is presumed to be infallible in the discharge of its prescribed duties.

The Majority is of the opinion that once the Executive Department of our government speaks, the Judiciary Department may not question what the Executive Department has said or even inquire into the circumstances which brought about the Executive Department's utterance. Nothing in the Constitution, no expression in statutory law, no precedent in court decisions, and, needless to say, nothing in the chronicles of deliberation of our founding fathers, does or can justify so startling a proposition. The decision of this Court is even more astonishing because the very Department which this Court declares infallible has denied infallibility and has specifically announced, as a matter of official policy, that foreign sovereign immunity in commercial transactions is something not to be decided unilaterally by the State Department, but is a matter for adjudication in the Courts.

.

. . . [T]o the extent that sovereign immunity exists, it is a creature of the Courts, not the Executive Department of our government. And what the Courts have created, they can take away.

The Majority Opinion cites no case and quotes from no decision of the Supreme Court of the United States which strips that Court of its power

to determine whether sovereign immunity has been properly invoked. The *Republic of China* case, in fact, rules absolutely to the contrary. . . .

What the Majority overlooks in this, its present decision, is that sovereign immunity is not a constitutional mandate. . . .

Of course, it is obvious and indisputable that where the nation's security is involved, the Courts will support the foreign policy of the nation, as it is officially made known by the President of the United States. But that is not this case. It is not even close. We have here outrightly a commercial transaction. We have here the case of American businessmen, under the most absolute assurance of safeguarding by Venezuela, going into Venezuela, investing huge sums of money to develop Venezuela's resources with the official sanction and urging of the Venezuelan government, and then that same government confiscating, without compensation, the property of these American businessmen, property amounting, as already stated, to over a hundred million dollars.

MAJORITY'S ERRONEOUS CONCEPT

The Majority Opinion in this case is built on an erroneous concept of the law, namely, that once the State Department whispers sovereign immunity the Courts must close their doors to everyone who may come within the breeze of the zephyric suggestion. Fortunately, for the majesty of the law, the dignity of the courts, and the fair-minded administration of justice in America, that is not the case. In fact, that is not even the view of the State Department.¹

The State Department intervened in this litigation on the basis of a question of law, not policy. In a letter to the President of the plaintiff corporation, Chemical Natural Resources, Inc., the State Department said: "The decision of the Department of State in this matter was made in the light of *legal issues*." (Emphasis supplied.)

Thus, it must be obvious that we are not here considering any question of United States foreign policy. We are adjudicating legal issues and I certainly should not have to emphasize that legal issues are resolved by the judicial branch of our government, not the executive branch. . . .

The *claims of justice* guarantee to the plaintiffs here a forum in which to prosecute their case against a foreign government, engaged in commercial enterprise, without in any way embarrassing our government. . . .

[Justice Musmanno also took the position that the Sabbatino Amendment to the Foreign Assistance Act was intended to override sovereign immunity (as well as the act of state doctrine).]

MAJORITY CITES CASES WHICH ARE NOT CONTROLLING

Instead of accepting its responsibility and stoutheartedly recognizing the legal issue in this case, the Majority attempts to bolster an archaic doctrine with cases which have no resemblance to the fact situation before us. It says, for instance, that the decision in the case of *Ex parte Peru*, 318 U. S. 578 . . . is "controlling." It is not controlling. To begin

¹ Dept. of State Bulletin, Vol. 26, p. 984.

with, the *Peru* case preceded the Tate Proclamation which announced the restricted sovereign immunity rule, and, more importantly, it antedated the decision of the Supreme Court in the *Republic of China* case, which affirmed the restrictive sovereign doctrine. Moreover, the facts in *Peru* are wholly different from the facts in the case at bar. The Peruvian vessel "Ucayali" had been seized and was being detained at the time of the lawsuit. The ship in the instant case, the "Ciudad de Valencia," although originally attached, was released two days later and the proceedings here are *in personam* and not *in rem*. The plaintiff is not seeking execution on a judgment, it is not holding property belonging to the defendant, it is not embarrassing foreign relations between Venezuela and the United States. It is merely seeking an adjudication in an American court of its legal rights. Even if it obtains judgment, the question as to whether the judgment can be collected is something to be decided later but certainly it has the legal and constitutional prerogative to have its rights determined in a court of law.

In the *Peru* case the petitioner procured the release of the vessel by filing a surety release bond in the sum of \$60,000. There has been no such bond filed in this case. The whole ratio decidendi in the *Peru* case is the seizure and *detention* of a vessel. And I repeat, there is no detention here, there is no embarrassment to the United States, no impediment to Venezuela in carrying on its commercial enterprises with and in the United States. There is only a business transaction in which American citizens are seeking to litigate their claims in an American court, because they have, quite effectually, been denied an impartial forum in Venezuela.

The Majority Opinion says that the case of *F. W. Stone Engineering Co. v. Petroleos Mexicanos*, 352 Pa. 12, is "likewise pertinent and controlling," but since *Stone Engineering* is built on *Peru* and we have seen that *Peru* is no longer authority for the proposition urged by the defendant, *a fortiori*, *Stone Engineering* would not be authoritative in the case at bar. In addition, it is to be noted that in *Stone Engineering* our Court specifically stated that we accepted the Department of State's suggestion of immunity because it was a "determination with respect to political matters" concerning foreign relations. Exercising the most fertile imaginative creative faculty, it cannot be said that the litigation here involved, that is, the ascertainment of damages due to a breach of a business contract, constitutes a determination of "*political matters concerning foreign relations.*"

The case of *Rich v. Naviera Vacuba, S.A.*, 4 Cir., 295 F.2d 24, also cited by the Majority Opinion is also not controlling or relevant because there, again, there was a detained vessel and, in addition, the Suggestion of Immunity filed by the State Department specifically declared: "This is to inform you that it has been determined that the release of this vessel would avoid further disturbance to our international relations in the premises." No such precarious situation is presented or even hinted at

in the case at bar, and it is particularly to be noted that in the *Rich v. Naviera* case the litigation was permitted to *go to judgment* in spite of the international relationship phase, the judgment entered in favor of the plaintiff amounting to \$80,517.61. It was only when execution was attempted that the question of sovereign immunity arose. And I repeat that no execution or detention is involved in the instant case. The plaintiffs are seeking merely to have their case *adjudicated* as was done in *Rich v. Naviera*.

It is true, as the Majority's opinion points out, that in the *Rich v. Naviera* case the petition for certiorari was denied on the authority of the *Peru* case under the emergency circumstances which existed there, but I again call attention to the fact that the *Naviera* case had to do with execution on a judgment, an actual seizure of the vessel involved, whereas, in the case at bar, I repeat, we do not have the question of attachment, seizure or execution.

.

THE SOVEREIGN IMMUNITY RULE IS A RELIC OF THE LAW, OVERDUE FOR
INTERMENT IN A LEGAL MUSEUM

The doctrine of sovereign immunity rose from the fiction that kings were divinely anointed and, therefore, could do no wrong. Not only was this sovereign infallibility recognized in the realm over which the king reigned but it extended into other kingdoms because all the kings were in mutual conspiracy to prevent anybody from attacking their infallibility and subject them to such mundane annoyances as responsibility for debt. . . .

In time, monarchical government fell into desuetude and was succeeded by constitutional government but the fiction of sovereign immunity had carried on for so long and had always been approached with such reverential fear that even with the demise of its principal beneficiary, the aura of supreme authority still endured because one approaches even a dead lion with a certain sense of respect and awe.

.

America, however, was not so mesmerized as the rest of the world with the idea of governmental sanctification, and accordingly, as early as 1797, the United States Congress recognized the injustice of the doctrine and modified it to the extent that when the United States brought a civil action against an individual, the individual defendant was allowed to set off debts due him from the government. . . .

. . . in 1857 Congress boldly took the first step toward making government responsible for its debts by creating the Court of Claims. In 1877 Congress went further and gave concurrent jurisdiction to the United States Courts to entertain claims against the government sounding in contract. Then, by a series of acts, notably the Federal Employees' Compensation Act of 1916 (39 Stat. 742, 5 U.S.C. sec. 751 et seq.), the United States made itself liable to pay workmen's compensation to its employees.

Acknowledgment of governmental responsibility was further expanded by the passage in 1920 of the Suits in Admiralty Act, (41 Stat. 525, 46 U.S.C. 741 et seq.) followed in 1925 by a similar act applying even to actual ships of war. And then finally Congress almost wholly dismantled the wall surrounding sovereign irresponsibility by passage of the Federal Tort Claims Act of 1946, 60 Stat. 843, 28 U.S.C. sec. 1346(b).

After thus opening the gates of justice to American claimants, our government decided to make itself liable to foreign claimants as well because one should not be less just outside his house than he is under his own roof. The United States embarked on the policy of not claiming immunity for its publicly-owned or publicly-operated merchant vessels. . . .

The Majority Opinion in this case does not answer the question which inevitably springs up: Why should this government allow to foreign governments a privilege which it does not enjoy itself? Why should Venezuela be permitted to come into our courts and claim an immunity from a contractual obligation when the United States does not exercise that privilege in its relationship with its own citizens or with foreigners?

. . . I cannot understand why the government of Venezuela is guaranteed an immunity which the United States does not claim in any other country in the world. It is impossible for me to escape the conviction that this kind of a decision on the part of the Majority contributes to international irresponsibility and international disrespect for law.

This Court's decision promotes the idea of a promiscuous, general allowance of absolute sovereign immunity which could undermine the whole structure of international trade which depends on prompt liquidation of monetary obligations. No one denies that Venezuela, under its power of eminent domain, could take the plaintiff's property, but it is the most elementary, incontestable, fundamental ABC of international law that it must make payment for that taking.

The sovereign immunity doctrine, with the exception clearly spelled out in this opinion, is no longer a healthy manifestation of society. It is, in fact, an excrescence on the body of the law, it encourages irresponsibility to world order, it generates resentments and reprisals. Sovereign immunity is a stumbling block in the path of good neighborly relations between nations, it is a sour note in the symphony of international concord, it is a skeleton in the parliament of progress, it encourages government toward chicanery, deception and dishonesty. Sovereign immunity is a colossal effrontery, a brazen repudiation of international moral principles, it is a shameless fraud.

For these reasons, therefore, I must dissent to what the Majority has done and what, in the face of the dominant law, it has failed to do but should do.

Act of state doctrine—action by former owner to recover painting seized in Belgium during World War II by an organ of the National Socialist Party

MENZEL v. LIST. 49 Misc. 2d 300; 267 N.Y.S. 2d 804.*

Supreme Court, Special and Trial Term, New York County, Feb. 10, 1966. Arthur G. Klein, J.

This action in replevin was tried to the court and a jury. Plaintiff sought to recover a painting by Marc Chagall, which she and her husband had left in their apartment in Brussels when they fled in March, 1941, before the oncoming Nazis.

Treated by the Nazis as "decadent Jewish art," the painting was seized by the "Einsatzstab der Dienststellen des Reichsleiters Rosenberg" on or about March 31, 1941, and a certification or receipt left, indicating that the painting, among other works of art, had been taken into "safekeeping."

.

Search had been made by Mr. and Mrs. Menzel for the painting ever since the end of the war, but they were unable to locate it, until in 1962, it was discovered in the possession of defendant Albert A. List.

Demand, refusal, and this action followed.

List, a well-known art collector, defending, brought in as third-party defendants the proprietors of the gallery from which he purchased the painting, Klaus G. Perls and Amelia B. Perls, doing business as Perls Galleries. Perls likewise is a well-known art gallery.

.

The jury by its verdict for the plaintiff has established the identity of the painting, by whatever name, and whatever description; Mrs. Menzel's unqualified ownership of the painting; that the painting was looted and stolen from her apartment, as alleged in the complaint, and that the painting, or its value, which the jury fixed at \$22,500, be awarded to Mrs. Menzel; and that List upon delivery of the painting to Mrs. Menzel recover the \$22,500 from Perls Galleries.

The result reached is amply supported by the record, and the motion to set aside the verdict as contrary to the weight of the evidence is denied.

There remain for disposition, on the motion to set aside, numerous questions of law which have been earnestly and forcefully pressed by able counsel for the defense and vigorously opposed by learned counsel for plaintiff.

These include:

* Excerpted opinion. Certain footnotes and citations omitted.

(I) the defense of the Statutes of Limitations of New York and Belgium;

(II) the plaintiff having fled Belgium, abandoned everything in her apartment;

(III) the painting was captured by occupying land forces on land and title accordingly passed to the nation prosecuting the war;

(IV) the painting was lawfully requisitioned by German authority, as an occupying power in the prosecution of the law and as confiscation of the property of its nationals;

(V) that the defendants are bona fide purchasers of the painting for value.

In their supplemental brief, the third-party defendants, planting themselves upon *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398 . . . (1964), urge with respect to IV, above, the applicability of the Act of State Doctrine; they assert that this Court should not "assume jurisdiction to determine title as of 1941 to the property seized, requisitioned, confiscated or expropriated by duly authorized German officers from one of its own nationals, blacklisted as an enemy of the State" because of the "fortuitous" circumstance that the property was found here.

The court will treat these grounds *seriatim*. The resolution of these problems is made the more difficult in view of the fact that one of two innocent parties must bear the loss.

I.

The court held the defense of the Statute of Limitations inapplicable because in

"replevin, as well as in conversion, the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand."

II.

Abandonment is defined as a voluntary relinquishment of a known right . . . with no intent to reclaim . . . ; and see, particularly, *Collac c. Etat Serbe-Croate-Slovene* [*Yugoslavia*], IX Recueil des Decisions des Tribunaux Arbitraux Mixtes, 195 (Tribunal Arbitral Mixte Hungaro-Serbe-Croate-Slovene, 15 Mai 1929).

In *Collac*, it was held that personal property temporarily abandoned at the approach of the enemy, without the relinquishment of the owner's right of ownership, is neither foreclosed nor forfeited.

The relinquishment here by the Menzels in order to flee for their lives was no more voluntary than the relinquishment of property during a holdup . . . , and from the history of their search for the painting, there was obviously a continuing intent to reclaim.

The court finds, accordingly, as a matter of law, that there was here no abandonment.

III.

Nor may this seizure be treated as lawful booty of war by conquering armies.

If the seizure is to be classified at all, it is to be classified as plunder and pillage, as those terms are understood in international and military law.

A.

Booty is defined as property necessary and indispensable for the conduct of war, such as food, means of transportation, and means of communication; and is lawfully taken. See V Hackworth, *Digest of International Law*, pp. 682, 689 *et seq.*; *Planters' Bank v. Union Bank*, 16 Wall. 483, 495, 21 L.Ed. 473 (U.S. 1872).

Booty is described in the Annex to the Hague Convention of 1907 "between the United States and other Powers relative to the opening of hostilities," October 18, 1907, proclaimed February 28, 1910, 36 U.S. Stat. at L. 2259, Art. 53, at 2308:

"An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations."¹

The Hitler Government's definition was somewhat broader, but even that definition did not include works of art. . . .

B.

Pillage, or *plunder*, on the other hand, is the taking of private property not necessary for the immediate prosecution of war effort, and is unlawful. VI Hackworth, *op. cit. supra*, at 403.

¹ Cf. Rules of Land Warfare, War Department of the United States:

"292. Means of transportation.—The military occupant exercises authority over all means of transportation, both public and private within the occupied district and may seize and utilize them and regulate their operation.

"321. Two classes of movable property.—All movable property belonging to the State directly susceptible of military use may be taken possession of as booty and utilized for the benefit of the invader's government. Other movable property, not directly susceptible of military use, must be respected and cannot be appropriated.

"329. Pillage is formally forbidden.

"332. What included in rule.—The foregoing rule [art. LIII, par. 2, of the regulations annexed to the Hague convention quoted ante] includes everything susceptible of direct military use, such as cables, telephone, and telegraph plants, horses, and other draft and riding animals, motors, bicycles, motorcycles, carts, wagons, carriages, railways, railway plants, tramways, ships in port, all manner of craft in canals and rivers, balloons, airships, airplanes, depots of arms, whether military or sporting, and in general all kinds of war material." Basic Field Manual (FM 27-10, 1940) 77, 82, 84.

Similar provisions are contained in the July 1956 revision, Department of the Army, FM 27-10.

Where pillage has taken place, the title of the original owner is not extinguished. *Mazzoni v. Finanze dello Stato*, LII Il Foro Italiano 960 (Tribunale di Venezia, 1927); *Collac c. Yugoslavia*, *supra*, IX Recueil des Decisions des Tribunaux Arbitraux Mixtes 195; VI Hackworth, *supra*, at 403.

Said the Venetian Court in *Mazzoni*, as translated and digested in Annual Digest of Public International Law Cases, 1927-1928 (London, 1931) at 564-565:

"The argument that the property of citizens absent from occupied territory is to be considered *res nullius*, or war booty, cannot be admitted. * * *

"The principle based upon the Roman Law according to which property seized during a war is put on an equal footing with the property seized in the air, in the sea or in the earth, and which in a similar way becomes the property of the captor—since the right of war constitutes a just cause of acquisition—may be applicable to things liable or apt to be used for the needs of the army and belonging to the other belligerent. But it cannot be applied to private property which, if it has not become the object of requisition or sequestration, must be restored or compensated. The objects involved in the present case are private property which had not been requisitioned or sequestered as it could not be used for the needs of the army. Their seizure must therefore be considered as having been effected by pillage.' "

Similarly, in *Collac (supra)*, it was held that personal property left behind at the approach of the enemy cannot automatically be considered as war booty; but it must be ascertained whether they belonged to a private person who, having *temporarily abandoned them*, has not relinquished his rights of ownership in such property.

Indeed, the very description of the acts of Einsatzstab Rosenberg, in *United States et al. v. Goering et al.*, *infra*, is entitled "Pillage of Public and Private Property". 6 F.R.D. at 120.

And in the first order issued by the 21st Army Group, July, 1944, upon the return of Allied Forces to the French beachhead, where the question arose what German property was booty ("butin de guerre"), under the general principles of the laws of war, it was provided:

"The Germans have acquired no title to private movable property * * * which has been acquired by theft, looting, or pillage." Note to Article By Dr. Smith, *supra*, 23 Brit. Y.B. Intl. L. at 238-239 (1946).

IV.

We come now to the assertion that the Act of State Doctrine precludes any inquiry by this court into the validity of the acts of the Nazis.

The doctrine states, in terms of the most recent opinion on the subject by the Supreme Court of the United States, that "the Judicial Branch [of the government] will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty

or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law". *Banco Nacional de Cuba v. Sabbatino*, *supra*, 376 U. S. 398, 428 (1964), *supra*.

.

Analysis of the doctrine, as thus stated by the Supreme Court, indicates that invocation of the doctrine rests upon the confluence of four factors:

- (A) the taking must be by a foreign sovereign government;
- (B) the taking must be within the territorial limitations of that government;
- (C) the foreign government must be extant and recognized by this country at the time of suit;
- (D) the taking must not be violative of a treaty obligation.

Analysis of the facts in the case at bar and the Court's own research into controlling principles lead inexorably to the conclusion that of these four factors, not one has been met.

A.

The taking was not by a foreign sovereign government.

.

In the circumstances, the Court finds that this painting was seized not by a foreign sovereign government but rather by "The Centre for National Socialist Ideological and Educational Research", an organ of the Nazi Party.

B.

The taking was not within the territory of the foreign government.

Since, as indicated, the taking was not by a foreign sovereign, the location of the property as within or without its jurisdiction is moot.

However, assuming, *arguendo*, that the taking had been by the German Government, it would nevertheless be invalid because not within its own territory.

Brussels, the site of the appropriation of the painting, was the territory of Belgium. The government of the Kingdom of Belgium in exile, in March 1941, was the recognized government of Belgium. The governments of Belgium and Holland "continue to exist as international entities".

"Military occupation, by itself, does not confer title, nor extinguish a nation."

"[S]o long as a people do not accept military conquest; so long as they can manifest, in one way or another, their inalterable will to regain their freedom, their sovereignty, even though flouted, restricted, and sent into exile, still persists." (35 Am. Journ. Int. Law, 666, 667 [October 1941].)

C.

The Third Reich was neither extant nor recognized by the Government of the United States at the time of trial.

The Third Reich collapsed with the surrender in 1945. See *The Axis in Defeat* [Department of State, Publication 2423] page 45, Declaration regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers, June 5, 1945.

D.

The seizure of this painting was in violation of specific treaty obligations to the United States.

The Hague Conventions, to which Belgium, Germany, and the United States were parties, provided for "recourse * * * to the good offices or mediation of one or more friendly Powers * * * before an appeal to arms." 1899 Convention, Title II, Art. II; 32 Stat. at Large 1779, 1785. A similar clause was inserted in the Convention for Pacific Settlement of International Disputes, of 1907 (pt. II, art. 2; 36 U. S. Stat. 2199, 2212).

In the accompanying 1907 Convention Relative to the Opening of Hostilities, Article 1 provided:

"The Contracting Powers recognize that *hostilities* between themselves *must not commence without previous and explicit warning*, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war." (36 U. S. Stat. 2271; italics supplied.)

Article 56 of the simultaneous Convention Respecting the Laws and Customs of War on Land provided as follows:

"The property of municipalities, of religious, charitable, educational, artistic and scientific institutions, although belonging to the State, is to be accorded the same standing as private property. All pre-meditated seizure, destruction or damage of such institutions, historical monuments, works of art and science, is forbidden * * *." (36 U. S. Stat. 2309; 6 F.R.D. 69, 120.)

And Articles 46 and 47 provided as follows:

"Article 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."

"*Private property cannot be confiscated.*" (36 U. S. Stat. 2306-2307; italics supplied.)

"Article 47. *Pillage is formally forbidden.*"² (36 U. S. Stat. 2307; italics supplied.)

²The Pact of Paris, also known as the Kellogg-Briand Peace Pact of 1928, was likewise entered into by Belgium, Germany, and the United States. It provided:

"Outlawry of War.

"Article I

"The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international contro-

1.

The very invasion of Belgium was a violation of these solemn treaty obligations. *United States v. Goering, supra*, 6 F.R.D. at 102, 108.³

2.

The pillage so rampant during Nazi occupation was specifically held to be in violation of Article 56 of the Hague Convention of 1907. *United States v. Goering, supra*, 6 F.R.D. at 120-123.

Accordingly, in any view of the case, the Act of State Doctrine has no application.

E.

The application of the "Bernstein Exception" to the Act of State Doctrine has been both vigorously asserted by the defense and opposed by the plaintiff.

.

Since the Court is of the opinion that the Act of State Doctrine itself has no application to the case, it is unnecessary to pass upon an exception to the doctrine.

.

V.

A.

It is of no moment that Perls Galleries may have been a *bona fide* purchaser of the painting, in good faith and for value and without knowledge of the saga of the Menzels. No less is expected of an art gallery of distinction.

Throughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith. And the principle has been basic in the law that a thief conveys no title as against the true owner. *Silisbury v. McCoon*, 3 N.Y. 379, 383-384 (1850); II Kent Comm. 14th ed., per Holmes, 324-325.

"Provisions of law for the protection of purchasers in good faith which versies, and renounce it as an instrument of national policy in their relations with one another.

"Article II

"The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be which may arise among them, shall never be sought except by pacific means." (46 U. S. Stat. 2343 *et seq.*)

³ As Henry L. Stimson, the Secretary of State of the United States, said, in 1932:

"War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world * * * an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law * * *. We denounce them as law breakers." Quoted at 6 F.R.D. 108.

would defeat restitution [of Nazi confiscations] shall be disregarded." Law #59, U. S. Military Government for Germany, 10 Nov. 1947; Military Government Gazette, Amtsblatt der Militärregierung Deutschland, Amerikanisches Kontrollgebiet, Part I, Article 1, Para. 2. Cf. Re, Developments in Sovereign Immunity, 1 N.Y.L.F. 160, 201 (1955).

CONCLUSION

The jury has found plaintiff to be the sole and rightful owner of the painting. The court has found that she never abandoned it but that it was pillaged and plundered by the Nazis. No title could have been conveyed by them as against the rightful owners. The law stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors.

The motion to set aside the verdict is in all respects denied. Judgment may be entered accordingly.

CASE NOTES

Sovereign immunity—foreign state immune from suit for sovereign (jure imperii) act despite Sabbatino Amendment which held to relate only to scope of permissible inquiry once jurisdiction established

American Hawaiian Ventures, Inc. (Hawaiian) brought a libel in admiralty against Djakarta Lloyd Lines (Djakarta), allegedly a wholly-owned agency of the Government of the Republic of Indonesia (Indonesia), as respondent *in personam* and against a motor vessel owned by Djakarta as respondent *in rem*. Hawaiian sought damages for the alleged tortious conversion by Indonesia of its rubber plantation and related property, including loading boats, in and about the Island of Sumatra. The District Court sustained all of Djakarta's six exceptions and dismissed the libel. The first five of these exceptions were previously sustained in an unreported decision involving the same parties in the United States District Court for the Southern District of California (Order of May 14, 1965). The sixth exception was *res judicata*.

The court held that the action

was not properly within admiralty jurisdiction since libelants' grievances do not arise to a significant degree from any maritime tort or relationship. . . . Beyond dispute the present action is overwhelmingly one for conversion on Sumatra proper of non-maritime property, a conversion having no flavor of admiralty whatsoever. The added assertion of incidental seizures of loading vessels . . . is insufficient to work some magical conversion of this suit into one of admiralty.

The libel *in rem* of the vessel could not be entertained, since no maritime contract with it nor injury of which it was the instrumentality was alleged. There was no basis for a libel *in personam* against Djakarta, since Djakarta did not participate in the seizure of Hawaiian's property.

If Indonesia rather than Djakarta was the real party in interest, the

court "lacks personal jurisdiction because of Indonesia's immunity to suit without its consent."

To be sure, the defense of sovereign immunity is not always allowed in actions involving the operation of non-military vessels by a foreign government. *Victory Transport v. Comisaria*, 336 F. 2d 353 (2nd Cir. 1964). . . . In that case the Court of Appeals explained that the privilege of immunity is strictly construed and granted only to a foreign state's public or sovereign acts (*jure imperii*), and not to its commercial activities (*jure gestionis*). . . .

In addition, however, that opinion listed several classes of actions typically considered *jure imperii* and afforded sovereign immunity when the country does not consent to be sued. Specifically included in that list was the expropriation of the kind involved here. . . .

Libelant had also asserted that the Sabbatino Amendment to the 1964 Foreign Assistance Act, §620 (e) (2), 78 Stat. 1013 (1964), deprived Indonesia of its claim to sovereign immunity. This was flatly denied by the court as "incorrect":

In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court ruled that American Courts were precluded by the Act of State Doctrine from determining whether a Nation's expropriation of American property violated international law. All the "Sabbatino Amendment" does is to overrule that decision and direct the courts to pass on this question unless the State Department requests that it refrain therefrom.

Both the case and the Amendment dealt only with the scope of inquiry permissible once the suit was heard. There was no question in *Sabbatino* of the Court's jurisdiction to hear a suit against Cuba, because an agent of Cuba had appeared voluntarily as plaintiff to claim proceeds of the sale of sugar which had been expropriated. Thus, the Amendment does not bear on the threshold question of whether this Court's jurisdiction over Indonesia would be defeated by its right to sovereign immunity for acts *jure imperii*. . . .

Finally, the libelant attempted to cure its defective pleading of a cause in admiralty by asserting that its allegation that its vessels were seized on the navigable waters and high seas in and around Indonesia alleged an act of piracy which "is *prima facie* a maritime tort." The court rejected this, saying: ". . . [I]t is unmistakably clear from a reading of the cases and authorities that such seizure must be done without color of authority and with the spirit of universal hostility (*animo forandi*) against the world." The confiscatory acts of the Government of Indonesia did not fit within the definition. *American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary and Djakarta Lloyd Lines* (U.S. Dist. Ct., N.J., Feb. 10, 1966).

Restrictive theory of sovereign immunity—suit against agency of Greek Government engaged in commerce—service by mail on an agency upheld

The Kingdom of Greece's Ministry of Commerce State Purchase Directorate (Kingdom) appealed from an order of the United States District

Court for the Southern District of New York directing it to proceed to arbitration. The dispute to be arbitrated arose out of a charter party agreement signed in New York City in 1960 between the respondent Kingdom and the Petrol Shipping Corporation (Petrol) as owner of the tanker *Atlantis*.

The purpose of the charter party was to provide for transportation of grain acquired by the Kingdom of Greece from the United States Government under the Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. 1691 *et seq.* The grain was to be shipped, at least 50% in U.S. flag vessels, from Houston, Texas, and/or Baton Rouge, Louisiana, to Piraeus, Greece. The *Atlantis*, one of the carriers, allegedly sustained bottom damage at the discharge berth, amounting to \$287,000, because the berth was unsafe.

The charter party agreement contained a clause providing for arbitration in New York before a panel of three "commercial men." After the respondent, Kingdom, failed to appear for arbitration, Petrol petitioned the District Court to compel arbitration. Service of process was effected by mail on the Kingdom's State Purchase Directorate offices in Washington and New York. This petition was denied on the ground of sovereign immunity of the Kingdom. On appeal, the decision was reversed and remanded to the District Court for it to determine the position of the State Department on the availability of sovereign immunity (see 58 A.J.I.L. 998 (1964)).

Despite a letter from the Greek Ambassador requesting the recognition of immunity, the State Department declined to grant immunity, referring to the Tate letter and stating that the Greek activities were private acts (*jure gestionis*). This position was based upon *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2nd Cir. 1964), 59 A.J.I.L. 388 (1965). The District Court, relying on *Victory Transport*, directed the Kingdom to proceed to arbitration, refusing to recognize any sovereign immunity. On appeal, this decision was affirmed.

The Court of Appeals stated:

The proper theoretical approach to the issues in this case is indicated by the brief of the United States as *amicus curiae* in the rehearing *en banc* [of the first action]. There . . . the brief states,

"the immunity of sovereign did not present a 'jurisdictional' defect such as improper service might. Under the Supreme Court's analysis [in *Ex Parte [Republic of] Peru*, 18 U. S. 578 . . . (1943)], it appears that in an action against a sovereign just as in any other suit, jurisdiction must be acquired either by service of process, or by the defendant's appearance in court, or in rem by seizure and control of property. Only after such jurisdiction is acquired, does the sovereign immunity defense property [*sic*] come into consideration. Instead of being a 'jurisdictional' matter in the same sense as acquiring jurisdiction over a person or property, sovereign immunity presents a ground for relinquishing the jurisdiction previously acquired." 360 F.2d at 106.

The court proceeded to discuss the following issues: (1) jurisdiction, (2) service, and (3) immunity. As to the first, it ruled that "the question of immunity does not bear on the question of amenability, or personal jurisdiction." By entering into the arbitration agreement, the Kingdom had made itself amenable to suit. As to the service of process, the court was dealing with a *casus omissus* both in the Federal Rules and in New York law:

The absence of provision in either as to the manner of serving a foreign government cannot reasonably be considered to manifest a policy that no *in personam* actions against foreign sovereigns could ever be brought. It reflects rather that until the treaties and declarations of the decade beginning in 1948, restricting immunity of foreign governments to public or sovereign acts . . . there was no occasion to make provision for service upon them, and that legislators and rulemakers have failed to catch up in their procedural provisions with the more substantive developments in this field of law. Moreover, in sharp contrast to diversity actions against foreign corporations, the fashioning of provisions with respect to service of foreign governments is a task peculiarly appropriate for federal courts. . . .

In the light of the above, we are not disposed to follow *Oster v. Dominion of Canada*, 144 F.Supp. 746 (N.D.N.Y.),¹ . . . or *Purdy Co. v. Argentina* . . . to the extent they hold that a sovereign cannot be served in federal court. See also *Berlanti Const. Co. v. Republic of Cuba*, 190 F.Supp. 126 (S.D.N.Y. 1960), where personal service in Havana, Cuba, on the Minister of the Presidency of the Republic of Cuba, was held invalid . . .

This is not to say that service on the sovereign may be effected on any representative of the sovereign. See *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978 (D.C.Cir.1965). We hold only that service on the branch which is a party to the contract sued on is sufficient.

Finally, it has not been suggested, nor do we believe, that the service here was inconsistent with due process.

The District Court holding on sovereign immunity was upheld. The Court of Appeals viewed the present case as even a stronger case for the denial of immunity than *Victory Transport*, since advice had been received from the State Department rejecting the claim of sovereign immunity. *Petrol Shipping Corporation*, 360 F.2d 103 (Ct. App., 2d Cir., April 21, 1966).

Sovereign immunity—Indian Code of Civil Procedure governs question of immunity

This appeal to the Supreme Court of India concerned an alleged breach of contract by the United Arab Republic and the Ministry of Economy, Supplies, Importation Department, of the Republic of Egypt. The

¹ The court in *Oster* relied on *Clark County, Nev. v. City of Los Angeles*, 92 F. Supp. 28 (D.Nev.1950), for the proposition that there is no authority for service of process in a manner other than is set forth in the Federal Rules. But in *Clark*, suit was against a municipal corporation, a category of defendant service on which is covered by the Rules. Rule 4(d) (6). That method, of course, is exclusive; but the case is not authority for the holding in *Oster*, since the Rules are silent as to the category of defendant there.

plaintiff-appellant, an Indian, argued that the U.A.R. should not be immune from suit, because sovereign immunity is no longer "an absolute and unqualified doctrine." The Court of Appeals had dismissed the case, on the ground that international law "recognizes the absolute immunity of sovereign independent states from being sued."

In affirming, the Supreme Court ruled that it was not necessary to consider the question of immunity under international law, since Sec. 86(1) of the Code of Civil Procedure had not been complied with. This provides:

No Ruler of a foreign State may be sued in any court otherwise competent to try the suit except with the consent of the Central Government in writing by a Secretary to that Government.

The court held that Sec. 86(1) "applies to cases where suits are brought against Rulers of foreign States and that foreign States fall within its scope whatever be their form of Government." The court's views as to the relationship of this rule to international law were as follows:

The effect of the provisions of s.86(1) appears to be that it makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under international law. It is not disputed that every sovereign State is competent to make its own laws in relation to the rights and liabilities of foreign States to be sued within its own municipal courts. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for the rights and liabilities of foreign States to sue and be sued in its municipal courts. That being so, it would be legitimate to hold that the effect of s.86(1) is to modify to a certain extent the doctrine of immunity recognised by International Law. This action provides that foreign States can be sued within the municipal courts of India with the Consent of the Central Government and when such consent is granted as required by s.86(1), it would not be open to a foreign State to rely on the doctrine of immunity under International Law, because the municipal courts in India would be bound by the statutory provisions, such as those contained in the Code of Civil Procedure.

Kashini v. United Arab Republic, Supreme Court of India, Civil Appellate Jurisdiction, Civil Appeal No. 220 of 1964 (Aug. 6, 1965).*

Cuban Assets Control Regulations—Constitutionality sustained

Section 201 of the Cuban Assets Control Regulations, 31 C.F.R. §515.201, issued pursuant to Section 5(b)(1) of the Trading with the Enemy Act, 50 U.S.C. App. §5(b)(1), prohibits transfers outside the United States of property owned by Cuban nationals except with specific authorization. Plaintiff, a Cuban residing in Havana and having \$7,000 in a savings account with a New York bank which he wished remitted to Cuba, instituted an action against the Federal Reserve Bank of New York and the Secretary of the Treasury to obtain a license or a declaration that none

* Text of decision made available by Mr. Bruno Ristau of the Department of Justice.

was required on the ground that the Regulations were not authorized by the statute and the Regulations were unconstitutional.

The United States Court of Appeals for the Second Circuit, affirming the District Court's dismissal of the action, held that the Cuban Assets Control Regulations were authorized by the Trading with the Enemy Act and, citing *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936), that the Act and the Regulations were constitutional. In dealing with the contention that the Regulations deprived plaintiff of his property without due process of law in violation of the Fifth Amendment, the court concluded that, while plaintiff (though a non-resident alien) was entitled to the protection of the Fifth Amendment and the Regulations operated to deprive him of his property, despite the Government's argument to the contrary, the Regulations did not violate the Fifth Amendment's due process requirements:

It does not follow that in dealing with the property of an alien the United States must be blind to the acts of the country of which he is a national; the Constitution protects the alien from arbitrary action by our government but not from reasonable response to such action by his own. The world today is not the classical international law world of black squares and white squares, where everyone is either an enemy or a friend. We are not formally at war with Cuba but only in a technical sense are we at peace. . . . The founders could not have meant to tie one of the nation's hands behind its back by requiring it to treat as a friend a country which has launched a campaign of subversion throughout the Western Hemisphere. Compare *Dennis v. United States*, 341 U.S. 494, 561-70 (1951) (concurring opinion of Mr. Justice Jackson). Hard currency is a weapon in the struggle between the free and the communist worlds; it would be a strange reading of the Constitution to regard it as demanding depletion of dollar resources for the benefit of a government¹ seeking to create a base for activities inimical to our national welfare. The Supreme Court's approval of wartime seizure of assets of a non-enemy alien "as a means of avoiding the use of the property to draw earnings or wealth out of this country to territory where it may more likely be used to assist the enemy than if it remains in the hands of his government," *Silesian-American Corp. v. Clark*, 332 U.S. 469, 476 (1947), is broad enough to justify the refusal of a license to Sardino.

Still other considerations support the constitutionality of the freezing order. Cuba has adopted a program expropriating property within its territory owned by designated American nationals, with a system of compensation holding out only an "illusory" possibility of payment. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401-05 and nn. 3, 4 and 7 (1964). Although recognizing the Cuban expropriation under the act of state doctrine, the Court in that case pointed to the very freezing regulations here at issue as exemplifying "the capacity of the political branches to assure, through a variety of techniques . . . that the national interest is protected against a country which is thought to be improperly denying the rights of

¹ Any dollar exchange received by Sardino would have to be exchanged for pesos at the National Bank of Cuba within ten days, Law No. 30 of Feb. 23, 1961, Art. 23, 29 Leyes del Gobierno Provisional de la Revolución 25 (1961); 13 International Monetary Fund Annual Report on Exchange Restrictions 91 (1962).

United States citizens." 376 U. S. at 412. We see no need to debate whether this approving nod was dictum or a ground for recognition of the expropriation of property of our nationals in Cuba, which the Court might have declined to make if it had thought the United States powerless to protect itself by freezing the property of Cuban nationals here. There is a long history of governmental action compensating our own citizens out of foreign assets in this country for wrongs done them by foreign governments abroad. A famous instance is the Litvinov Assignment by which claims of the Soviet Union and its nationals against the United States and its nationals were transferred to our Government to be used to reimburse American citizens whose property had been seized in Russia. See *United States v. Belmont*, 301 U. S. 324 (1937), and *United States v. Pink*, 315 U. S. 203 (1942). Although there the taking of the assets of the Russian corporations had been accomplished by their own government and the foreign creditors in *Pink* had no rights of ownership in the corporate assets transferred to the United States, other precedents cannot be disposed of on those grounds. The Treaty of Berlin, 42 Stat. 1939, 1940-41 (1921) terminating World War I with Germany, confirmed the retention of vested enemy property in the control of the United States until the German government had satisfied all war claims of our citizens; the Supreme Court has said "it does not matter whether this action was taken simply to secure claims of American citizens against Germany or was regarded as the rightful withholding of spoils of war." *Guessefeldt v. McGrath*, 342 U. S. 308, 313-14 (1952). The treaties of peace with Bulgaria, Hungary and Roumania at the end of World War II provided that any property of their nationals, blocked long before we were at war, Exec. Order No. 8389 of April 10, 1940, should vest in an agency or officer designated by the President and, after payment of debts owed by the owner, should be used to pay claims of United States nationals against the three countries. 22 U.S.C. §§1631a, 1641a. While these had been enemy countries, it is not clear that this was crucial. See *Guessefeldt v. McGrath*, *supra*; 2 O'Connell, *International Law* 846-48 (1965). In any event Congress followed the same course to compensate United States citizens for Czechoslovakian expropriations occurring after the war, setting up a fund out of the proceeds of Czech-owned steel mill equipment ordered here in 1947 and blocked and sold in 1954 by the Secretary of the Treasury. 22 U. S. §§1642a, c, and 1; see 1958 U. S. Code Cong. & Ad. News 3299, 3301.

Congress has already taken steps to determine the claims of our nationals against Cuba, 22 U. S. C. §1643, although without as yet providing for their payment. In *Propper v. Clark*, 337 U.S. 472, 484 (1949), the Court noted that a pre-war freezing order served the salutary purpose of immobilizing the assets of foreign nationals until our Government could determine whether they were needed "to compensate our citizens or ourselves for the damages done by the governments of the nationals affected." This would seem a rather clear intimation that if Congress should ultimately choose to apply the blocked assets of Cuban nationals to that purpose, the Fifth Amendment would not stand in its way. The unquestioned right of a state to protect its nationals in their persons and property while in a foreign country, see 1 Oppenheim, *International Law* §319 at 686-87 (8th ed. Lauterpacht 1955), must permit initial seizure and ultimate expropriation of assets of nationals of that country in its own territory if other methods of securing compensation for its

nationals should fail. See Colbert, *Retaliation in International Law* 63-69 (1948). To be sure, Congress has not yet chosen to invoke the ultimate sanction, having indeed eliminated a provision for the sale of certain Cuban assets to pay the expenses of administering the claims program, see 79 Stat. 988 (1965), amending 78 Stat. 1113 (1964), and 1965 U. S. Code Cong. & Ad. News 3581, 3583-84. Such commendable forbearance should not be understood as connoting lack of power.

Sardino v. The Federal Reserve Bank of New York and the Secretary of the Treasury of the United States (Ct. App., 2nd Cir., April 22, 1966).*

Foreign travel—students' trip to Cuba not illegal—"travel to" not covered by 8 U.S.C.A. §1185 (b)

Defendants, the organizers of the "Ad Hoc Committee for Travel to Cuba," were charged with having conspired among themselves and others to induce, recruit and arrange for their Committee members to depart from the United States for the Republic of Cuba and (in the case of certain defendants) with having departed and entered the United States "without bearing a valid passport" for the Republic of Cuba in violation of 8 U.S.C.A. §1185(b) which provides:

under certain circumstances it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

The court expressly noted that defendants were not charged with having knowingly made false statements in their passport applications and other related offenses for which "a grand jury might well have indicted" some or all of them.

The court found that this was the first case involving the departure from the United States of a citizen with an unexpired passport issued by the State Department, who visited a proscribed area despite the fact that his passport either was not validated for travel to such an area or recited that it was not valid for such travel. The court summarized the central issue as "whether the enactment of 8 U.S.C.A. §1185 in 1952 attached criminal penalties to travel to an area for which one's passport is not validated."

In finding that defendants "departed from" and "entered" the United States bearing valid passports within the meaning of §1185(b), the court distinguished between the events of leaving and entering the United States and of traveling in another country without permission:

One can understand the refusal of the Secretary to issue a passport or to validate a passport of one who intends to use it upon entry into a country with which the United States does not maintain diplomatic relations. Since we are not on speaking terms with such a country, the Secretary does not desire to make any request of "all whom it may concern" in that country. It does not follow that a passport "not valid" for purposes of the Secretary's request to "all whom it may

* Text of decision made available by Mr. Bruno Ristau of the Department of Justice.

concern" is not valid for purposes of departure from and entry into the United States.

If the Congress, by enacting §1185(b) and its predecessor, intended to prohibit travel to proscribed areas as well as to prohibit departure and entry without passports, one may reasonably wonder why the Congress did not expressly provide for such a prohibition. . . . There is nothing to indicate that the Congress intended, *sub silentio*, to include these "travel to" restrictions, imposed under this act [The Neutrality Act of 1939], in the departure and entry statute, the border control statute it enacted two years later [the predecessor of 1185 (b)].

United States v. Laub, 253 F. Supp. 433 (U.S. Dist. Ct., E.D. N.Y., April 15, 1966).

Judicial jurisdiction—courts of Ryukyu Islands established by Executive Order of President have criminal jurisdiction over United States citizens

Plaintiff, a native Okinawan who was a United States citizen by virtue of her marriage to a United States citizen, was convicted of violating an organic tax law promulgated by the Commissioner of the Ryukyu Islands and was sentenced to pay a fine of \$8,000. Plaintiff (who was the proprietress of the Tea House August Moon) sought a declaration that the conviction was null and void on the ground that the courts of the Ryukyu Islands, having been constituted by an Executive Order of the President of the United States, have no criminal jurisdiction over a United States citizen.

The court found that, following the Treaty of Peace between the United States and Japan, jurisdiction over the Ryukyu Islands was established under the interim control of the United States pending ultimate transfer to a trusteeship as provided by the United Nations Charter. The Executive Order established in the Ryukyu Islands courts essentially comparable to those established under the jurisdiction of the United States in its States and Territories. Citing *Madsen v. Kinsella*, 343 U.S. 341 (1951), it held that the courts of the Ryukyu Islands had been validly constituted by Executive Order and had jurisdiction over a United States citizen as to crimes occurring within the Ryukyu Islands during a period of military occupation, even though hostilities had ceased. The court distinguished *Reid v. Covert*, 354 U.S. 1 (1956), which held unconstitutional the trial of a United States citizen by a military court which did not provide certain constitutional safeguards, on the ground that plaintiff had not been denied any of her constitutional rights. *Rose v. McNamara*, 252 F. Supp. 111 (U.S. Dist. Ct., D.C., March 21, 1966).

Czechoslovakian distributee—applicable exchange rate found confiscatory

In a proceeding in the Surrogate's Court of Westchester County, distributees resident in Czechoslovakia sought payment of their distributive

shares of the decedent's estate through the medium of Tuzek certificates, a form of gift certificate usable at special stores in Czechoslovakia. The court found that the official Czechoslovakian exchange rate for dollars purchasing Tuzek certificates reflected such a substantial over-valuation of the Czech crown as to be confiscatory. It was also noted that the United States Treasury Department prohibited transfer of Federal funds to Czechoslovakia on the ground that their actual receipt by the payee was not reasonably assured. The court concluded that payment to the Czechoslovakian distributees through the Tuzek certificates would not afford them the "benefit or use or control" of their distributive shares, and ordered deposit of the funds with the Commissioner of Finance pursuant to Surrogate's Court Act, Section 269-a. *In re Shefsick's Estate*, 270 N.Y.S. 2d 34 (Surrogate's Court, Westchester County, May 23, 1966).

BOOK REVIEWS AND NOTES

LEO GROSS

Book Review Editor

Soviet Year-Book of International Law, 1962. Moscow: Publishing House of the Academy of Sciences U.S.S.R., 1963. pp. 373. 2 R., 48 k.

Soviet Year-Book of International Law, 1963. Moscow: Publishing House "Nauka," 1965. pp. 624. 2 R., 73 k.

A preoccupation with developing areas permeates the two latest volumes in the series of Soviet yearbooks initiated by the late Judge S. B. Krylov in 1958. The series is of major importance, being the briefs of Soviet professors written largely in support of their government's positions on legal matters before the United Nations. They represent current thinking in Moscow on attitudes to be encouraged in development of a new international law favorable to Soviet foreign policy. In Soviet parlance, they outline what is called the "law of peaceful coexistence."

Gregory Tunkin, who withdrew as legal adviser to the Soviet Foreign Office to fill the chair of the late noted Professor Eugene A. Korovin in the autumn of 1965, introduces the theme in the 1962 volume (distributed in 1964). He defines "peaceful coexistence" as a "struggle against imperialism," and notes that it "is not extended to the field of ideology and it does not presuppose compromises between the Communist and bourgeois outlooks." It "affords the best opportunities to spread the struggle for the attainment of the final goals of the world's working class, for the liberation of the colonial peoples." This is a restatement of the official Soviet position, expressed by Nikita Khrushchev and other Soviet spokesmen at the time.

Upon a foundation of law as an instrument of anti-colonial struggle, the authors following Tunkin argue the legal basis for linking a policy of anti-imperialism with simultaneous support for Marxist socialism. Self-determination holds the attention of Dr. D. B. Levin. He introduces limitations upon its applicability, for he would end the right when a people, exercising free choice, decides to remain in a multi-national state or to join another multi-national state. The right is restored if the host state violates the conditions of union or coerces continuation of the union. At that point the subject of self-determination passes from the sphere of constitutional law to international law, presumably giving other states the right to intervene in its protection. The right is not extended to national minorities scattered throughout a state. It is limited to peoples living in compact masses on a definite territory. Should a colonial Power or its ally seek to suppress a national liberation struggle, an act of aggression is committed.

The theme is embellished by G. A. Osnitskaya to claim for peoples, as opposed to states, recognition as subjects of international law "as a state in the process of emergence" when it is fighting for its independence against a state opposing its secession. France is taken to task for protesting Soviet recognition of the Algerian Provisional Government before the grant of independence.

In support of independence movements, other authors would ban military bases on foreign soil and prohibit as a first stage in disarmament the navigation of warships and the flight of military aircraft beyond territorial waters or airspace. Freedom of the seas and of the air would be limited to commercial vessels and aircraft. Soviet respect for developing nations is evidenced by an account of early denunciation of unequal Tsarist treaties after the Russian revolution.

The 1963 volume (distributed in 1965) advances the story of Soviet efforts to foster development of international law. A. P. Movchan reviews the codification resolutions of the General Assembly of the United Nations and their implementation. He equates their language of "friendly relations and co-operation of states" with the Soviet concept of "peaceful coexistence," although the majority in the United Nations chose the wording to avoid such equation. He expects codification to follow lines favorable to Soviet policy because of several factors. First among these is the presence of a considerable number of Marxian Socialist states; the formation of many new states; and "the rôle of the international revolutionary movement of the working class."

The emerging rôle of public opinion as a force supporting development of a new international law engages other authors. The "people" is now given sovereignty in international law, not solely to permit exercise of the right of self-determination, but to choose its social system, to change its government's domestic and foreign policy, to act against war and to work for disarmament. In short, the people not only have rights which Thomas Jefferson would have endorsed, but they have such rights under international law, with the implications such an extension carries of international intervention in support of their exercise.

The recognition of new states occupies the attention of D. I. Feldman. After restating commonly known positions, he concludes that disavowal of recognition cannot conceal the actual legal relations existing at a given moment. He notes that the International Law Commission in its work on treaties is establishing the rule that non-recognition of a state by another does not affect its participation in multilateral treaties. But then follows a comment to justify Soviet attitudes on China: No "puppet formation" can claim statehood because it signs a multilateral convention. The Soviet Government has refused to accept signature of the Test-Ban Treaty by the Republic of China, even though the latter signed the copy in the custody of the United States.

The relations of treaty and municipal law are supported as falling within a dualistic theory by N. V. Mironov, but he says it is of a "new kind." This is because municipal law and treaty law must be co-ordi-

nated, and he notes that this is done when each influences the other in a progressive way. T. P. Grevtsova is clearer when she notes that the Fundamental Principles of Civil Law and Procedure of the U.S.S.R. require that treaty law be given precedence over municipal law in the event of conflict.

Detailed problems of international rivers, of fishing zones, of the regulation of labor, of the recognition of foreign academic degrees, of medical law, and of the history of international law occupy the rest of the volumes, together with bibliographies, book reviews and the proceedings of the Soviet Association of International Law.

What can be said on completing reading of these volumes? Congratulations are in order for their preparation. They provide, as they always have, position papers for Soviet diplomats, and as such will be required reading in every foreign office. English summaries will facilitate their use by those not knowing Russian.

But then one turns to substance. The law in development is an intriguing subject, and for men of every land the effort is to mold it in directions favorable to social and political aspirations. No non-Marxist can be expected to accept proposals which equate all progressive steps with what provides advantage to Soviet policy. No American can be happy with the drumbeat of denunciation of United States policy on every issue, and classification of American scholars as supporters of imperialism and neo-colonialism. No American wants to perpetuate the evils of the past. All rejoice in the liberation of colonial peoples.

The quarrels with Soviet authors are not over policies focused on liberation but with ultimate goals for those who are liberated, and with some of the results of liberation as they have appeared in recent years. The formation of minute states incapable of survival in a turbulent world of competing great Powers, and domestic chaos, which invites intervention and intrigue, are not to be desired by those who relate peace to lack of warfare and not to movement in the direction of adoption of Marxian Socialist models. Thought must be given to more than liberation. Lawyers must devise means of meeting aspirations through United Nations procedures, and little is done by these volumes to go beyond the first steps.

Further, when goals are desirable only if models established by the U.S.S.R. are followed, Africans, Asians and Latin Americans who insist on preservation of humanistic values, which Stalin never knew, can be excused for rejecting the advice. There are other roads to real independence than those prescribed by the authors in these volumes.

JOHN N. HAZARD

The Corfu Incident of 1923: Mussolini and the League of Nations. By James Barros. Princeton, N. J.: Princeton University Press, 1965. pp. xxii, 339. Index. \$7.50; 60 s.

This is a blow-by-blow account of an incident which involved the conflict of Mussolini with the Conference of Ambassadors and the League

of Nations, and the conflict of the two latter institutions with each other, as well as several questions of international law. It is based on formerly secret archives of the Conference of Ambassadors (composed of representatives of the Great Powers—Britain, France, Italy and Japan, with a United States observer—to supervise fulfillment of the World War I peace treaties), and also archives of the League of Nations, Italy and Greece. The author also used papers of British Foreign Secretary Lord Curzon, and other British statesmen of the period. The full archives of the British and French Foreign Offices had not been made available.

The Corfu incident arose from the assassination on August 27, 1923, of Italian General Tellini on Greek territory near Janina while he was acting on a commission sent by the Conference of Ambassadors to determine the Greek-Albanian boundary. It aroused great interest because of the similarity of the demands made by Mussolini in an ultimatum to Greece, to those of the Hapsburg Empire to Serbia which led to World War I, and because of the bombardment and occupation of the Greek Island of Corfu by an Italian force when Greece refused to comply with all the demands. Conflicts arose between the Conference of Ambassadors, invoked by the Great Powers and the League of Nations, appealed to by Greece; among the Great Powers with diverse political interests; and between diverse views concerning the responsibility of a state for a political assassination in its territory and concerning the legitimacy under the Covenant of reprisals short of war.

The situation also manifested the difficulty of traditional diplomats in efforts to control the type of dictatorship represented by Mussolini, and the disposition of statesmen to appease a Great Power threatening war by sacrificing the rights of a small state, with the hope of "maintaining peace in our time."

The reviewer was especially interested to see whether this very detailed examination of the situation with the aid of hitherto secret materials altered the interpretations made at the time. It did in at least one important point. The Commission, sent by the Conference of Ambassadors with a representative of each of the four Great Powers to report on the responsibility of Greece for the Tellini assassination, found by a three-to-one majority that Greece had employed the degree of diligence to discover and punish the assassins required by international law and so was not responsible, although the assassins were not and have never been discovered. The author leans to the Greek view that they were probably Albanian bandits without political motivation (p. 32). The Conference of Ambassadors suppressed the report of its Commission, found Greece responsible, and required it to give Mussolini the fifty million lira (\$2,270,000 in 1923) he had demanded. Earlier it had required Greece to deposit this sum as security, to be paid to Mussolini only if the Permanent Court of International Justice found Greece responsible. Mussolini, however, threatened to remain in Corfu unless the assassins were found and punished or he was given the money. France wanted his help to defend its occupation of the Ruhr valley, and Britain, though it had

originally supported Greece and the competence of the League of Nations, wanted to avoid sanctions and to get Mussolini out of Corfu, whose neutralization, which it had guaranteed in 1864, was still in force, though it was terminated by the Treaty of Lausanne which went into effect in February, 1924.¹ Frank P. Walters, in his *History of the League of Nations* published in 1952, was aware of this situation and commented that the action of the Conference of Ambassadors was "tainted with intrigue and inefficiency" (Vol. 1, pp. 245 ff.).

The League of Nations Council took no action but left the problem to the Council of Ambassadors, though its competence to deal with the dispute, and especially with the Corfu occupation, was at first insisted on by Lord Robert Cecil, speaking for Britain (he was silent after his Government had changed its position), and by representatives of enough other states to indicate the general opposition to Mussolini's policy. The League's competence as well as the due diligence test of responsibility for political assassinations was later supported by a Commission of Jurists appointed by the members of the Council. The opinion was ambiguous, however, in dealing with the legitimacy of reprisals short of war, which Mussolini insisted were not barred by the Covenant, an opinion which some members of the Commission sought to deny by the ambiguous statement.²

Mr. Barros believes that the League's failure to maintain its competence and principles was the beginning of its end, thus agreeing with David Jayne Hill who commented in this JOURNAL in January, 1924,³ that the League was bound to fail because it was based on the "*lex talionis*" rather than on the judicial application of law.⁴

While subsequent events give much support to the more pessimistic appraisals, they also indicate a transition in the conduct of international relations. The traditional diplomacy of secrecy, courtesy and compromise was declining under the attacks, on the one hand, of ambitious, ignorant, ill-mannered but popularly supported dictatorships, and, on the other hand, by the public, quasi-parliamentary, collective-security diplomacy of the League of Nations and the United Nations. The transition period continues. The disposition of "statesmen" manifested in 1923 to pursue short-run national interests, often arising from their own ill-conceived incitements of their own public, to the detriment of the interests of mankind, of international law, and of the long-run interests of their own countries, can still be observed.

¹ P. 102; and Q. Wright, "The Neutralization of Corfu," 18 A.J.I.L. 104 (1924).

² Pp. 257, 311. See also Q. Wright, "Opinion of the Commission of Jurists in the Janina-Corfu Affair," 18 A.J.I.L. 536 (1924).

³ 18 A.J.I.L. 99 (1924).

⁴ The present reviewer expressed a somewhat more optimistic opinion in the same issue of this JOURNAL (p. 108) as did Frank Walters in 1952 (*op. cit.*, Vol. 1, p. 253), who thought that the League's action, though weak, manifested a world opinion which aided the peaceful solution of the problem, a clarification of several points of international law, and a moderation of Mussolini's policy, especially in the then pending Fiume affair.

Detailed expositions of critical situations such as that presented in this book, though not easy reading, are of great value to the student of international law and organization because they indicate the actual operation of these institutions in a world still dominated by power rivalries and the distorted images of the interests of the nation and the policies of others which those rivalries develop. Such understanding by students and statesmen may contribute, in this transitional period, to the more law-abiding world badly needed in the atomic age.

QUINCY WRIGHT

The United Nations: Peace and Progress. By Alf Ross. Totowa, N. J.: Bedminster Press, Inc., 1966. pp. xi, 443. Index. \$8.00.

In any assessment of contemporary international socio-political processes the United Nations Organization is a tantalizing point of focus and it is little wonder that books about it abound. Even restricting ourselves to our own primary discipline of international law, we can think immediately of countless studies of the United Nations as an historical institution, or as a juridical organ, or as a moral counterforce to war, to name the most frequently employed frameworks for analysis. What distinguishes Professor Alf Ross' new book on the United Nations is that it examines the United Nations as a political phenomenon *for the purpose of* creating a basis for free-world policy towards that world body.

Professor Ross falls into the category of the members of our art and craft known as "legal realists." Let's not quibble over the term. What matters is that Ross' work is not only profound and sophisticated, as befits his lifelong study of constitutional law,¹ international law² and the philosophy of law,³ it is also rigorously critical, as befits the seriousness of his purpose.

For international lawyers, Ross' most interesting theme is that the United Nations is a living being which must be permitted to adjust its growth to meet changing environmental conditions. Taking a robust whack both at those who would construe the Charter as if it were a first-mortgage indenture and at those, on the other hand, who would have the World Court assume legislative prerogatives, Ross distinguishes between the essentially static function a court has in deciding comparatively small conflicts on the basis of the established order and its rules for the distribution of wealth, power, advantages and burdens, and the very dynamic political function of a legislature in resolving society's competing demands for changes in the existing order. The United Nations is essentially a political institution, Ross argues, and a court of international law should

¹ See his article, "Is the Charter of the United Nations a Treaty or a Constitution?", 1 *Jus Gentium* 238 (1949), and his book, *The Constitution of the United Nations: Analysis of Structure and Function* (1950).

² See his book, *A Textbook of International Law* (1947).

³ See his books, *Towards a Realistic Jurisprudence* (1946), and *On Law and Justice* (1958). The works cited here are in English, but the bulk of Professor Ross' writing has been done in his native language, Danish.

not retard its efforts to adjust to its environment, this being a vital legislative-political function for the Organization itself.

A considerable part of the book is devoted to the consequences of the wartime Powers' failure, as Ross sees it, to establish an institution flexible enough to assure the permanent conjunction of power and responsibility. "It is never quite wrong to let responsibility and influence march together," he writes (p. 24). It is not quite right, he goes on to say, to ask if (or why) the U.N.'s security system has failed, inasmuch as it has never been tested under the conditions for which it was designed. The original strategic model placed the burden of maintaining peace and security on the Great Powers, rather than with all the Members of the Organization, as had been the case with the League of Nations. By the time the Security Council first met in 1946, however, the only "great" Powers were the United States and the Soviet Union and the world's power relations were becoming bipolarized. By freezing this postwar political configuration into the United Nations security system, Ross asserts, the Organization's founders rendered its strategic concept obsolete from the beginning. The expansion of regional security arrangements was inevitable when no nation could rest its national security in reliance on the United Nations.

Ross' central thesis is a somewhat disappointing one: It is that only an American-Russian *rapprochement* can save the world organization from being a mere bystander in the process of maintaining international peace and security. One wonders if this is sufficiently contemporary a thesis to provide the basis for a realistic policy in an era of expanding polycentrism. Yet, one is unlikely to be disappointed in Ross' book if what one seeks is a systematic appraisal of the foremost transnational legal regime of our time, for it is an extremely orderly presentation Professor Ross has given us, all the easier to read and enjoy for its neat prose, which is polished without being shiny, and for the author's penetrating legal insight, which has the added virtue of enabling his style to be concise while at the same time properly comprehensive.

EDWARD GORDON

International Law Chiefly as Interpreted and Applied in Canada. By J.-G. Castel. Toronto: University of Toronto Press, 1965. pp. xxii, 1402. Index of Cases and Subject Index. \$30.00.

Teachers, students and practitioners of international law, particularly those in North America, will find in this new casebook a welcome addition to the list of collections previously available. While especially designed for Canadian users, it includes many judicial decisions which do not directly touch Canada. Extensive notes and guidance to further reading enhance the usefulness of the volume. The editor suggests in his preface that, owing to the diversity of disciplines involved, the subject of international law is difficult both to learn and to teach, the difficulty being enhanced in Canada by the unavailability of a suitable textbook on the

graduate or undergraduate level. He also notes that the casebook by Norman MacKenzie and L. H. Laing, *Canada and the Law of Nations* (1938), has been out of print for more than a decade; the stated objective in the present volume is to supply an "ampler picture." He further observes that, since World War II, succeeding Canadian governments have "declined to follow slavishly the policies made in Washington or London."

While, as the editor explains, the volume is designed for use by Canadian law students in an introductory course on international law, he submits that it should also be a valuable reference book for students of political science and for diplomatic officers. The material is not restricted to the law of peace. Part VI, on "Disputes and Hostile Relations Between States," covers pacific settlement of international disputes, forcible or coercive means of settlement, and neutrality.

To select for special comment particular parts of a volume of this size is not a simple task. The reviewer may draw attention, however, to illustrative features, *e.g.*, the statement reproduced from the *Forces* case (p. 45) to the effect that international law is not a part of Canadian law unless incorporated, to three theories (suggested at p.154) to resolve the difficulties involved in recognition, to a mention of the "ice-is-water" school in connection with law applicable to Arctic regions (p. 253), and to the highly useful inclusion of maps (as at pp. 333, 362, 363, 364, 365, 412). It is of limited value to describe a case (involving re-employment of aliens) as one "of great interest," although in the particular instance there follows an explanation designed to justify the statement (p. 453). The editor reproduces an official statement that claims of enemy aliens arising out of the Second World War present problems more intractable than those that followed the First World War (pp. 1196-1197).

As with respect to any casebook, questions may naturally arise as to the criteria for selection of materials. Discussion of the law of the air and of outer space covers twenty pages (258-278), but there is scant mention of Antarctica, as to which, of course, Canada does not have direct treaty commitments.

On the Commonwealth of Nations there is much material, including the statement (p. 108) that it is practically impossible to define it. There is valuable material on Canada's rôle in Commonwealth developments (pp. 99-111).

On the subject of nationality and citizenship the editor observes that, although the Universal Declaration of Human Rights states that everyone has the right to a nationality, "there are hundreds of thousands of persons who either have no nationality or whose claim to nationality is disputed" (p. 465). The material on "Nationality and Individuals in International Law" comprises more than a hundred pages.

Users of the new casebook will welcome extensive guidance which the volume provides to further materials on the decisions, statutes and treaties that are reproduced in the volume.

ROBERT R. WILSON

Diplomatic Asylum. Legal Norms and Political Reality in Latin American Relations. By C. Neale Ronning. The Hague: Martinus Nijhoff, 1965. pp. vi, 242. Index. Gld. 27; \$7.50.

Controversy is characteristic of the practice of political asylum, whatever form it may take. A grant of asylum involves a political judgment by the asylum state upon the state from which the *soi-disant* refugee has fled. In a particular situation, as in the massive post-World-War-II European refugee programs, in which the United States has been a major participant, or in the massive instances of diplomatic asylum in the Guatemalan crisis of 1954, this political factor may be heavily outweighed by the factor of humane necessity; even so, the political element will not be wholly discounted by the policy-makers of the states concerned.

Political or humanitarian considerations may provide the rationale for a particular grant of asylum, but the question remains as to whether the general practice has any legal foundation, that is, whether it is a practice recognized within the international legal system and whether it is governed by legal rules. Disregarding territorial asylum, which presents its own problems, legal and otherwise for the asylum state, diplomatic asylum as a "legal practice" is particularly vulnerable to criticism. Although the Latin American states are by no means the only practitioners of this form of asylum (instances can be cited from the contemporary practice of states around the world), Latin America has the dubious advantage of the greatest frequency of practice whether exercised by Latin American or non-Latin American diplomatic missions, whereas diplomatic asylum is sporadic in other areas. For this reason diplomatic asylum is often described by Latin American publicists as a regional practice which is regularized by customary and conventional rules of international law peculiar to this area. That some publicists, Planas-Suárez and Corpeño V. among others, can argue vigorously the opposite view, and that some states, such as Peru, Haiti, and Venezuela, can manage to espouse both points of view depending upon the circumstances of the case, only serve to keep diplomatic asylum in the vanguard of disputatious topics. Most writing on the subject emanates from Latin American and Iberian publicists; some French and German publicists have been interested in it; but only García Mora has done much with it in English. In seeking to determine whether there is a discernible legal foundation for the practice in Latin America, the author has made a worth-while contribution to the literature in English on diplomatic asylum.

Two approaches are taken to the subject matter of the book: first, assuming that diplomatic asylum is granted only to political offenders, the author endeavors to determine whether the practice is supported by customary or conventional law; he then considers how the political offense is defined in customary and conventional law for the purpose of this kind of asylum and whether the characterization of the offense as "political" is the prerogative of the territorial state or the asylum state. The first part of the book treats the historical background of the practice in

Latin America, the importance of *opinio juris sive necessitatis* to the existence of a presumed rule of customary law, the limited recognition of a general right of diplomatic asylum in the multilateral conventional law of Latin America, examples from the practice of selected Latin American states and the United States, and it concludes with a consideration of asylum in consulates. The second section of the study deals with the "qualification" of an offense as political as revealed in Latin American treaties and practice. Three appendices show the status as to signature and ratification of the 1928 Havana Convention on Asylum, the 1933 Montevideo Convention on Political Asylum and the 1954 Caracas Convention on Diplomatic Asylum; the fourth and fifth appendices list the instances of grants of diplomatic asylum by Latin American states and the United States in Latin America which were cited by Colombia in support of its position in the *Colombian-Peruvian Asylum case*.

Observing that no right of asylum as such is established in international law, the author finds that a regional "institution" of diplomatic asylum has developed in response to conditions commonly found in Latin America. He argues effectively that no feelings of right or obligation can be shown to underlie the practice of diplomatic asylum so as to warrant its being described as a rule of customary international law in this area, and that the several inter-American conventions dealing with asylum are not helpful in establishing its legal basis. He concludes that this regional institution is extra-legal in character, and deliberately so, for the susceptibility of diplomatic asylum to abuse as a form of intervention by a foreign state in domestic politics makes Latin American states cautious in committing themselves to precise definitions of any of the terms of reference of the practice. Despite its extra-legal character, however, "the institution of diplomatic asylum is *in fact* respected" (p. 218) because it serves a useful purpose where unstable political conditions warrant this safety valve.

The book is based upon a wide selection of official material, representing much diligent research. In this regard it is surprising, however, that the Venezuelan reply to Chile with reference to the 1949 Betancourt incident is drawn from Planas-Suárez' book rather than from the Venezuelan *Libro Amarillo* for 1948-1952. Notwithstanding the problem of finding adequate documentation for the practice of many Latin American states (newspaper accounts and other unofficial sources must often be used), the chapter on state practice omits some well-known episodes, such as the rancorous situation in Guatemala following the downfall of the Arbenz Guzmán regime in 1954, in which there were massive grants of asylum (some 300 persons were reported to have taken refuge in the Mexican Embassy), or the situation in Argentina following the ouster of Perón, which included the abduction of General Tanco and six other Peronistas from the Haitian Embassy at Buenos Aires. The more recent instances of diplomatic asylum in the Dominican Republic and Cuba are relegated to brief reference in the concluding chapter. Preferring to emphasize official sources, the author does not undertake to cover the sizeable literature on diplomatic asylum; however, in Professor Manuel Adolfo Vieira's *Derecho*

de Asilo Diplomático (1961), he would have found one of the more interesting recent discussions of the subject by a Latin American publicist which also contains a full account of Uruguayan practice, to which no reference is made in the chapter on state practice. Extradition does not come within the scope of this book, but the answer to the question raised by the author as to why a Chilean communiqué to Colombia in 1952 did not indicate the source of the statement that an assassination for political reasons is not a political offense is found in the *attentat* clause common to Latin American extradition treaties, particularly of the late nineteenth century. It may be added that such points are often made in Latin American diplomatic correspondence without documentation because they are considered to be matters of common knowledge. Among minor considerations is the failure to include in the bibliography some sources cited in the text or footnotes; the appendices on the status of the 1933 Montevideo Convention and the 1954 Caracas Convention do not show the ratifications through 1963, although the table of ratifications which appears in the text is correct as of 1963. The organization of the book and the *lacunae* in the index militate against its usefulness for reference purposes.

As a study of diplomatic asylum, this one is very good of its kind. It advances our knowledge of the realities of Latin American practice appreciably. The need continues, however, for a different type of approach, that is, for studies of individual state practice regarding all aspects of asylum based upon diplomatic correspondence, statutes, judicial opinions, and the works of publicists. In such studies instances of asylum should be presented in the political context in which they occurred, for the answer to the question as to whether an offense is political is often implicit in the circumstances of the case but cannot be made explicit in diplomatic correspondence for obvious reasons of international policy. Until such studies are available, our knowledge of the practice of political asylum in its several forms in Latin America, and in other parts of the world, will continue to be inadequate for the purpose of evaluating this practice with a view to developing acceptable rules of law to govern it.

ALONA E. EVANS

Das Klagrecht der Mitgliedstaaten der Europäischen Gemeinschaften gegen Durchgriffsakte. Wesen und Bedeutung für den Rechtsschutz des Einzelnen. By Rüdiger Bandilla. Hamburg: Verlag Christen & Co., 1965. pp. 139. DM. 28.

The new institutions of the European Communities have the authority to render quasi-legislative and administrative acts with direct legal impact not only upon member states but upon individuals and enterprises as well. As behooves a legal order governed by the rule of law, member states and "Common Market citizens" possess legal remedies against such acts, the foremost of which is an action for annulment before the Court of Justice of the Communities. In view of the predominant rôle of the member

states in the Community system, their right of action is substantially broader than that accorded to individuals and enterprises, who can obtain judicial review only if they can show direct and specific concern. The scope of the individual's right of action has been the subject of extensive investigation by continental writers and the Court of Justice has been engaged in the process of defining it in its judgments. The monograph under review—a doctoral dissertation sponsored by the Europa-Kolleg of Hamburg—focuses on a different aspect of the problem: Is there any legal device whereby an individual could compel his state to exercise its right of action for his protection and on his behalf when the individual himself has no right to sue? The first question raised is whether the right of diplomatic protection, based upon customary international law or derived from the Community treaties themselves, is apposite in this context. After an over-elaborate conceptional analysis extending over more than forty pages, the rather obvious conclusion is reached that diplomatic protection, predicated as it is upon the traditional state-to-state relationship, is excluded from the integrated Community system. In the following and more interesting section, the author defines three categories of interests which a member state may press in an action for annulment of a Community act before the Court of Justice: first, the interest in national economic welfare pursued by the state in its capacity as the representative of the public;¹ second, the interest of the state in preserving the integrity of its governmental competence against encroachments by Community institutions; and third, the interest of the state in the proper evolution of the Community and in the observance of the obligations undertaken toward the Community ("*Kontrollfunktion*"). In none of these categories—which are viewed as exhaustive—is the state's interest predicated upon the interest of an individual or a particular group of individuals. The conclusion is then drawn that under Community law—and for that matter also under German Constitutional law which is reviewed briefly in the closing chapter of the book—an individual has no legal means to compel a member state to sue for the protection of his individual interest; nor has he a standing to intervene in the state's suit before the Court of Justice. The individual is thus confined to the right of action that is specifically conferred upon him in his personal capacity by the Community treaties.

The principal virtue of this interesting volume, based mainly on an analysis of the treaties and legal literature, with only intermittent attention given to case law, is that hopefully it will serve as a useful conceptual framework for a pragmatic, fact-finding inquiry into the true nature of the interests which member states take into account in deciding whether to prosecute actions for annulment before the Court of Justice. It should not come as a surprise if such a study disclosed, for instance, that concern for individual interests and particularly pressures from enterprises and

¹ A brief analogy is drawn to the interests which the States of the United States sought to vindicate before the U.S. Supreme Court in situations such as *Pennsylvania v. West Virginia*, and *Ohio v. West Virginia*, 262 U.S. 553 (1922).

groups of enterprises loom larger in the decisions of the member states than the author of the present volume suggests.

ERIC STEIN

The Effect of Independence on Treaties. By the International Law Association Committee on State Succession to Treaties and Other Governmental Obligations. London: Stevens & Sons; South Hackensack, N.J.: Fred B. Rothman & Co., 1965. pp. xvi, 391. \$17.50.

It is difficult to fault a book which purports to be, and by and large is, a compendium of primary materials. This difficulty is increased when the book consists in great part of materials relating to the international activities of developing countries. Anyone who has attempted to gather such materials will readily appreciate the great efforts which must have gone into the preparation of this long-awaited handbook. At last scholars and interested practitioners have been provided with the documentation necessary for rational consideration of the various policy proposals regarding a rule or rules of state succession.

Among the situations revealed in the book is the almost astonishing lack of consistency in the attitudes of the various international organizations towards state succession. While inconsistency on the part of the new nations might be excused on the ground of the lack of information or trained personnel, this is not true of the various international bodies. The handbook thus evidences an international parochialism which has resulted in a great deal of confusion in the new states. Among the handbook's many other valuable contributions is a lengthy compilation of the United Kingdom treaties which were applied to the Dominions and several colonies and protectorates prior to independence (pp. 65-91). Among the peculiarities revealed by the list is the fact that the U.K.-Denmark Agreement for Relief of Distressed Seamen, 1883, which was denounced by Denmark in 1934, was included in the list of bilateral agreements presented to Nigeria when it became independent in 1960. This suggests that the colonial powers might have done a bit more in helping the new states deal with their succession problems.

About the only criticism one can make of the handbook is the wish that it could have included more. There is much material on the ex-British colonies, but very little on the attitude of the former French territories towards succession. Moreover, while the policy statements are all included, one would certainly hope that more material could be collected on the actual practice of states. Nigeria, for instance, signed a devolution agreement in 1960, yet a notice published by that government in 1965¹ revealed that only seven pre-independence bilateral agreements were considered in force. It would be interesting to know how the remainder (revealed in the extensive compilation referred to above) were "disposed of." The text also notes that "India is known also to have relied on the same Devo-

¹ Government Notice No. 88 of Sept. 24, 1965.

lution Order [Indian Independence (International Arrangements) Order, 1947] in its diplomatic relations . . ." (p. 193). Scholars would certainly want to know how and in what circumstances India "relied on" that Order. Finally, the organization of the handbook is slightly disconcerting, as the reader is constantly required to refer backwards or forwards to other sections of the handbook in order to understand the point being made at any given time. Nonetheless, the handbook is absolutely essential for an understanding of the problems of independence and succession to treaties and will undoubtedly be the primary source of reference for scholars and practitioners concerned with these problems for years to come.

GILBERT VERBIT

The Brussels Salvage Convention. Its Unifying Effect in England, France, Germany, Belgium and The Netherlands. By Ina H. Wildeboer. Leyden: A. W. Sythoff, 1965. pp. xii, 328. Index. Fl. 28.50.

The impressario of a stirring "Tugboat Annie" story thinks of "salvage" as a hazardous adventure to save life, ship and cargo; a race to be first at a scene of maritime disaster, with equipment to accomplish a miracle. The dictionary definition is confined to compensation paid for the rescue service. Lawyers and judges say it is derived from the Roman law, modified by equitable principles, commingled with private rights and public policies, unified in part by international agreement, and then changed by national statutes and court decisions. There is in fact a large body of decision law in each maritime nation and considerable textbook reference to the subject.

In this book Miss Ina H. Wildeboer has summarized, in seventeen chapters, the results of exhaustive research into the salvage laws of The Netherlands, France, Belgium, Germany, England and the United States. She has used the Brussels International Salvage Convention of 1910 as the basis of discussion, has demonstrated its scope and intention, outlined the extent to which the various articles have been incorporated into national legislation, and summarizes many of the decisional interpretations which have followed. It is a monumental work on a technical subject. The text of this book is in English translation from the Dutch. The appendices include the Convention itself in French and in English, the statutes of the six nations, Lloyd's Salvage Agreement, a bibliography, a table of cases and an index.

The Salvage Convention was formulated for the most part by the *Comité Maritime International*, which has made great efforts to obtain uniform rules in matters of international maritime law since its organization in 1897. This Convention and the Collision Convention were the first two efforts of the *Comité* to be signed. The Salvage Convention was ratified by most of the maritime nations, including the United States, on February 1, 1913. Although the official text was in French, there are few impurities or inaccuracies in the translations of the various nations. The official

phraseology and the intention of the delegates would have been easier to clarify if the discussions of the *Comité* had been published. In recent years, as witness the Ship Mortgage Convention adopted in New York in 1965, the written proposals and the oral discussions of the delegates are fully published, even during the course of the conference. The Salvage Convention is one of fourteen efforts to obtain international agreement that have been hammered out at twenty-seven conferences of the *Comité*.

In England and in the United States it was felt, somewhat inaccurately, that the Convention had fully adopted English law, that the law of the United States was quite similar, and that only a few of the articles need be enacted into national legislation of those two countries. The American law was conformed by the Salvage Act of 1912, 46 U.S. Code, Sections 727 to 731. England adopted two of the articles, one relating to the obligation to render assistance to persons in danger at sea, and a limitation of the time within which claims for salvage awards may be made. The commercial codes of The Netherlands, France, Belgium and Germany are more elaborate and are fairly similar, but their interpretation by the courts has been divergent. The author recommends a thorough investigation of the differences and amendments to the Convention for the purpose of achieving a higher degree of uniformity.

The salvage law of England and the United States is to be found primarily in the decisions of the courts. The leading British text, W. R. Kennedy's *The Law of Civil Salvage*, does not discuss the Convention. Two American texts, Gilmore & Black, *The Law of Admiralty*, and Norris, *The Law of Salvage*, discuss the Convention briefly and cite many American court decisions. Interpretations of the right to a salvage award, the factors to be considered in determining the amount, the effect of salvor's negligence or improper conduct while performing the services, apportionment of awards between shipowner and crew, effect of saving lives as to the award made from salvaged property, the rule that no remuneration is due from persons whose lives are saved, and many other facets of the subject are fully discussed by the author. In short, the book has real value for the shipowner, the underwriter, and the maritime lawyer; in fact for anyone who is interested in the varied aspects of salvage law beyond the borders of his own country.

STUART B. BRADLEY

Világűrjog [Space Law]. By Gyula Gál. (Russian and English Summaries.) Budapest: Közgazdasági és Jogi Könyvkiadó, 1964. pp. 366. Index. Ft. 43.

This seems to be the first major monograph on space law in the Hungarian language, although judging from the bibliography (pp. 313-325), interest in the subject on the part of the younger generation of Hungarian international lawyers has increased in recent years. After briefly surveying the relation between the earth and the universe and

defining the concept and sources of space law, the author analyzes, successively, problems of sovereignty in space, the legal status of space and of celestial bodies, and the law applicable to space instrumentalities. The best part of the book is Chapter 6 (pp. 247 ff.) dealing in detail with practical problems of space law, both from the point of view of substantive and procedural law, *i.e.*, damages caused by space instrumentalities, the return of such instrumentalities or their fixtures that have landed or fallen on foreign territory, the rescue of personnel, meteorology and space communications. The last chapter summarizes the activities of international organizations (the United Nations and regional organizations) and non-governmental bodies in space law.

In general the treatment of the subject is scholarly. The author is obviously familiar with the extensive literature produced by Western scholars, which in itself is significant. It indicates that the isolation from Western ideas that until fairly recently characterized the intellectual communities of the peoples' democracies has been relaxed at least for the present. Dr. Gál has endeavored to treat various topics of space law in the light of relevant non-legal background material, such as biology and other scientific and technical data. A comparison between "Socialist" and Western schools of thought on various subjects—*e.g.*, whether space is *res communis omnium*, or whether liability for damage or injury should be absolute or based on negligence—leads him to the conclusion that the differences in many respects are not basic, although this is clearly not the case regarding the definition of "exclusively peaceful use" of space. These comparisons also reveal (although there was no comment on this by Dr. Gál) that there are nearly as many conflicting views among scholars of the "Socialist" as in the Western world. Surely, if Dr. Gál's summaries are accurate, there is no monolithic Soviet-bloc position on most aspects of space law.

It is regrettable that a scholar of the caliber of Dr. Gál was unable to free himself from the propagandistic backdrop of Marxist-Leninist terminology. Aside from the fact that he consistently characterizes countries—or at least the major Powers—outside the Soviet bloc as the "imperialist" states (ignoring, conveniently, the neo-imperialism of the Soviet Union and mainland China), his prejudice colors in many places and in many forms an otherwise scholarly discussion. A few illustrations will suffice. Besides emphasizing—correctly from the factual point of view but unnecessarily for the purpose of legal analysis—the Soviet Union's leadership in space exploration (*e.g.*, pp. 17, 19), Dr. Gál assumes a premise that Soviet studies of space law are motivated only by considerations of peaceful coexistence (pp. 28, 218). He criticizes at some length the West-Ford project as a unilateral United States experiment violating the principle of space freedom (pp. 180 ff.); he further implies that the United States alone is engaged in collecting intelligence information by means of space vehicles (pp. 191–193), although it is generally known that Soviet-launched satellites do the same. It is asserted that data concerning some United States satellites, which he alleges were launched for secret purposes, are not registered with the U.N. Secretariat pursuant to General Assembly

Resolution 1721 (XVI) (p. 242); but the author does not seem to be aware of the fact that the whole Soviet space program operates in great secrecy, and the world knows only as much of its successes (seldom of its failures) as the Soviet Government pleases to reveal. Soviet protests against the activities of other states, especially the United States, are faithfully recorded; but when the United States saw fit to report to the U.N. Space Sub-Committee in 1962 the finding of a piece of metal claimed to have fallen in United States territory from *Sputnik 4*, the author characterizes the American delegate's presentation as "theatrical" (p. 248).

These illustrations indicate, to this reviewer at least, that ideological considerations and a more or less uncritical acceptance of the Soviet point of view remain the pervasive, if not controlling, guideline for scholars in the peoples' democracies. The basic difference between an open and a closed society is perhaps as much responsible for this lopsided approach as any other factor. It is indeed ironic that, with two exceptions, the majority of the photographs on space instrumentalities included in this book were released by the United States—not by the Soviet Union!

FRANCIS DEAK

BRIEFER NOTICES

International Law: Cases and Materials. Rev. ed. By Lester B. Orfield and Edward D. Re. (Indianapolis, Kansas City and New York: Bobbs-Merrill Co., 1965. pp. xliv, 1102. Index.) The casebook method of teaching international law in the law schools began along the lines of the casebooks of private law, collections of decisions of national and international courts illustrating the interpretation and application of concrete cases coming before them. Then came Manley O. Hudson with his customary constructive outlook and showed us in a study of "Twelve Casebooks on International Law"¹ that court cases could give only a limited picture of the law, that an adequate description would require the inclusion of treaties, statutes, declarations of Foreign Offices, acts of international conferences and other documents. He himself, and concurrently Professor Dickinson in 1929, had led the way with the inclusion in his casebook of "other materials"; and from then on a new standard was established.

The second edition of the volume by Orfield and Re is described by the authors as a "source book rather than a casebook," and it rivals Briggs' edition of 1952 and Bishop's of 1962 in the vast amount of collateral material accompanying the cases selected, including quotations from documents, elaborate notes, literally exhaustive references, and excerpts from monographs by scholars. While the traditional classification of topics is followed at a distance, the authors give International Agreements a more prominent place, Pacific Settlement comes before the substantive law, a chapter on the International Administration of Justice includes both extradition and judicial assistance, and a thorough and most useful chapter on State Responsibility and International Claims includes a study by Professor Re of the Foreign Claims Settlement Commission. Everything seems to be here, the *Sabbatino* case, the *U-2* incident, the quarantine of Cuba, and the Nuclear Test Ban Treaty. It seems to be a big

¹ 32 A.J.I.L. 447 (1938).

order for the law school student; but if he can take it, the foreign policy of the United States should be the better for it.

C. G. FENWICK

Der Minderheitenschutz in der Arbeit der Vereinten Nationen. By Felix Ermacora. (Vienna, Stuttgart: Wilhelm Braumüller, 1964. pp. 118. S. 5.60.) This is a most useful survey and penetrating analysis of the activities of the United Nations in the field of minorities protection. The author, professor of public law at the University of Vienna, is particularly well qualified to deal with the subject matter of this slender volume: as Austrian delegate to the Human Rights Commission of the United Nations he has had the opportunity closely to watch the pertinent work of the world organization and, as a member of the European Commission for Human Rights, is familiar with the problems he discusses in the present study. Professor Ermacora sketches in the first chapter the rôle of the several organs of the United Nations that have been charged with the questions of minorities protection. He reviews in the second chapter the relevant discussions in connection with the elaboration of the Universal Declaration of Human Rights of 1948. The third chapter covers the origin of Article 25 of the Draft Covenant on Civil and Political Rights relating to "ethnic, religious or linguistic minorities," and examines its meaning and significance. After a brief survey in the two subsequent chapters of other United Nations activities bearing on minorities protection, he analyzes in the concluding chapter the chief problems, political and legal, which an attempt to establish a universal, uniform system of minorities protection poses, and weighs the results actually achieved. They are extremely modest, as Professor Ermacora frankly states. Strictly speaking, Article 25 of the said Draft Covenant is the only legislative product of all the laborious deliberations in United Nations organs for almost twenty years. Not only is the Covenant as a whole still today a mere draft with very little chance of ever becoming law proper, Article 25 itself fails to recognize special rights of minorities as collective entities, and is at best an endorsement of the principle of non-discrimination in relation to the individual members of the types of minorities enumerated in the article. Professor Ermacora gives a masterful account of the reasons why governments have refused to universalize the system of international minorities protection which was tailored to, and was in force in, Central and Southeastern Europe between the two world wars. No less valuable are his remarks on the technical deficiencies of the United Nations machinery which concerned itself with the questions of minorities protection.

ERICH HULA

La Integración de Centroamérica. By Felix Fernández-Shaw. (Madrid: Ediciones Cultura Hispanica, 1965. pp. 1086. Indices. Pts. 450.) This is a massive volume on the integration of Central America by the author of an equally massive publication on a more important subject, the O.A.S.: *La Organización de los Estados Americanos* (second edition, 1963, 989 pp.). It is a follow-up to a less massive monograph on *Panamá y Sus Relaciones Centroamericanas* (1964), and benefited like the latter from the professional experiences in the area of the author in the foreign service of his country, Spain. Its size is due to the inclusion in the main body of the book at the end of each chapter of long lists of the meetings of the various Central American bodies and of the even longer texts of the relevant regional documents.

Of the three main chapters of the book concerned with the political, economic, and cultural integration of Central America, the first one is of particular interest for readers of this JOURNAL. It describes the origins of, and analyzes, the Charters of San Salvador of 1951 and 1962 and also deals briefly with the Central American Association of Intermunicipal Co-operation, the Central American Congress of Congresses, and the Conference of the Presidents of Central America, the United States and Panama. In an Addendum the author was able to record the entry into force on March 30, 1965, of the new Charter of San Salvador¹ and the results of the First Special Conference of the Foreign Ministers of Central America of April, 1965.

Indices, organization charts, and an extensive bibliography increase the usefulness of the book.

SALO ENGEL

Rights in Air Space. By David H. N. Johnson. (Manchester: Manchester University Press; Dobbs Ferry, N. Y.: Oceana Publications, Inc., 1965. pp. viii, 129. Index. 21 s.; \$4.50.) David H. N. Johnson, of the London School of Economics and Political Science, the first Professor to hold a combined Chair of International and Air Law in the United Kingdom, here surveys briefly the development of air law from its earliest days to the present day. The book is the outgrowth of a series of lectures delivered at the University of Manchester and has the virtues and some of the defects of such a publication. The material is well organized and clearly written and offers a simple overview of the origins and development of air law of use primarily as an introduction to the field or for the more casual scholar. Neither in his introductory background chapters nor in his brief treatment of such current issues as civil aviation under the Chicago Convention of 1944, trespass in airspace, and crime on board aircraft, will the reader already conversant with the field of air law find anything novel of note.

Professor Johnson does devote two of his five chapters to the problems of air law in wartime and to the attempts to develop rules governing air warfare. The picture is of course a gloomy one. The materials presented concerning the British approach to air warfare and air law in the two world wars, while brief, are interesting and not as well known as most of the material presented elsewhere in the book. Professor Johnson's conclusion, after the experience of World War II, is that, while "strategic" and "tactical" bombing are legally permissible, pure "terror-bombing" is even today barred by existing international law (p. 57). By intent he omits any discussion of the problem of nuclear weapons, but his brief comment indicates his disapproval of their use (pp. 54-55). The use of rocket weapons and earth satellite military systems is not dealt with either, except to the extent that the reader can construct his own analogies. The Tokyo Convention of 1963 on Offences and Certain Other Acts Committed on Board Aircraft and the text of the Chicago Convention of 1944 on International Civil Aviation are included as Appendices. In short, this work represents a well-written introduction to some of the problems of airspace and air law but it is in no sense comprehensive in scope or in depth.

HOWARD J. TAUBENFELD

¹ For a comparison of the two Charters and the English text of the New Charter, see 58 A.J.I.L. 127-138 (1964).

American-Venezuelan Private International Law. By Richard S. Lombard. (Dobbs Ferry, N. Y.: Oceana Publications, 1965. pp. ii, 125. Index. \$5.50.) As this reviewer has pointed out earlier,¹ the editor of the series seems to have abandoned insistence on truly "bilateral" studies. The present volume, like several of its predecessors, is satisfied with presenting a foreign law for American readers without attempting to follow the French, Greek, Japanese, or Swiss studies of the series in assembling corresponding American authority. Within this limited framework the author has done a superb job. To be sure, the presentation of Venezuelan law, no doubt unavoidably, suffers from an almost entirely academic discussion, even as to such highly practical subjects as marriage (p. 38), wills (pp. 57-59), contracts (pp. 62-63), and torts (pp. 67-69). But the careful analysis of judicial and legislative authority in the chapters on divorce and annulment (pp. 40-52), corporations (pp. 70-81), currency provisions (pp. 86-90) and judgments (pp. 96-103) alone justify publication of this study, which gains additional value through its excellent introduction to Venezuelan law (pp. 7-28) and an appendix setting forth the 1963 Draft Law of Principles of Private International Law.

There are those who, like this reviewer, believe that courts all over the world in most fields of international conflicts law, in effect, notwithstanding much dogmatic language to the contrary, regularly apply their own law except in the broad fields of party autonomy, status and immovables. The present study will confirm these heretics in their faith when they find that Venezuelan courts, encouraged by the legislature (pp. 20-27), have, despite the adoption of the long obsolete Bustamante Code, applied the *lex fori* even to the form of foreign agreements, foreign wills, family relations among foreigners, and, most startlingly, to all property, real and personal, located in Venezuela (pp. 22, 25, 43-44, 53-56).

ALBERT A. EHRENZWEIG

Die Bestimmungen über das Kriegsverbrechens- und Besatzungsstrafrecht in den Genfer Abkommen zum Schutze der Kriegsgesopfer von 1949. By Walter Meier. (Winterthur: Verlag P. G. Keller, 1964. pp. xx, 239.) The author subjects the four Geneva Conventions of August 12th, 1949, to a thoroughgoing analysis with special reference to war crimes and the treatment of civilian populations under occupation. The author is correct when he states that

The lack of prosecution of clearly determined war crimes and crimes against humanity places in doubt the principles of international law developed during the past two decades and further, is in conflict with the duties for universal prosecution assumed by the signatories of the Geneva Conventions.*

The Soviet Union and other Communist states reserved the right to prosecute war criminals according to national law and not as prisoners of war under the Geneva Conventions, which raises the question whether it is to be expected that a country involved in military operations will apply the same law to enemy prisoners it judges as war criminals as to her own soldiers, as the Convention provides. Perhaps an international tribunal

¹ Book review, 60 A.J.I.L. 439 (1966).

* "Das Nichtverfolgen von eindeutig festgestellten Kriegs- und Menschlichkeitsverbrechen stellt die in den letzten zwei Jahrzehnten entwickelten voelkerrechtlichen Grundsätze in Frage und steht ueberdies im Widerspruch zu den universellen Strafverfolgungspflichten der Unterzeichnerstaaten der Genfer Abkommen." (p. 97.)

could be expected to be more impartial; but, unlike the Genocide Convention, the Geneva accords do not provide for the alternative of an international penal tribunal (Article VI, Convention on the Prevention and Punishment of the Crime of Genocide).

The work raises questions as to possible conflicts between national statutes of limitation and the right to prosecute war crimes under the universal principle of jurisdiction. Dr. Meier has written an excellent dissertation.

ROBERT K. WOETZEL

The Foundations of Freedom: The Interrelationship between Democracy and Human Rights. By Durward V. Sandifer and L. Ronald Scheman. (New York, Washington and London: Frederick A. Praeger, 1966. pp. xvi, 139. \$5.00.) The problem discussed here is an old one, and it might be thought that there was little more to be said about either democracy or human rights. The authors are convinced, however, that there is a contribution to be made in examining the relation between the two conditions of freedom in the light of the conflicting conceptions of public welfare. Which comes first, the state or the individual; the material welfare of the group or the moral principle of freedom; the efficiency of the organized anthill or the more stumbling progress of democracy; dictatorship in the development of economic and social needs or the experimental search for higher standards of living, freely chosen in the open market of public opinion? The revolution of rising expectations is at times impatient in its claims: can coercion and intimidation be justified by the delay of democracy in securing social justice?

An opening chapter explains the relationship between democracy and human rights, pointing out the different meanings of "liberty" in the theory of the Soviet Union and in that of the Anglo-Saxon tradition. Then follows a detailed study of the rights of man and of the corresponding duties, treated along traditional lines. A closing chapter deals with the rôle of international organization and the conflict between the principle of non-intervention and the obligation of representative democracy set forth in the Charter of the Organization of American States.

The study looks primarily toward meeting the objectives of the Inter-American Commission on Human Rights, and the comments of the authors are directed to that end. The "revolution of rising expectations," they repeat, can be fatal to human rights unless kept under the control of law. With this situation before them, the authors seek to restrain the impatient who would sacrifice freedom for more immediate economic gain. "The great challenge of our day is to gain time for the spirit of democracy to grow."

C. G. FENWICK

Le Principe d'Effectivité dans l'Ordre International. By Jean Touscoz. (Paris: Librairie Générale de Droit et de Jurisprudence, R. Pichon et R. Durand-Auzias, 1964. pp. xiv, 280. Index. Fr. 35.) Increasing attention is being given recently—and rightly so—to the principle of effectiveness in the literature of international law.¹ It is, indeed, a very important principle not only of the law of nations but of law in general. This is the first comprehensive, detailed and well-documented study (the bibliography and table of cases comprise 14 pages) of a difficult subject.

¹ See, most recently, the special section on this principle in Tucker's revision of Kelsen's *Principles of International Law* 420 ff. (New York, 1966).

Dr. Touscoz of the University of Grenoble accords the principle a decisive rôle in the international legal order, fulfilling both a "creative" and a "revisionist" function. On the basis of this distinction, he discusses in Part I on the creative function, effectiveness as conditioning the formation of legal rules and as founding the validity of legal titles; and in Part II on the revisionist function of effectiveness, the change of legal rules because of changes in their effectiveness, the invalidity of ineffective legal titles and conflicts between legal titles. Since every revision is a creation and *vice versa*, the value of this distinction is questionable. The author rightly concludes that the "systematic and abusive [why abusive?] recourse to the principle of effectiveness" would lead to the admission of the rule of *ex injuria jus oritur*. This, however, "no legal system can accept," he says, and "happens only in a primitive legal system"—which the international legal order certainly is. Whatever the relationship between *ex injuria jus non oritur* and *ex factis jus oritur*, Dr. Touscoz' monograph is a valuable contribution to the study of a fundamental problem.

SALO ENGEL

BOOKS RECEIVED *

- Altug, Yilmaz. *Yabancıların Hukuki Durumu* [*Legal Status of Aliens*]. 2nd ed. Istanbul: İsmail Akungün Matbaası, 1966. pp. xiii, 284. Index. ₺T. 22.25.
- American Law Institute. *Restatement of the Law—Second: Foreign Relations Law of the United States. As Adopted and Promulgated at Washington, D. C., May 20, 1962.* (Revisions adopted and promulgated at Washington, D. C. on May 20, 1964, and May 20, 1965.) St. Paul, Minn.: American Law Institute Publishers, 1965. pp. xxvi, 679. Index. \$17.50.
- Anglin, Douglas G. *The St. Pierre and Miquelon Affaire of 1941. A Study in Diplomacy in the North Atlantic Quadrangle.* Toronto: University of Toronto Press, 1966. pp. xvi, 219. Index. \$6.00.
- Annuaire Français de Droit International*, 1965. Vol. IX. Paris: Centre Nationale de la Recherche Scientifique, 1966. pp. iv, 1313. Index. Fr. 78.
- Bennett, John Coleman. *Foreign Policy in Christian Perspective.* New York: Charles Scribner's Sons, 1966. pp. 160. \$1.25.
- Blaisdell, Donald C. *International Organization.* New York: The Ronald Press Co., 1966. pp. vi, 531. Index. \$7.50.
- Blumenwitz, Dieter. *Die Grundlagen eines Friedensvertrages mit Deutschland.* Berlin: Duncker & Humblot, 1966. pp. 208. Index.
- Centres de Droit International de l'Institut de Sociologie de l'Université de Bruxelles et de l'Université de Louvain. *L'Adaptation de la Constitution Belge aux Réalités Internationales. Actes du Colloque des 6 et 7 Mai 1965.* Brussels: Éditions de l'Institut de Sociologie, 1966. pp. 135. B. Fr. 195.
- Clark, Grenville, and Louis B. Sohn. *World Peace Through World Law. Two Alternative Plans.* 3rd ed. enlarged. Cambridge: Harvard University Press, 1966. pp. liv, 535. Index. \$8.50.
- Drapier, G. I. A. D. *Civilians and the Nato Status of Forces Agreement.* Leyden: A. W. Sijthoff, 1966. pp. iv, 204. Index. Fl. 20.
- Gaja, Giorgio. *Decisioni della Corte Costituzionale in Materia Internazionale.* (Sezione VIII, No. 1, Testi per Esercitazioni.) Milan: Dott. A. Giuffrè, 1966. pp. iv, 147. L. 1200.
- García Robles, Alfonso. *La Desnuclearización de la América Latina.* Segunda Edición Aumentada. Mexico, D. F.: El Colegio de Mexico, 1966. pp. 154.

* Mention here neither assures nor precludes later review.

- Hague Conference on Private International Law. *Actes et Documents de la Dixième Session 7 au 28 Octobre 1964*. Vol. I: *Séances plénières—Divorce*. pp. 341; Vol. II: *Adoption*. pp. 439; Vol. IV: *For Contractuel*. pp. 231. The Hague: Permanent Bureau of the Conference, 1965, 1966. Fl. 18 each.
- Haley, Andrew G., and Mortimer D. Schwartz (eds.). *Proceedings of the Eighth Colloquium on the Law of Outer Space*. International Institute of Space Law of the International Astronautical Federation, September 14–15, 1965, Athens, Greece. South Hackensack, N. J.: Fred B. Rothman & Co., 1966 (Distributors). pp. ix, 475. \$6.50.
- Hinsley, F. H. *Sovereignty*. London: C. A. Watts & Co., Ltd., 1966. pp. viii, 255. Index. 15 s.
- Hogue, Arthur R. *Origins of the Common Law*. Bloomington, Indiana, and London: Indiana University Press, 1966. pp. xii, 276. Index. \$6.50; 49 s.
- Jacobson, Harold Karan, and Eric Stein. *Diplomats, Scientists, and Politicians. The United States and the Nuclear Test Ban Negotiations*. Ann Arbor: The University of Michigan Press, 1966. pp. ix, 538. Index. \$8.50.
- Keeton, George W. *The Norman Conquest and the Common Law*. New York: Barnes & Noble, Inc.; London: Ernest Benn Limited, 1966. pp. 238. Index. \$6.00.
- Kelsen, Hans. *Principles of International Law*. 2nd ed. Revised and edited by Robert W. Tucker. New York: Holt, Rinehart and Winston, Inc., 1966. pp. xviii, 602. Index. \$9.95.
- Koh, Byung Chul. *The United Nations Administrative Tribunal*. Baton Rouge: Louisiana State University Press, 1966. pp. ix, 176. Index. \$4.00.
- Kohlík, George, and Ernest A. Rovelstad (eds.). *Digest of Commercial Laws of the World*. New York: Oceana Publications, Inc., 1966. Vol. I: Brazil, Chile, Egypt, El Salvador, Ireland, Italy, Japan, Lebanon, Mexico, Norway, Peru, Portugal and Uruguay. \$25.00.
- Lombardi T., Juan E. *La Responsabilidad Extracontractual Civil ex el Derecho Panameño*. Panama: República de Panamá, 1965. pp. x, 342. Bibliography.
- Mahnke, Hans Heinrich. *Das Problem der Einheit der Völkerrechtsgemeinschaft und die Organisation der Internationalen Sicherheit*. Berlin: Duncker & Humblot, 1966. pp. 250. Index.
- Makarov, Alexander N. *Deutsches Staatsangehörigkeitsrecht. Kommentar*. Frankfurt and Berlin: Alfred Metzner Verlag, 1966. pp. 640. Index. DM. 89.
- Mateesco, Mircea. *Le Droit Maritime Soviétique Face au Droit Occidental*. Paris: Éditions A. Pedone, 1966. pp. 214.
- Mughraby, Muhamad A. *Permanent Sovereignty Over Oil Resources. A Study of Middle East Oil Concessions & Legal Change*. Beirut: The Middle East Research and Publishing Center, 1966. pp. xviii, 233. Index. \$7.00; £2 11 s.; L.L. 22.00.
- Nantwi, E. K. *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law*. Leyden: A. W. Sijthoff, 1966. pp. xv, 209. Index. Fl. 17.50.
- Panama, Universidad de. *Cuaderno de la Facultad de Derecho y Ciencias Políticas*. No. 4. Panama: Universidad de Panama, Oficina de Informacion y Publicaciones, 1966. pp. 168.
- Parra Aranguren, Gonzalo. *Origen y Evolución del Sistema Anglo-American de Derecho Internacional Privado*. Caracas: Empresa el Cojo S.A., 1966. pp. 78. Bibliography.
- Queneudec, Jean-Pierre. *La Responsabilité Internationale de l'État pour les Fautes Personnelles de Ses Agents*. Paris: Librairie Générale de Droit et de Jurisprudence, R. Pichon et R. Durand-Auzias, 1966. pp. ii, 275.
- Rigaux, François. *La Nature du Contrôle de la Cour de Cassation*. Brussels: Établissements Émile Bruylant, 1966. pp. xxiii, 482. Index. Fr. 1,420, cloth; Fr. 1,140, paper.

- Rubin, Seymour J. *The Conscience of the Rich Nations. The Development Assistance Committee and the Common Aid Effort.* New York and London: Harper & Row, 1966. pp. xii, 164. Index. \$3.95.
- Schelling, Thomas C. *Arms and Influence.* New Haven: Yale University Press, 1966. pp. ix, 293. Index. \$7.50.
- Smit, Hans. *International Co-operation in Litigation: Europe.* The Hague: Martinus Nijhoff, 1965. pp. xxxiv, 486. Index. Gld. 58.50.
- Starke, J. G. *The ANZUS Treaty Alliance.* Melbourne, Australia: Melbourne University Press; New York: Cambridge University Press, 1966. pp. xiv, 315. Index. \$12.50.
- Tax Institute of America. *Taxation of Foreign Income.* Symposium conducted December 2-3, 1965. Princeton, N. J.: 1966. pp. xii, 340. Index. \$12.50.
- Tosato, Gian Luigi. *I Regolamenti delle Comunità Europee.* Milan: Dott. A. Giuffrè, 1965. pp. vii, 336. Index.
- Triffin, Robert. *The World Money Maze: National Currencies in International Payments.* New Haven and London: Yale University Press, 1966. pp. xii, 585. \$12.50; 90 s.
- United States Department of State. *Foreign Relations of the United States. Diplomatic Papers 1944.* Vol. IV: *Europe.* (Dept. of State Pub. 8067.) Washington, D. C.: U. S. Govt. Printing Office, 1966. pp. vi, 1473. Index. \$4.75.
- United States Naval War College. *International Law Studies, 1962.* Vol. LV: *The International Law of Outer Space.* By Carl Q. Christol. (NAVPERES 15031.) Washington, D. C.: U. S. Govt. Printing Office, 1966. pp. x, 513. Index. \$2.50.
- Van der Meersch, W. J. Ganshof. *Organisations Européennes.* Vol. I. Brussels: Établissements Émile Bruylant; Paris: Éditions Sirey, 1966. pp. 580. Index. B.Fr. 1,320.
- Weinstein, Jerry L. (ed.) *Law and Administration.* Vol. 4. (Progress in Nuclear Energy, Series X.) London, New York, Toronto, Paris, Frankfurt: Pergamon Press, 1966. pp. xxiv, 398. Index. \$15.00.
- Wilson, Clifton E. *Cold War Diplomacy. The Impact of International Conflicts on Diplomatic Communications and Travel.* Tucson: The University of Arizona Press, 1966. pp. viii, 67. \$1.50.
- Woetzel, Robert K. *The Philosophy of Freedom.* With a discussion at the Center for the Study of Democratic Institutions. Dobbs Ferry, N. Y.: Oceana Publications, 1966. pp. xviii, 200. Index. \$6.00.
- Wolfers, Arnold, Robert E. Osgood, et al. *The United States in a Disarmed World. A Study of the U. S. Outline for General and Complete Disarmament.* Baltimore: Johns Hopkins Press, 1966. pp. xii, 236. Index. \$8.50; 68 s.
- Yntema, Hessel E. (ed.) *The American Journal of Comparative Law Reader.* Dobbs Ferry, N. Y.: Oceana Publications, 1966. pp. xi, 493. \$10.00.
- Zolberg, Aristide R. *Creating Political Order. The Party-States of West Africa.* Chicago: Rand McNally & Co., 1966. pp. viii, 168. Index. \$2.50.

OFFICIAL DOCUMENTS *

CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES¹

Adopted March 18, 1965; entered into force October 14, 1966

PREAMBLE

The Contracting States

Considering the need for international cooperation for economic development, and the role of private international investment therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

* Obtained and prepared by R. R. Baxter of the Board of Editors.

¹ Submitted to governments by the Executive Directors of the International Bank for Reconstruction and Development.

The convention is reproduced from the authentic text as published by the International Bank. In another printing by the International Bank, the text of the convention is accompanied by the Report of the Executive Directors on the convention, March 18, 1965 (separate publications in English, French, and Spanish).

The United States Senate gave its advice and consent to the ratification of the convention on May 16, 1966; the President ratified it on June 1, 1966; and the U. S. instrument of ratification was deposited on June 10, 1966. Other governments on whose behalf instruments of ratification have been deposited are: Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Ghana, Iceland, Ivory Coast, Jamaica, Malagasy Republic, Malawi, Malaysia, Mauritania, Netherlands, Nigeria, Pakistan, Sierra Leone, Tunisia, Uganda, Upper Volta.

The convention was signed on behalf of: Austria, Belgium, Cameroon, Central African Republic, Chad, Republic of China, Congo (Brazzaville), Cyprus, Dahomey, Denmark, Ethiopia, France, Gabon, Federal Republic of Germany, Ghana, Greece, Iceland, Ireland, Italy, Ivory Coast, Jamaica, Japan, Kenya, Korea, Liberia, Luxembourg, Malagasy Republic, Malawi, Malaysia, Mauritania, Morocco, Nepal, Netherlands, Niger, Nigeria, Norway, Pakistan, Sierra Leone, Somalia, Sweden, Togo, Tunisia, Uganda, United Kingdom, United States, Upper Volta. (I.B.R.D. Press Release No. 66/50, Sept. 15, 1966.)

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:

CHAPTER I

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

SECTION 1

Establishment and Organization

Article 1

(1) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).

(2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

Article 2

The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

Article 3

The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators.

SECTION 2

The Administrative Council

Article 4

(1) The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act.

(2) In the absence of a contrary designation, each governor and alter-

nate governor of the Bank appointed by a Contracting State shall be *ex officio* its representative and its alternate respectively.

Article 5

The President of the Bank shall be *ex officio* Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council.

Article 6

(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall

- (a) adopt the administrative and financial regulations of the Centre;
- (b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;
- (c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
- (d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;
- (e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;
- (f) adopt the annual budget of revenues and expenditures of the Centre;
- (g) approve the annual report on the operation of the Centre.

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.

Article 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council.

(2) Each member of the Administrative Council shall have one vote and, except as otherwise herein provided, all matters before the Council shall be decided by a majority of the votes cast.

(3) A quorum for any meeting of the Administrative Council shall be a majority of its members.

(4) The Administrative Council may establish, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

Article 8

Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre.

SECTION 3

The Secretariat

Article 9

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

Article 10

(1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

(2) The offices of Secretary-General and Deputy Secretary-General shall be incompatible with the exercise of any political function. Neither the Secretary-General nor any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

(3) During the Secretary-General's absence or inability to act, and during any vacancy of the office of Secretary-General, the Deputy Secretary-General shall act as Secretary-General. If there shall be more than one Deputy Secretary-General, the Administrative Council shall determine in advance the order in which they shall act as Secretary-General.

Article 11

The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted by the Administrative Council. He shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered pursuant to this Convention, and to certify copies thereof.

SECTION 4

The Panels

Article 12

The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

Article 13

(1) Each Contracting State may designate to each Panel four persons who may but need not be its nationals.

(2) The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.

Article 14

(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

(2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

Article 15

(1) Panel members shall serve for renewable periods of six years.

(2) In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.

(3) Panel members shall continue in office until their successors have been designated.

Article 16

(1) A person may serve on both Panels.

(2) If a person shall have been designated to serve on the same Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which first designated him or, if one such authority is the state of which he is a national, by that state.

(3) All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification is received.

SECTION 5

Financing the Centre

Article 17

If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

SECTION 6

Status, Immunities and Privileges

Article 18

The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity

- (a) to contract;
- (b) to acquire and dispose of movable and immovable property;
- (c) to institute legal proceedings.

Article 19

To enable the Centre to fulfil its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.

Article 20

The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

Article 21

The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat

(a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;

(b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by

Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.

Article 22

The provisions of Article 21 shall apply to persons appearing in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.

Article 23

(1) The archives of the Centre shall be inviolable, wherever they may be.

(2) With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favourable than that accorded to other international organizations.

Article 24

(1) The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.

(2) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.

(3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or members of a Committee appointed pursuant to paragraph (3) of Article 52, in proceedings under this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.

CHAPTER II

JURISDICTION OF THE CENTRE

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that state) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

- (a) any natural person who had the nationality of a Contracting State other than the state party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
- (b) any juridical person which had the nationality of a Contracting State other than the state party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that state unless that state notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

CHAPTER III

CONCILIATION

SECTION 1

Request for Conciliation

Article 28

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

SECTION 2

Constitution of the Conciliation Commission

Article 29

(1) The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request pursuant to Article 28.

(2) (a) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of conciliators and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties.

Article 30

If the Commission shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 28, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.

Article 31

(1) Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments by the Chairman pursuant to Article 30.

(2) Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in paragraph (1) of Article 14.

SECTION 3

Conciliation Proceedings

Article 32

(1) The Commission shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 33

Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. If any question of procedure arises which is not covered by this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

Article 34

(1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties. The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations.

(2) If the parties reach agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties, it shall close the proceedings and shall draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall close the proceedings and shall draw up a report noting that party's failure to appear or participate.

Article 35

Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.

CHAPTER IV

ARBITRATION

SECTION 1

Request for Arbitration

Article 36

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

SECTION 2

Constitution of the Tribunal

Article 37

(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.

(2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

Article 38

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-

General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

Article 39

The majority of the arbitrators shall be nationals of states other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Article 40

(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.

(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

SECTION 3

Powers and Functions of the Tribunal

Article 41

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 42

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

Article 43

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

- (a) call upon the parties to produce documents or other evidence, and
- (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

Article 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Article 45

(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

Article 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

SECTION 4

The Award

Article 48

(1) The Tribunal shall decide questions by a majority of the votes of all its members.

(2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.

(3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

(4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

(5) The Centre shall not publish the award without the consent of the parties.

Article 49

(1) The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

SECTION 5

Interpretation, Revision and Annulment of the Award

Article 50

(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Article 51

(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

(3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the state party to the dispute or of the state whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those states, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new tribunal constituted in accordance with Section 2 of this Chapter.

SECTION 6

Recognition and Enforcement of the Award

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such state shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that state or of any foreign state from execution.

CHAPTER V

REPLACEMENT AND DISQUALIFICATION OF
CONCILIATORS AND ARBITRATORS*Article 56*

(1) After a Commission or a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if a conciliator or an arbitrator should die, become in-

capacitated, or resign, the resulting vacancy shall be filled in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

(2) A member of a Commission or Tribunal shall continue to serve in that capacity notwithstanding that he shall have ceased to be a member of the Panel.

(3) If a conciliator or arbitrator appointed by a party shall have resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy.

Article 57

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

Article 58

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

CHAPTER VI

COST OF PROCEEDINGS

Article 59

The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council.

Article 60

(1) Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General.

(2) Nothing in paragraph (1) of this article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.

Article 61

(1) In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.

(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

CHAPTER VII

PLACE OF PROCEEDINGS

Article 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

Article 63

Conciliation and arbitration proceedings may be held, if the parties so agree,

(a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or

(b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

CHAPTER VIII

DISPUTES BETWEEN CONTRACTING STATES

Article 64

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the states concerned agree to another method of settlement.

CHAPTER IX

AMENDMENT

Article 65

Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-

General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered and shall forthwith be transmitted by him to all the members of the Administrative Council.

Article 66

(1) If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.

(2) No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such state arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.

CHAPTER X

FINAL PROVISIONS

Article 67

This Convention shall be open for signature on behalf of states members of the Bank. It shall also be open for signature on behalf of any other state which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

Article 68

(1) This Convention shall be subject to ratification, acceptance or approval by the signatory states in accordance with their respective constitutional procedures.

(2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each state which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Article 69

Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

Article 70

This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are ex-

cluded by such state by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

Article 71

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

Article 72

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that state or of any of its constituent subdivisions or agencies or of any national of that state arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

Article 73

Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to states members of the Bank and to any other state invited to sign the Convention.

Article 74

The depositary shall register this Convention with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

Article 75

The depositary shall notify all signatory states of the following:

- (a) signatures in accordance with Article 67;
- (b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;
- (c) the date on which this Convention enters into force in accordance with Article 68;
- (d) exclusions from territorial application pursuant to Article 70;
- (e) the date on which any amendment of this Convention enters into force in accordance with Article 66; and
- (f) denunciations in accordance with Article 71.

AGREEMENT BETWEEN THE INTERNATIONAL ATOMIC
ENERGY AGENCY, THE GOVERNMENT OF THE KING-
DOM OF THAILAND AND THE GOVERNMENT OF
THE UNITED STATES OF AMERICA FOR THE
APPLICATION OF SAFEGUARDS¹

*Signed at Vienna, September 30, 1964; entered into force
September 10, 1965*

WHEREAS the Government of the United States of America (hereinafter called the "United States") and the Government of the Kingdom of Thailand (hereinafter called "Thailand") have been cooperating on the civil uses of atomic energy under their Agreement for Cooperation of 13 March 1956,² as amended on 27 March 1957, 11 June 1960, 31 May 1962 and 8 June 1964³ (hereinafter called the "Agreement for Cooperation"), which requires that equipment, devices and materials made available to Thailand by the United States be used solely for peaceful purposes and establishes a system of safeguards to that end; and

WHEREAS the Agreement for Cooperation reflects the mutual recognition of the two governments of the desirability of arranging for the International Atomic Energy Agency (hereinafter called the "Agency") to administer safeguards as soon as practicable; and

WHEREAS the Agency is, pursuant to its Statute⁴ and the action of its Board of Governors, now in a position to apply safeguards to certain materials, equipment and facilities in accordance with the Agency's safeguards procedures set forth in the Safeguards Document and in the Inspectors Document; and

WHEREAS the two governments have reaffirmed their desire that equipment, devices and materials supplied by the United States under the Agreement for Cooperation or produced by their use or otherwise subject to safeguards under that Agreement shall not be used for any military purpose and have requested the Agency to apply, insofar as it has appropriate provisions to do so, safeguards to such materials, equipment and facilities as are covered by this Agreement; and

WHEREAS the Board of Governors of the Agency has acted favourably upon that request on 19 September 1964;

Now, THEREFORE, the two governments and the Agency agree as follows:

¹ T.I.A.S. No. 5861. This agreement is representative of a number of tripartite agreements for the application of safeguards by the International Atomic Energy Agency to equipment, devices, and materials made available to various countries by the United States of America under agreements for co-operation on the civil uses of atomic energy.

² T.I.A.S. No. 3522; 7 U. S. Treaties 416.

³ T.I.A.S. Nos. 3842, 4533, 5122, 5765, 8 U. S. Treaties 832; 11 U. S. Treaties 1874; 13 U. S. Treaties 1776; 16 U. S. Treaties 91.

⁴ T.I.A.S. No. 3873; 8 U. S. Treaties 1093.

ARTICLE I

Use of Materials, Devices and Facilities for Peaceful Purposes

Section 1. Thailand hereby undertakes that, during the term of this Agreement, it will not use in such a way as to further any military purpose any material, equipment or facility listed in the inventory for Thailand provided for in paragraphs 1 and 2 of the Annex.

Section 2. The United States hereby undertakes that, during the term of this Agreement, it will not use in such a way as to further any military purpose any special fissionable material listed in the inventory for the United States provided for in paragraph 3 of the Annex.

Section 3. The Agency hereby agrees to apply safeguards, during the term of and in accordance with the provisions of this Agreement, to materials, equipment and facilities while they are listed in the inventories provided for in the Annex, to ensure that they will not be used in such a way as to further any military purpose, provided that there need be no application of safeguards to:

- (a) Nuclear materials, except to the extent that the quantity of PN material of that type in the state, including that listed in the inventory provided for in the Annex, is in excess of:
 - (i) In the case of natural uranium or depleted uranium with a uranium-235 content of 0.5 per cent or greater—10 metric tons;
 - (ii) In the case of depleted uranium with a uranium-235 content of less than 0.5 per cent—20 metric tons;
 - (iii) In the case of thorium—20 metric tons;
 - (iv) In the case of special fissionable material: plutonium, uranium-233 or fully enriched uranium or its equivalent in the case of partially enriched uranium—200 grams;
- (b) Reactors specified by Thailand and determined by the Agency to have a maximum calculated power for continuous operation of less than three thermal megawatts, provided that the total such power of the reactors thus specified by Thailand under this and all other agreements providing for safeguards by the Agency in Thailand may not exceed 6 thermal megawatts;
- (c) Mines, mining equipment or ore-processing plants.

Section 4. Thailand and the United States undertake to facilitate the application of such safeguards and to co-operate with the Agency and each other to that end.

Section 5. The United States agrees that its rights under Article VI of the Agreement for Cooperation to apply safeguards to equipment, devices and materials subject to that Agreement will be suspended with respect to materials, equipment and facilities while they are listed in the

inventory for Thailand provided for in the Annex. It is understood that no other rights and obligations of Thailand and the United States between each other under Article VI and under other provisions of the Agreement for Cooperation, including those arising by reason of paragraph B of Article VII, will be affected by this Agreement. If the Board determines, pursuant to Section 15(a) or otherwise, that the Agency is unable to apply safeguards to any such material, equipment or facility, it shall thereby be removed from such inventory until the Board determines that the Agency is able to apply safeguards to it.

ARTICLE II

Application of Agency Safeguards

Section 6. An initial inventory of all the materials, equipment and facilities which are within the jurisdiction of Thailand and subject to the Agreement for Cooperation and which are within the scope of the Agency's safeguards system shall be prepared by the two governments and submitted to the Agency. Upon the entry into force of this Agreement, the Agency will commence applying safeguards to such materials, equipment and facilities. Thereafter Thailand and the United States shall jointly notify the Agency of:

- (a) Any transfer from the United States to Thailand under their Agreement for Cooperation of materials, equipment or facilities which are within the scope of the Agency's safeguards system;
- (b) Any transfer from Thailand to the United States of any special fissionable material included in the inventory pursuant to Section 8.

Such materials, equipment and facilities shall be listed in the respective inventory provided for in the Annex, within thirty days of receipt of such notification by the Agency and thereupon become subject to safeguards by the Agency, unless the Agency notifies the two governments that it is unable to apply safeguards thereto.

Section 7. The notification by the two governments provided for in Section 6 shall normally be sent to the Agency not more than two weeks after the material, equipment or facility arrives in the recipient country, except that shipments of natural uranium, depleted uranium, or thorium in quantities not exceeding one ton shall not be subject to the two-week notification requirement but shall be reported to the Agency at quarterly intervals. Such notification shall include the type, form and quantity of the material and/or the type and capacity of the equipment or facility involved, the date of shipment, the date of receipt, the identity of the recipient, and any other relevant information. The two governments also undertake to give the Agency as much advance notice as possible of the transfer of large quantities of nuclear materials or major equipment or facilities. Design information pertinent to safeguards and concerning the facilities listed in the inventory provided for in paragraphs 1(a) and 2

of the Annex shall also be provided to the Agency by the party concerned at the request of the Agency.

Section 8. Thailand shall notify the Agency, by means of its routine safeguards reports, of any special fissionable material it has produced, during the period covered by the report, in or by the use of any of the materials, equipment or facilities listed in the principal part of the inventory for Thailand provided for in the Annex. Upon receipt by the Agency of the notification, such produced material shall be listed in that inventory provided that any material so produced shall be deemed to be listed and therefore to be subject to safeguards by the Agency from the time it is produced. The Agency may verify the calculations of the amounts of such materials; appropriate adjustment in the inventory provided for in the Annex will be made by agreement of the parties to the Agreement concerned. Pending final agreement of the parties concerned, the Agency's calculations will govern.

Section 9. Thailand and the United States shall jointly notify the Agency of the return to the United States of any materials, equipment or facilities listed in the inventory for Thailand provided for in the Annex. Upon receipt thereof by the United States:

- (a) Materials described in Section 6(b) shall be transferred from the inventory for Thailand to the inventory for the United States;
- (b) Other materials, and equipment or facilities shall be deleted from the inventory provided for in the Annex.

Section 10. Thailand and the United States shall jointly notify the Agency of any transfer of materials, equipment or facilities listed in the inventory provided for in the Annex to a recipient which is not under the jurisdiction of either Thailand or the United States. Such materials, equipment or facilities shall thereupon be deleted from such inventory, provided that:

- (a) Safeguards by the Agency continue to apply to such materials, equipment or facilities; or
- (b) Other safeguards generally consistent with Agency safeguards and acceptable to Thailand and the United States, will apply to such materials, equipment or facilities, provided that in the case of materials included in the inventory pursuant to Section 6(b) or 8 such other safeguards are also acceptable to the Agency.

Section 11. The notifications by the two governments provided for in Sections 9 and 10 shall be sent to the Agency at least two weeks before the material, equipment or facility is transferred. In other respects these notifications shall conform, as far as appropriate, to the requirements of Section 7.

Section 12. Agency safeguards applied to nuclear material pursuant to this Agreement will be suspended while such material is transferred to

any other state or group of states or to an international organization, solely for the purpose of processing, reprocessing or testing, under an agreement approved by the Agency and within the scope of the Agreement for Cooperation or is transferred, under an arrangement approved by the Agency, to a facility within Thailand or the United States of America to which safeguards are not applied, provided that:

- (a) The agreement or the arrangement requires that there be placed under safeguards by the Agency, at a time to be agreed and with due allowance for processing losses, an amount of the same type of nuclear material at least equal to such transferred material and not otherwise subject to safeguards (hereinafter called "substituted material"); or
- (b) The quantities of such transferred material are not at any time in excess of:
 - (i) In the case of natural uranium or depleted uranium with a uranium-235 content of 0.5 per cent or greater—10 metric tons;
 - (ii) In the case of depleted uranium with a uranium-235 content of less than 0.5 per cent—20 metric tons;
 - (iii) In the case of thorium—20 metric tons;
 - (iv) In the case of special fissionable material: plutonium, uranium-233 or fully enriched uranium or its equivalent in the case of partially enriched uranium—1000 grams.

In the case of materials listed in the inventory pursuant to Section 6(b), the Agency undertakes to give any requisite approvals necessary to allow the suspension of safeguards within the United States.

Section 13. In the event material is substituted as provided for in Section 12, that substituted material will be listed in the inventory provided for in the Annex in place of the original produced material as of the date of substitution. Safeguards suspended pursuant to Section 12 will remain suspended for as long as the substituted material remains subject to Agency safeguards or as long as the quantities of the materials for which no substitution was made do not exceed the limits specified in Section 12(b). When and if the original produced material is returned to the safeguards system provided for by this Agreement, that material will be listed in the inventory provided for in the Annex in place of the substituted material.

Section 14. The safeguards to be applied by the Agency are those procedures specified in Part V of the Safeguards Document, provided that the procedures for notification of transfers shall be as set forth in this Agreement.

Section 15. If the Board determines, in accordance with Article XII.C of the Statute, that there has been any non-compliance with this Agreement, the Board shall call upon the state concerned to remedy forthwith such non-compliance and shall make such reports as may be appropriate.

In the event of failure by such state to take fully corrective action within a reasonable time:

- (a) The Agency shall be relieved of its responsibility under Section 3 to apply safeguards for such time as the Board determines the Agency cannot effectively apply the safeguards provided for in this Agreement; and
- (b) The Board may take any other measures prescribed in Article XII.C of the Statute.

The Agency shall promptly notify the parties in the event of any determination by the Board pursuant to this Section.

ARTICLE III

Agency Inspectors

Section 16. Agency inspectors performing functions pursuant to this Agreement shall be governed by paragraphs 1 through 7 and 9, 10, 12 and 14 of the Inspectors Document and by paragraph 41 of the Safeguards Document. Whenever the United States avails itself of the provisions of Section 12(a) with respect to any material listed in the inventory pursuant to Section 6(b), it is understood that, with respect to the right of access of Agency inspectors within the United States of America, the requirements of paragraph 9 of the Inspectors Document shall be satisfied by affording Agency inspectors access at all times to the substituted materials.

Section 17. Thailand shall apply the provisions of the Agreement on the Privileges and Immunities of the Agency to Agency inspectors performing functions consequent upon this Agreement and to any property of the Agency used by them.

Section 18. The provisions of the International Organizations Immunities Act ⁵ of the United States shall apply to Agency inspectors per-
⁵ 59 Stat. 669; 22 U.S.C. §288 note.

forming functions in the United States of America under this Agreement and to any property of the Agency used by them.

ARTICLE IV

Use of Information by the Agency

Section 19. The Agency shall not publish nor communicate to any state, organization or person not on its staff any information obtained by it under this Agreement, other than summarized information about the inventories provided for in the Annex, except with the consent of the government of the state to which the information relates. Specific details concerning safeguards aspects of the nuclear energy programmes of either Thailand or the United States may be disseminated to the Board and to appropriate Agency staff members as necessary for the Agency to fulfil its safeguards responsibilities under this Agreement.

ARTICLE V

Finance

Section 20. In connection with the implementation of this Agreement all expenses incurred by or at the written request or direction of the Agency, its inspectors or other officials shall be borne by the Agency, and neither Thailand nor the United States shall be required to bear any expenses for equipment, accommodation, or transport furnished pursuant to paragraph 6 of the Inspectors Document.

ARTICLE VI

Settlement of Disputes

Section 21. Any dispute arising out of the interpretation or application of this Agreement which is not settled by negotiation or as may otherwise be agreed by the parties concerned shall on the request of any party be submitted to an arbitral tribunal composed as follows:

- (a) If the dispute involves only two of the parties to this Agreement, all three parties agreeing that the third is not concerned, the two parties involved shall each designate one arbitrator, and the two arbitrators so designated shall elect a third, who shall be the Chairman. If within thirty days of the request for arbitration either party has not designated an arbitrator, either party to the dispute may request the President of the International Court of Justice to appoint an arbitrator. The same procedure shall apply if, within thirty days of the designation or appointment of the second arbitrator, the third arbitrator has not been elected; or
- (b) If the dispute involves all three parties to this Agreement, each party shall designate one arbitrator, and the three arbitrators so designated shall by unanimous decision elect a fourth arbitrator, who shall be the Chairman, and a fifth arbitrator. If within thirty days of the request for arbitration any party has not designated an arbitrator, any party may request the President of the International Court of Justice to appoint the necessary number of arbitrators. The same procedure shall apply if, within thirty days of the designation or appointment of the third of the first three arbitrators, the Chairman or the fifth arbitrator has not been elected.

A majority of the members of the arbitral tribunal shall constitute a quorum, and all decisions shall be made by majority vote. The arbitral procedure shall be fixed by the tribunal. Upon application by any party, and if necessary to ensure that this Agreement continues to function effectively, the arbitral tribunal shall be empowered to make interim decisions and to issue interim orders pending a final decision on any dispute, except with respect to matters covered by Section 22. The final decision and interim orders and decisions of the tribunal, including all

rulings concerning its constitution, procedure, jurisdiction and the division of the expenses of arbitration between the parties, shall be binding on all parties and shall be implemented by them. The remuneration of the arbitrators shall be determined on the same basis as that of *ad hoc* judges of the International Court of Justice under Article 32, paragraph 4, of the Statute of the Court.

Section 22. Decisions of the Board concerning the inability of the Agency to apply safeguards or concerning any non-compliance with this Agreement, taken pursuant to Section 6 or 15, shall, if they so provide, immediately be given effect by the parties, pending the conclusion of any consultation, negotiation or arbitration that may be or may have been invoked with regard to the dispute.

ARTICLE VII

The Agency's Safeguards System and Definitions

Section. 23. The terms "application of safeguards", "Board", "depleted uranium", "Director General", "nuclear material", "PN material", "reactor", "special fissionable material", and "Statute" have the same meaning in this Agreement and the Annex hereto as they do in the Safeguards Document. The term "substituted material" refers to material described in Section 12(a). "Equivalent" amounts of special fissionable materials for purposes of Sections 3(a)(iv) and 12(b)(iv) shall be as defined by the equation in the Appendix to the Safeguards Document; the equivalent amounts of plutonium and U²³³ are the same as for fully enriched uranium. "Party" shall mean the Agency, Thailand or the United States.

Section 24. The terms "the Agency's safeguards system" and "Agency safeguards" refer to the procedures for safeguarding reactors with less than 100 megawatts thermal output, the related nuclear materials and small research and development facilities, as set forth in the Safeguards Document (INFCIRC/26, approved by the Board on 31 January 1961) and, with respect to Agency inspectors, the Inspectors Document (GC(V)/INF/39, Annex, placed in effect by the Board on 29 June 1961). In the event the Agency modifies those documents or the scope of the system, the parties may agree to apply any or all such modifications for purposes of this Agreement.

ARTICLE VIII

Amendment, Entry into Force and Duration

Section 25. Upon the request of any party there shall be consultations among them concerning the amendment of this Agreement.

Section 26. This Agreement shall enter into force, after signature by or for the Director General and by the authorized representatives of

Thailand and of the United States, on the date on which the Agency accepts the initial inventory provided for in Section 6.

Section 27. This Agreement shall remain in force until 5 March 1975 unless sooner terminated by any party upon six months' notice to the other parties or as may otherwise be agreed.

DONE in Vienna, this 30th day of September 1964, in triplicate in the English language.

For the INTERNATIONAL ATOMIC ENERGY AGENCY:

SIGVARD EKLUND

For the GOVERNMENT OF THE KINGDOM OF THAILAND:

TH. KHOMAN

For the GOVERNMENT OF THE UNITED STATES OF AMERICA:

FRANK K. HEFNER

[SEAL]

ANNEX

MATERIALS, EQUIPMENT AND FACILITIES SUBJECT TO AGENCY SAFEGUARDS

Inventories, with respect to Thailand and with respect to the United States, of the materials, equipment and facilities subject to safeguards by the Agency pursuant to this Agreement shall be currently maintained by the Agency on the basis of the notifications, agreements and determinations provided for in Article II of this Agreement, and on the basis of the safeguards reports submitted by the governments pursuant to this Agreement. These inventories will be considered integral parts of this Agreement, and the Agency will communicate them routinely to Thailand and to the United States every three months and also within two weeks of the receipt of a special request therefor from one of the governments.

1. The principal part of the inventory with respect to Thailand will consist of at least the following categories:
 - (a) Equipment and facilities transferred to Thailand;
 - (b) Material transferred to Thailand, and any substituted material;
 - (c) Special fissionable materials produced in Thailand, as specified in Section 8 of this Agreement, and any substituted material; and
 - (d) Nuclear materials utilized in or recovered from any materials, equipment or facilities listed in the principal part of this inventory, and any substituted material.
2. The subsidiary part of the inventory with respect to Thailand will contain any other equipment or facility while it is using, fabricating or processing any material listed in the principal part of this inventory.

3. The inventory with respect to the United States will contain any special fissionable material of whose transfer from Thailand the Agency has been notified pursuant to Section 6(b) of this Agreement, and any substituted material.

THE SITUATION IN SOUTHERN RHODESIA

RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY AND THE SECURITY COUNCIL OF THE UNITED NATIONS

GENERAL ASSEMBLY RESOLUTION No. 2012 (XX), OCTOBER 12, 1965¹

The General Assembly

Deeply concerned at the situation in Southern Rhodesia,

Noting with particular concern the repeated threats of the present authorities in Southern Rhodesia immediately to declare unilaterally the independence of Southern Rhodesia, in order to perpetuate minority rule in Southern Rhodesia,

Noting the attitude of the Government of the United Kingdom of Great Britain and Northern Ireland that a unilateral declaration of independence for Southern Rhodesia would be an act of rebellion and that any measure to give it effect would be an act of treason,

1. *Condemns* any attempt on the part of the Rhodesian authorities to seize independence by illegal means in order to perpetuate minority rule in Southern Rhodesia;

2. *Declares* that the perpetuation of such minority rule would be incompatible with the principle of equal rights and self-determination of peoples proclaimed in the Charter of the United Nations and in the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in General Assembly resolution 1514 (XV) of 14 December 1960;

3. *Requests* the United Kingdom of Great Britain and Northern Ireland and all Member States not to accept a declaration of independence for Southern Rhodesia by the present authorities, which would be in the sole interest of the minority, and not to recognize any authorities purporting to emerge therefrom;

4. *Calls upon* the United Kingdom to take all possible measures to prevent a unilateral declaration of independence and, in the event of such a declaration, to take all steps necessary to put an immediate end to the rebellion, with a view to transferring power to a representative government in keeping with the aspirations of the majority of the people;

5. *Decides* to keep the question of Southern Rhodesia under urgent and

¹ U.N. Doc. A/RES/2012 (XX) (1965); General Assembly, 20th Sess., Official Records, Supp. No. 14 (A/6014), p. 53. Adopted on the report of the Fourth Committee (A/6041), by a vote of 107 to 2 (Portugal and South Africa), with 1 abstention (France). The United Kingdom did not participate in the vote.

continuing review during the twentieth session and to consider what further steps may be necessary.

GENERAL ASSEMBLY RESOLUTION No. 2022 (XX), NOVEMBER 5, 1965²

The General Assembly,

Having examined the chapters of the reports of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples relating to Southern Rhodesia,³

Recalling its resolutions 1514 (XV) of 14 December 1960, 1747 (XVI) of 28 June 1962, 1760 (XVII) of 31 October 1962, 1883 (XVIII) of 14 October 1963, 1889 (XVIII) of 6 November 1963, 1956 (XVIII) of 11 December 1963 and 2012 (XX) of 12 October 1965, the resolutions adopted by the Special Committee on 22 April 1965⁴ and 28 May 1965,⁵ and Security Council resolution 202 (1965) of 6 May 1965,

Considering that the administering Power has not implemented the above resolutions and that no constitutional progress has been made,

Noting that the increasing co-operation between the authorities of Southern Rhodesia, South Africa and Portugal is designed to perpetuate racist minority rule in southern Africa and constitutes a threat to freedom, peace and security in Africa,

Noting with grave concern the manifest intention of the present authorities in Southern Rhodesia to proclaim independence unilaterally, which would continue the denial to the African majority of their fundamental rights to freedom and independence,

Deeply concerned about the explosive situation in Southern Rhodesia,

1. *Approves* the chapters of the reports of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples relating to Southern Rhodesia and endorses the conclusions and recommendations contained therein;

2. *Reaffirms* the right of the people of Southern Rhodesia to freedom and independence and recognizes the legitimacy of their struggle for the enjoyment of their rights as set forth in the Charter of the United Nations,

² U.N. Doc. A/RES/2022 (XX) (1965); General Assembly, 20th Sess., Official Records, Supp. No. 14 (A/6014), p. 54. Adopted on the report of the Fourth Committee (A/6041/Add.1), by a vote of 82 to 9, with 18 abstentions. The states voting against were Australia, Belgium, Canada, Luxembourg, Netherlands, New Zealand, Portugal, South Africa, and the United States. The United Kingdom did not participate in the vote.

³ General Assembly, 19th Sess., Official Records, Annexes, Annex No. 8 (Pt. I) (A/5800/Rev. 1), Chap. III; *ibid.*, 20th Sess., Annexes, addendum to agenda item 23 (A/6000/Rev. 1), Chap. III.

⁴ *Ibid.*, 20th Sess., Annexes, addendum to agenda item 23 (A/6000/Rev. 1), Chap. III, par. 292.

⁵ *Ibid.*, par. 513.

the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in General Assembly resolution 1514 (XV);

3. *Solemnly warns* the present authorities in Southern Rhodesia and the United Kingdom of Great Britain and Northern Ireland, in its capacity as administering Power, that the United Nations will oppose any declaration of independence which is not based on universal adult suffrage;

4. *Condemns* the policies of racial discrimination and segregation practised in Southern Rhodesia, which constitute a crime against humanity;

5. *Condemns* any support or assistance rendered by any state to the minority régime in Southern Rhodesia;

6. *Calls upon* all states to refrain from rendering any assistance whatsoever to the minority régime in Southern Rhodesia;

7. *Requests* that the administering Power effect immediately:

(a) The release of all political prisoners, political detainees and re-strictees;

(b) The repeal of all repressive and discriminatory legislation and, in particular, the Law and Order (Maintenance) Act and the Land Apportionment Act;

(c) The removal of all restrictions on African political activity and the establishment of full democratic freedom and equality of political rights;

8. *Requests once more* the Government of the United Kingdom to suspend the Constitution of 1961 and to call immediately a constitutional conference in which representatives of all political parties will take part, with a view to making new constitutional arrangements on the basis of universal adult suffrage and to fixing the earliest possible date for independence;

9. *Appeals* to all states to use all their powers against a unilateral declaration of independence and, in any case, not to recognize any government in Southern Rhodesia which is not representative of the majority of the people;

10. *Requests* all states to render moral and material help to the people of Zimbabwe in their struggle for freedom and independence;

11. *Calls upon* the Government of the United Kingdom to employ all necessary measures, including military force, to implement paragraphs 7 and 8 above;

12. *Draws the attention* of the Security Council to the threats made by the present authorities in Southern Rhodesia, including the threat of economic sabotage against the independent African States adjoining Southern Rhodesia;

13. *Further draws the attention* of the Security Council to the explosive situation in Southern Rhodesia which threatens international peace and security and decides to transmit to the Council the records and resolutions of the twentieth session of the General Assembly on this question;

14. *Decides* to keep the question of Southern Rhodesia under urgent and continuing review.

GENERAL ASSEMBLY RESOLUTION No. 2024 (XX), NOVEMBER 11, 1965⁶

The General Assembly,

Considering the explosive situation created in Southern Rhodesia following the unilateral declaration of independence,

Noting the measures taken by the Government of the United Kingdom of Great Britain and Northern Ireland,

1. *Condemns* the unilateral declaration of independence made by the racist minority in Southern Rhodesia;

2. *Invites* the United Kingdom of Great Britain and Northern Ireland to implement immediately the relevant resolutions adopted by the General Assembly and the Security Council in order to put an end to the rebellion by the unlawful authorities in Southern Rhodesia;

3. *Recommends* the Security Council to consider this situation as a matter of urgency.

SECURITY COUNCIL RESOLUTION No. 216 (1965), NOVEMBER 12, 1965⁷

The Security Council

1. *Decides to condemn* the unilateral declaration of independence made by the racist minority in Southern Rhodesia;

2. *Decides to call upon* all states not to recognize this illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to this illegal régime.

SECURITY COUNCIL RESOLUTION No. 217 (1965), NOVEMBER 20, 1965⁸

The Security Council,

Deeply concerned about the situation in Southern Rhodesia,

Considering that the illegal authorities in Southern Rhodesia have proclaimed independence and that the Government of the United Kingdom of Great Britain and Northern Ireland, as the administering Power, looks upon this as an act of rebellion,

Noting that the Government of the United Kingdom has taken certain measures to meet the situation and that to be effective these measures should correspond to the gravity of the situation,

1. *Determines* that the situation resulting from the proclamation of independence by the illegal authorities in Southern Rhodesia is extremely grave, that the Government of the United Kingdom of Great Britain and

⁶ U.N. Doc. A/RES/2024 (XX) (1965); General Assembly, 20th Sess., Official Records, Supp. No. 14 (A/6014), p. 55. Adopted on the Report of the Fourth Committee (A/6041/Add.2), by a vote of 107 to 2 (Portugal and South Africa), with 1 abstention (France). The United Kingdom did not participate in the vote.

⁷ U.N. Doc. S/RES/216 (1965). This and the following resolution were adopted by a vote of 10 to 0, with 1 abstention (France).

⁸ U.N. Doc. S/RES/217 (1965).

Northern Ireland should put an end to it and that its continuance in time constitutes a threat to international peace and security;

2. *Reaffirms* its resolution 216 (1965) of 12 November 1965 and General Assembly resolution 1514 (XV) of 14 December 1960;

3. *Condemns* the usurpation of power by a racist settler minority in Southern Rhodesia and regards the declaration of independence by it as having no legal validity;

4. *Calls upon* the Government of the United Kingdom to quell this rebellion of the racist minority;

5. *Further calls upon* the Government of the United Kingdom to take all other appropriate measures which would prove effective in eliminating the authority of the usurpers and in bringing the minority régime in Southern Rhodesia to an immediate end;

6. *Calls upon* all states not to recognize this illegal authority and not to entertain any diplomatic or other relations with this illegal authority;

7. *Calls upon* the Government of the United Kingdom, as the working of the Constitution of 1961 has broken down, to take immediate measures in order to allow the people of Southern Rhodesia to determine their own future consistent with the objectives of General Assembly resolution 1514 (XV);

8. *Calls upon* all states to refrain from any action which would assist and encourage the illegal régime and, in particular, to desist from providing it with arms, equipment and military material, and to do their utmost in order to break off economic relations with Southern Rhodesia, including an embargo on oil and petroleum products;

9. *Calls upon* the Government of the United Kingdom to enforce urgently and with vigour all the measures it has announced, as well as those mentioned in paragraph 8 above;

10. *Calls upon* the Organization of African Unity to do all in its power to assist in the implementation of the present resolution, in conformity with Chapter VIII of the Charter of the United Nations;

11. *Decides* to keep the question under review in order to examine what other measures it may deem necessary to take.

SECURITY COUNCIL RESOLUTION No. 221 (1966), APRIL 9, 1966^a

The Security Council,

Recalling its resolutions Nos. 216 of 12 November 1965 and 217 of 20 November 1965 and in particular its call to all states to do their utmost to break off economic relations with Southern Rhodesia, including an embargo on oil and petroleum products,

Gravely concerned at reports that substantial supplies of oil may reach Rhodesia as the result of an oil tanker having arrived at Beira and the approach of a further tanker which may lead to the resumption of pump-

^a U.N. Doc. S/RES/221 (1966). This resolution was adopted by a vote of 10 to 0, with 5 abstentions (Bulgaria, France, Mali, U.S.S.R., and Uruguay).

ing through the CPMR pipeline with the acquiescence of the Portuguese authorities,

Considering that such supplies will afford great assistance and encouragement to the illegal regime in Southern Rhodesia, thereby enabling it to remain longer in being,

1. *Determines* that the resulting situation constitutes a threat to the peace;

2. *Calls upon* the Portuguese Government not to permit oil to be pumped through the pipeline from Beira to Rhodesia;

3. *Calls upon* the Portuguese Government not to receive at Beira oil destined for Rhodesia;

4. *Calls upon* all states to ensure the diversion of any of their vessels reasonably believed to be carrying oil destined for Rhodesia which may be en route for Beira;

5. *Calls upon* the Government of the United Kingdom to prevent by the use of force if necessary the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia, and empowers the United Kingdom to arrest and detain the tanker known as the Joanna V upon her departure from Beira in the event her oil cargo is discharged there.

INTERNATIONAL LEGAL MATERIALS

The following documents are reproduced in Volume V, No. 4 (July, 1966) and No. 5 (September, 1966) of *International Legal Materials: Current Documents*:¹

VOLUME V, NUMBER 4 (JULY, 1966)

	PAGE
LEGISLATION AND REGULATIONS	
Ceylon: Policy Statement on Private Foreign Investment	591
China, People's Republic of: Regulations on Border Rivers and Ports	605
Liberia: Investment Incentive Code	607
United States: Designation of Telecommunications Satellite Consortium as an International Organization	615
Department of State Letter Regarding Proposed 12-Mile Fishery Zone	616
Fishery Jurisdiction Claims of Other Countries	618
TREATIES AND AGREEMENTS	
Brazil: Agreement for Purchase of Brazilian Telephone Company from Brazilian Traction, Light & Power Company	619

¹ The annual subscription for six numbers of *International Legal Materials* is \$24.00; there is a concessionary rate of \$18.00 for members of the American Society of International Law. Inquiries and orders should be directed to *International Legal Materials*, American Society of International Law, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

	PAGE
Economic Community of Eastern Africa: Terms of Association ..	633
Hague Conference on Private International Law: Convention on the Recognition and Enforcement of Foreign Judgments	636
International Labour Organisation: U. S. Executive Branch State- ment on Convention Concerning Employment Policy	641
International Bank for Reconstruction and Development: U. S. Senate Report and Hearings on Convention on Settlement of In- vestment Disputes	646
North Atlantic Treaty Organization: Exchanges of Notes on With- drawal of French Forces	680
N.A.T.O. Council Communiqué	685
France-United States Bilateral Agreements Regarding U. S. Forces and Installations in France:	
Air Depot at Déols-La Martinerie	690
Certain Air Bases	695
United States Military Headquarters	705
Pipeline	706
System of Communications	712
Northwest Atlantic Fisheries Convention: Amendments (entry into force of Commission proposals; control measures)	718
Singapore and U.S.S.R.: Trade Agreement	724
Togo and United States: Treaty of Amity and Economic Relations	737
U.S.S.R. and United Kingdom: Consular Convention	747
United Kingdom and Venezuela: Agreement Concerning Frontier Between British Guiana (Guyana) and Venezuela (procedure for resolving boundary dispute)	764
United States: Withdrawal of Notice of Denunciation of Warsaw Convention (liability for air transport injury)	767
JUDICIAL AND SIMILAR PROCEEDINGS	
United Kingdom: House of Lords Decision in <i>Carl-Zeiss-Stiftung</i> <i>v. Rayner and Keeler Ltd.</i> (legal effect of non-recognition of East Germany)	769
United States: Note on U. S. Court of Appeals Decision in <i>Sardino</i> <i>v. Federal Reserve Bank</i> (constitutionality of Cuban Assets Con- trol Regulations)	771
OTHER DOCUMENTS	
China, People's Republic of: Note to Indonesia Terminating Assist- ance in Building Textile Mill	774
Notes to Indonesia Requesting Repatriation of Chinese Nationals	775
European Economic Community: Council Decisions on Financing Agricultural Policy and Timetable for Completing Customs Union	778
European Free Trade Association: Council Decision on Establish- ment	784
United Nations: Exchange of Letters on Procedure for Calling Security Council Meetings in Emergency	785

	PAGE
United States: Department of Defense Statement on Effects of a Formal Declaration of War	791

VOLUME V, NUMBER 5 (SEPTEMBER, 1966)

LEGISLATION AND REGULATIONS

Union of Soviet Socialist Republics: Statute on Diplomatic and Consular Missions	801
United States:	
Foreign Agents Registration Act. Amendment	814
Act Implementing I.B.R.D. Convention on Settlement of Invest- ment Disputes (enforcement of arbitral awards)	820
Department of State Statement	821
Act Providing for Admissibility in Evidence of Slip Laws and T.I.A.S.	827

TREATIES AND AGREEMENTS

European Economic Community and Nigeria: Association Agree- ment	828
France and U.S.S.R.: Agreement on Scientific Cooperation	859
Holy See and Yugoslavia: Agreement on Relations	862
Indonesia and Malaysia: Agreement to Normalize Relations	867
Italy and U.S.S.R.: Agreement on Scientific Collaboration	868
Northwest Atlantic Fisheries Convention: Statement of U.S. Depart- ment of State on Amendments (entry into force of Commission proposals; control measures)	871
Thailand and United States: Treaty of Amity and Economic Re- lations	876

JUDICIAL AND SIMILAR PROCEEDINGS

Court of Justice of the European Communities: Decision in <i>Consten and Grundig v. E.E.C. Commission</i> (relation of Court to Com- mission; exclusive dealership agreements)	891
France: Court of Cassation Decision in <i>Royal Dutch Case</i> (Nether- lands law on forfeiture of claims; French "public policy" con- cerning uncompensated takings)	931
International Court of Justice: Judgment in <i>South West Africa Cases</i> (jurisdiction of the Court; interpretation of treaties; League of Nations mandates)	932

OTHER DOCUMENTS

Asian and Pacific Council: Joint Communiqué on Establishment ..	985
International Atomic Energy Agency: Extension of Safeguards System to Reprocessing Plants	987
International Telecommunication Union: Decision on Deletion of Rhodesia's Signature to 1965 I.T.U. Convention (capacity to conclude treaties)	989
United States: Department of State Statement on U. S.-U.S.S.R. Fishery Discussion	991

INDEX TO VOLUME 60

[Abbreviations: *AJIL*, American Journal of International Law; *ASIL*, American Society of International Law; *BN*, Book Note; *BR*, Book Review; *CN*, Notes and Comments; *Ed*, Editorial Comment; *I.C.J.*, International Court of Justice; *I.L.C.*, International Law Commission; *JD*, Judicial Decision; *LA*, Leading Article; *P.C.I.J.*, Permanent Court of International Justice]

- Académie de Droit International. 1966 sessions, E. H. Finch, *CN*, 86; teaching and dissemination of international law by, 351, 352, 355.
- Academy of American and International Law. E. H. Finch. *CN*. 378.
- Act of state:
- Banco Nacional de Cuba v. Farr, 243 F. Supp. 957. *JD*. 107.
- Iraq v. First National City Bank, 241 F. Supp. 567, *JD*, 120; 353 F. 2d 47, *JD*, 592.
- Menzel v. List, 267 N.Y.S. 2d 804. *JD*. 851.
- Adam, H. T. Les Organismes Internationaux Spécialisés. *BR*. 606.
- Adams, Communist China and the United Nations. Quoted on Communist Chinese attitude toward disarmament. 712.
- Adams, President John. Message to Congress regarding interference by individuals in U. S. foreign relations. Quoted. 270.
- Aden and the Federation of South Arabia. J. Y. Brinton. *BR*. 427.
- Admiralty jurisdiction. American Hawaiian Ventures, Inc. v. M. V. J. Latuharhary and Djakarta Lloyd Lines, U. S. Dist. Ct., N. J., 1936. *JD*. 858.
- Aerial intrusion. Public Prosecutor v. Matsumoto, Taipei Dist. Ct., 1965. *JD*. 412.
- Africa. New Nations. Federalism and. D. P. Currie. *BR*. 140.
- Aggression:
- Armed intervention as. U. N. Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 1965. 663.
- Before U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. E. McWhinney, *LA*, 8, 10, 12, 14; Czechoslovak proposal, 8; Ghana-India-Yugoslav proposal, 9; United Kingdom proposal, 8; Yugoslav proposal, 9.
- Southeast Asia Collective Defense Treaty, 1954. 647; Protocol, 649; U. S. Understanding, 649; Q. Wright, *LA*, 769.
- Viet-Nam Armistice Agreement, 1954. 636; Declaration of Geneva Conference on Restoring Peace in Indo-China, 643; U. S. Declaration on Indochina, 645; legal aspects of, Q. Wright, *LA*, 750, 753, 755, 764, 769.
- Agrawala, S. K. International Law: Indian Courts and Legislature. *BN*. 619.
- Air law, international. Johnson, D. H. N., Rights in Air Space, *BN*, 886; Public Prosecutor v. Matsumoto, Taipei Dist. Ct., 1965, *JD*, 412.
- See also Private international air law
- Airspace. Rights in, D. H. N. Johnson, *BN*, 886; sovereignty over, Public Prosecutor v. Matsumoto, Taipei Dist. Ct., 1965, *JD*, 412.
- Air transportation, international:
- Italy-United States Arbitration. Advisory Opinion, 1965. *JD*. 413.
- Jurisdiction of torts over high seas. Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874. *JD*. 410.
- Limitation of carriers' liability. Warsaw Convention:
- U. S. denunciation of. Statement of Department of State, Nov. 15, 1965, 395; withdrawal of, 826; Department of State statement and plan concerning adherence to, 824.
- Warren v. Flying Tiger Line, Inc., 352 F. 2d 494, *JD*, 593; cited, 396.

Algeria. France-U. S. Convention and Protocol of Establishment, 1959. 385; Sec. 1 on arrest of nationals, 385, 387.

Aliens:

Acquisition and ownership of property. U. S. treaty provisions. 95.

Application of U. S. Logan Act to. D. F. Vagts. *LA.* 281, 292.

Arbitration of contract disputes with governments. Exhaustion of local remedies and. S. M. Schwebel and J. G. Wetter. *LA.* 484.

See also Investment disputes, Convention on Settlement of.

Arrest and imprisonment of. Notification to consular officers. U. S. treaty provisions. 385.

Enemy. Seizure of property. Restitution in International Law. I. Vásárhelyi. *BN.* 623.

Exemption from military service by treaty and U. S. nationality law. In re Petition for Naturalization of Regan, 244 F. Supp. 664. *JD.* 405.

Immunity from taxation to pay war damages. Decision of German Fed. Sup. Constitutional Court, 1965. Quoted, 513; S. A. Riesenfeld, *Ed.*, 511.

Inheritance of property. U. S. treaty provisions. 95.

Non-resident:

Distribution of estates to. In re Greenberg's Estate, 261 N.Y.S. 2d 176, *JD.* 128; In re Estate of Petroff, 267 N.Y.S. 2d 8, *JD.* 596; In re Shefsick's Estate, 270 N.Y.S. 2d 34, *JD.* 866.

Inheritance of estates. In re Larkin's Estate, 44 Calif. Reporter 731. *JD.* 128.

Private property. Seizure of. *Sardino v. Federal Reserve Bank of New York and U. S. Secretary of the Treasury*, Ct. App., 2nd Cir., 1966. *JD.* 862.

Private property. Confiscation of. *American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary and Djakarta Lloyd Lines*, U. S. Dist. Ct., N. J., 1966, *JD.* 858; *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, *JD.* 107.

Allen, Edward W. Freedom of the sea, *CN.* 814; *BE.* Christy and Scott. 605.

Alliance for Progress. Economic and Social Act of Rio de Janeiro, 1965. 447.

American and International Law. Academy of. E. H. Finch. *CN.* 278.

American Banana Co. v. United Fruit Co., 213 U. S. 347. Cited on Logan Act. 292.

American Friends Service Committee, Report on Peace in Vietnam. *Cited*, 754, 755, 756, 758, 761; quoted, 757, 762.

American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary and Djakarta Lloyd Lines, U. S. Dist. Ct., N. J., 1966. *JD.* 858.

American Society of International Law:

Annual Meeting, 60th. *CN.* 79, 382, 546.

Board of Review and Development. Conference on law and developing countries, 1965, summary report, H. C. L. Merillat, *CN.* 71; Conference on regulation of international trade, 1965, summary report, S. D. Metzger, *CN.* 537.

Regional meetings. E. H. Finch, *CN.* 379, 551; Stanford University, J. I. Laun, *CN.* 817; Vancouver, B. C., C. B. Bourne, *CN.* 553.

American states:

Economic integration. Economic and Social Act of Rio de Janeiro, 1965. 453.

Ministers of Foreign Affairs. Meetings, Act of Rio de Janeiro, 1965. 446; Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965, 454.

Tenth Meeting, 1965. Resolution establishing Inter-American Armed Force in Dominican Republic. Quoted. 66.

Mutual economic and social assistance. Act of Rio de Janeiro, 1965. 451.

See also Organization of American States.

American Support of Free Elections Abroad. T. P. Wright. *BE.* 432.

American-Swedish Private International Law. H. Nial. *BN.* 439.

American-Venezuelan Private International Law. R. S. Lombard. *BN.* 887.

Amsterdam University, Europa Instituut. Course on European integration. E. H. Finch. *CN.* 555.

- Anglo-Iranian Oil Co. case, United Kingdom *v.* Iran, I.C.J. S. M. Schwebel and J. G. Wetter, *LA*, 490, 497; Judgment, [1952] I.C.J. Rep. 93, quoted, 493; Pleadings, quoted, 491, 492, 493.
- Anglo-Iranian Oil Co.-Iran. Convention, 1933. Arbitration clause. Quoted. 490, 491.
- Anglo-Norwegian Fisheries Case, I.C.J. *Cited*. 304.
- Anglo-Turkish Treaty of 1913. Art. 5 on autonomy of Kuwait. 736.
- Antarctic Treaty. Inspection experience under. J. Simsarian. *LA*. 502, 507.
- Apartheid, racial. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 653; General Assembly resolutions cited, 790.
- Aptheker *v.* Secretary of State, 378 U. S. 500. *Cited*. 294, 298.
- Arab states. Nationality laws. Opperman, T., and A. Yousry. Das Staatsangehörigkeitsrecht der Arabischen Staaten. *BN*. 149.
- Arabian-American Oil Co. arbitration, 1958. *Cited*. 501.
- Arbitral awards. Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965. 893, 904.
- Annulment, interpretation and revision. Convention on Settlement of Investment Disputes, 1965. 905.
- Recognition and enforcement. Convention on Settlement of Investment Disputes, 1965. 907.
- Arbitral tribunal. Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965. 902.
- Arbitration, commercial. M. Domke, *BN*, 436; Oregon-Pacific Forest Products Corp. *v.* Welsh Panel Co., 248 F. Supp. 903, *JD*, 594; Petrol Shipping Corporation, 360 F. 2d 103, *JD*, 859.
- Arbitration, international:
- Before U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. E. McWhinney, *LA*, 20; Czechoslovak proposal, 16; Ghana-India-Yugoslav proposal, 17; United Kingdom proposal, 16.
 - Exhaustion of local remedies and. S. M. Schwebel and J. G. Wetter, *LA*, 484; Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965. 899.
 - Investment Disputes. Convention on Settlement between States and Nationals of Other States, 1965. 892, 902.
 - Mexico and. Gomez Robledo, A. Mexico y el Arbitraje Internacional. *BN*. 622.
 - Safeguards Agreement, IAEA-Thailand-U. S., 1964. 918.
- Arbitration clauses. Contracts between states and aliens. S. M. Schwebel and J. G. Wetter. *LA*. 486.
- Arbitrators, panel of. Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965. 893, 896, 907.
- Archibald case, World War I. Logan Act and. 274.
- Archives. Special missions. Inviolability of. I.L.C. draft articles and commentary. 212.
- Armed attack:
- Legal aspects of Viet-Nam situation. Q. Wright. *LA*. 750, 755, 764, 769.
 - Southeast Asia Collective Defense Treaty, 1954. 647; Protocol, 649; U. S. Understanding, 649.
 - U. S. Congressional resolution on assistance to SEATO states. Quoted, 768; Q. Wright, *LA*, 755, 768.
- Armed force. Before U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. E. McWhinney, *LA*, 9; Czechoslovak proposal, 8; Ghana-India-Yugoslav proposal, 9; United Kingdom proposal, 8; Yugoslav proposal, 9.
- Armies in the field. Protection of sick, wounded and shipwrecked. F. M. de Lasala Samper. *BE*. 437.

- Armistice Agreement, French Union Forces in Indo-China-People's Army of Viet-Nam, 1954. 629; Declaration of Geneva Conference on Restoring Peace in Indo-China, 643; United States Declaration on Indochina, 645; legal aspects of, Q. Wright, *LA*, 750.
- See also* Indo-China and Viet-Nam.
- Arrest and imprisonment of aliens. Notification to consular officers. U. S. treaty provisions. 385.
- Art, works of. Seizure by belligerent occupant. *Menzel v. List*, 267 N.Y.S. 2d 804. *JD*. 851.
- Asian-African Legal Consultative Committee. I.L.C. co-operation with. Report, 1965. 239.
- Assembly, peaceful. Equal right to. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.
- Association, freedom of. Equal right to. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654; statement of U. S. representative in General Assembly, 650.
- Asylum:
- Diplomatic. Legal Norms and Political Reality in Latin American Relations. C. N. Ronning. *BE*. 876.
 - Territorial. Cuban political refugees, Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965, 457; Inter-American Convention, 1954, ratification of, Resolution of 2nd Special Inter-American Conference, 1965, 458.
- Atomic bomb. Collective security and. C. G. Fenwick. *LA*. 479.
- Atomic energy, peaceful uses:
- Canada-United Kingdom-United States Joint Declaration, 1945. Quoted. 36.
 - Safeguarding atoms for peace. M. Willrich. *LA*. 34.
 - Safeguards agreements for. J. Simsarian, *LA*, 503, M. Willrich, *LA*, 50; bilateral agreements, J. Simsarian, *LA*, 503, M. Willrich, *LA*, 37, 50, 54; Euratom arrangements, J. Simsarian, *LA*, 503, M. Willrich, *LA*, 49, 50; International Atomic Energy Agency arrangements, J. Simsarian, *LA*, 502, 509, M. Willrich, *LA*, 34, 41, 52; International Atomic Energy Agency-Thailand-United States Agreement, 1964, 912.
- Atomic warfare. Dunshee de Abranches, C. A. Proscrição das Armas Nucleares. *BN*. 146.
- Attachment. Sovereign immunity from. King and Kingdom of Saudi Arabia. Letters of Department of State, Sept. 14 and 15, 1965. 100, 101.
- Aufrecht, Hans. Comparative Survey of Central Bank Law, *BN*, 625; The International Monetary Fund, *BN*, 435; *BE*: Bernhardt, 137; Degan, 135.
- Azzam, Issam Abdul Rahman. Quoted on Kuwait-Saudi Arabia Neutral Zone. 740.
- Bahama Islands, Government of-Home Lines Inc. Contract arbitration clause. 499.
- Balfour Committee on Inter-Imperial Relations, 1926. Report cited, 774, 778; quoted, 776.
- Banco Nacional de Cuba v. Farr, 243 F. Supp. 957. *JD*. 107.
- Banco Nacional de Cuba v. Sabbatino, 376 U. S. 398. Cited on validity of international law rules. 785.
- Bandilla, Rüdiger. Das Klagerecht der Mitgliedstaaten der Europäischen Gemeinschaften gegen Durchgriffsakte. *BE*. 878.
- Barnet, Richard J., and R. A. Falk. Security in Disarmament. *BE*. 612.
- Barnett, A. Doak. Communist China in Perspective. Quoted. 699, 700, 701, 702.
- Barros, James. The Corfu Incident of 1923; Mussolini and the League of Nations. *BE*. 870.
- Bataafse Petroleum Maatschappij N.V.-National Iranian Oil Co. Joint Structure Agreement, 1965. Arbitration clause. 486.
- Baxter, Richard R. Carnegie-Harvard Seminar on international law for legal officers, *CN*, 554; *BN*: Gotlieb, 621.

- Bays. Defined. *United States v. California*, 382 U. S. 448. *JD.* 588.
- Bays, historic. *United States v. California*, 382 U. S. 448. *JD.* 588.
- Bebr, Gerhard. *BR*: Kovar, 428.
- Belgium. Legislation on pirate broadcasting, 324; ratification of Warsaw Convention and inconsistent law, *Kelley v. Société Anonyme Belge d'Exploitation de la Navigation Aérienne*, 242 F. Supp. 129, *JD.* 124.
- Belgium-United States. Treaty of Friendship, Establishment and Navigation, 1961. Art. 3 concerning arrest of nationals. 385.
- Belize dispute, Guatemala-United Kingdom. U. S. mediation. Statement of Department of State, 1965. 396.
- Belligerent occupation:
- Meier, W. Die Bestimmungen über das Kriegsverbrechens- und Besatzungsstrafrecht in den Genfer Abkommen zum Schutze der Kriegsgesopfer von 1949. *BN.* 887.
- Private property under. *Menzel v. List*, 267 N.Y.S. 2d 804. *JD.* 851.
- Bernhardt, Rudolf. Die Auslegung Völkerrechtlicher Verträge insbesondere in der Neueren Rechtsprechung internationaler Gerichte. *BE.* 137.
- Bevans, Charles I. Contemporary practice of the United States relating to international law. 91, 385, 559, 824.
- Beyrouth, Compagnie du Port, des Quais et des Entrepôts, and Société Radio-Orient, *France v. Lebanon*, I.C.J. S. M. Schwebel and J. G. Wetter, *LA*, 494, 498; Pleadings quoted, 495.
- Beyrouth Co., Electricité de, case, *France v. Lebanon*, I.C.J. S. M. Schwebel and J. G. Wetter, *LA*, 493, 498; Pleadings quoted, 494.
- Bilateral agreements. Creation of binding international rules by. A. Verdross. *LA.* 61.
- Bilder, Richard B. Quoted on human rights complaints before the United Nations. 793.
- Bishop, Donald G. The Roosevelt-Litvinov Agreements. *BE.* 419.
- Bishop, William W., Jr. Appointment to Edwin D. Dickinson Professorship of Law. B. MacChesney. *CN.* 384.
- Bisson, Wacker v., 348 F. 2d 602. *JD.* 400.
- Blackmer v. United States, 284 U. S. 421. Cited on Logan Act. 292.
- Bloomfield, Lincoln P. *BN*: Gross, 151.
- Bogotá, Charter of. Amendments. Act of Rio de Janeiro, 1965. 445.
- Bohan, Richard T. The Dominican case: unilateral intervention. *CN.* 809.
- Book notes, 144, 434, 617, 884; book reviews, 130, 419, 602, 868, Festschriften and, S. Engel, *CN*, 822; books received, 151, 442, 625, 889.
- Borah, Senator William. Logan Act incident. 275, 290.
- Bos, M. Cited on extension of international law by analogy. 321.
- Bourne, C. B. Canadian Yearbook of International Law, 1964, *BR*, 421; ASIL regional meeting at Vancouver, B. C., *CN*, 553.
- Bradley, Stuart B. *BE*: Wildeboer, 881.
- Brazil. Air Code. Limitation of liability in air accidents. Application by U. S. courts. *Ciprari v. Servicos Aereos Cruzeiro do Sul*, S. A., 245 F. Supp. 819, *JD*, 409; *Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense*, 350 F. 2d 468, *JD*, 408.
- Brenner, Ely Lilly and Company v., 248 F. Supp. 402. *JD.* 590.
- Brengel, J. W. Quoted on human rights complaints before the United Nations. 794.
- Briehl v. Dulles, 248 F. 2d 561. *Cited.* 295.
- Briggs, Herbert W. Institut de Droit International, Warsaw session, 1965, *CN*, 517; *BN*: British International Law Cases, 618; British Year Book of International Law, 1963, 618; Parry, 617.
- Brinton, J. Y. Aden and the Federation of South Arabia, *BE*, 427; Federations in the Middle East, A Documentary Survey, *BE*, 427.

- British Commonwealth. Commercial relations within, 773; conferences, 775; immigration control within, 772; international law and, 1907-1967, R. R. Wilson, *Ed.*, 770; mission to re-establish peace in Viet-Nam, Report quoted on Viet-Nam conflict, 780; new members, 777; official representation among members, 781.
- British Dominions. Status in international law, 773; unity in international law, 770.
- British Honduras. Guatemala-U. K. dispute. U. S. mediation. Statement of Department of State, 1965. 396.
- British International Law Cases. C. Parry. *BN.* 618.
- British Petroleum Co., *Waldron v.*, 231 F. Supp. 72. Logan act interpretation. *Cited*, 280, 288, 289, 299, 301.
- British Prime Ministers' conferences. R. R. Wilson. *Ed.* 777.
- British Year Book of International Law, 1963. *BN.* 618.
- Broadcasting, pirate. Legal aspects of. H. F. van Panhuys and M. J. van Emde Boas. *LA*, 303.
- Brown, Philip Marshall. E. H. Finch. *Ed.* 515.
- Brussels Convention for Unification of Certain Rules Relating to Immunity of State-Owned Vessels, 1926. Nicholas E. Vernicos Shipping Co. *v.* United States, 349 F. 2d 465. *JD.* 403.
- Brussels Salvage Convention, 1910. I. H. Wildeboer. *BR.* 881.
- Bryant *v.* Finnish National Airline, 260 N.Y.S. 2d 625. *JD.* 126.
- Bulgarian Academy of Sciences. Mezhdunarodnopraven Rezhim na Dunava. *BN.* 441.
- Bunch case, United States-Great Britain. Logan Act and. 272, 281.
- Burke, Edmund. Quoted on private communications with foreign governments. 298.
- Bynkershoek, Cornelius van. Quoted on good faith and treaties. 63.
- Cabinet ministers. Special missions by. Draft rules submitted by I.L.C. special rapporteur. 233; I.L.C. report, 232.
- California, United States *v.*, 382 U. S. 448. *JD.* 588.
- Cambodia:
- Armed attack against. Southeast Asia Collective Defense Treaty, 1954. 647; Protocol, 649; U. S. Understanding, 649.
 - Armistice agreement, 1954. Declaration of Geneva Conference on Restoring Peace in Indo-China, 643; U. S. Declaration on Indochina, 645.
 - Declaration regarding free general elections. Declaration of Geneva Conference on Restoring Peace in Indo-China, 643.
- Cambodia-Viet-Nam border question. Communist Chinese attitude. 715.
- Campbell, Lord. Quoted on illegality of private mission to Napoleon III. 293.
- Canada. International Law Chiefly as Interpreted and Applied in. J.-G. Castel. *BR.* 874.
- Canada-France. Agreement regarding cultural ententes between Provinces and France, 1965. G. F. FitzGerald. *CN.* 529, 532; exchange of letters, Nov. 17, 1965, quoted, 533.
- Canada-United Kingdom-United States. Joint Declaration by Heads of Government, on peaceful uses of atomic energy, 1945. Quoted. 36.
- Canadian Yearbook of International Law, 1964. *BR.* 421.
- Canals, international. Wolfrom, Marc. L'Utilisation à des Fins Autres que la Navigation des Eaux des Fleuves, Lacs et Canaux Internationaux. *BR.* 424.
- Carey, John. United Nations double standard on human rights complaints. *CN.* 792.
- Carlston, Kenneth S. A framework for the legal analysis of war-peace issues, *LA*, 728; *BN:* Domke, 436.
- Carnegie Endowment for International Peace-Harvard Law School. Seminar on international law for legal officers. R. R. Baxter. *CN.* 554.
- Carroll, Mitchell B. *BN:* Wurfel, 624.
- Castel, J.-G. International Law Chiefly as Interpreted and Applied in Canada. *BR.* 874.

- Celestial bodies. Exploration of. Treaty on rules and procedures for. Letter of Ambassador Arthur J. Goldberg to U. N. Committee on Peaceful Uses of Outer Space, 835; Statement by President Lyndon B. Johnson, 834.
- Central America. American Support of Free Elections, T. P. Wright, *BR*, 432; First Special Conference of Foreign Ministers, 1965, S. Engel, *CN*, 807; integration of, F. Fernández-Shaw, *BN*, 885.
- Central American States, Organization of. New charter. S. Engel. *CN*. 806.
- Central Bank Law. Comparative Survey of. H. Aufrecht. *BN*. 625.
- Chamizal arbitration, Mexico-United States. A. Gomez Robledo. *BN*. 622.
- Chang, Yeh. Mei-kuo yu mei-chou kuo-chia tsu-chih. *BN*. 438.
- Chao Yüeh. Quoted on treaties as source of international law. 258.
- Chemical Natural Resources, Inc. v. Republic of Venezuela, 215 At. 2d 864. *JD*. 838.
- Chen T'i-chiang. Cited on research in Communist China, 267; theory of international law, *cited*, 249.
- Chen Yi, Communist Chinese Foreign Minister. Quoted on increase of nuclear weapons, 714; on proletarian internationalism, 257; on "two Chinas" and participation in United Nations, 727; on the United Nations, 711.
- Chiang Yang. Quoted on bourgeois universalism, 262; on proletarian internationalism, 257.
- Chicago Convention on International Civil Aviation. Chinese civil aviation law and. Public Prosecutor v. Matsumoto, Taipei Dist. Ct., 1965. *JD*. 412.
- China:
- Participation in the United Nations. M. S. McDougal and R. M. Goodman, *LA*, 671; political settlement and, 726; proposed committee on, 724.
 - Two Chinas. Chinese Communist Foreign Minister Chen Yi quoted on, 727; French and U. K. policy, 727.
- China, Communist:
- Attitude toward international law, H. Chiu, *LA*, 245; toward League of Nations, 703, 711.
 - Communist Party Central Committee. Statement on majority rule at international conferences. Quoted. 717.
 - Peking Review. 264; quoted, 703, 705, 708-716, 727.
 - People's China. 264.
 - People's Daily. 264; quoted, 707-711, 713-717.
- China, People's Republic of:
- As new state. M. S. McDougal and R. M. Goodman. *LA*. 699.
 - Attitude at international conferences, 717; toward United Nations, 703, 708; toward war and nuclear warfare, 703.
 - Disarmament proposals. 713.
 - Participation in the United Nations. M. S. McDougal and R. M. Goodman, *LA*, 671, 696, 718; Foreign Minister Chen Yi quoted on two Chinas policy and, 727; U. N. Secretary General U. Thant quoted, 696.
 - Statement on U. N. Emergency Force, 1956. 716.
- China, People's Republic of-India. Border dispute. Van Eekelen, W. F. Indian Foreign Policy and. *BR*. 431.
- China, People's Republic-Pakistan. Joint Communique, 1965. Quoted on reorganization of United Nations. 710.
- China Political Science and Law Association. 263.
- China, Republic of:
- As new state. 718.
 - Civil Aviation Law. Public Prosecutor v. Matsumoto, Taipei Dist. Ct., 1965. *JD*. 412.
 - Participation in the United Nations. M. S. McDougal and R. M. Goodman. *LA*. 671, 696, 718.
 - Public Prosecutor v. Matsumoto, Taipei Dist. Ct., 1965, *JD*, 412; v. Wang Min-yao and Sung Chen-wu, Taipei Dist. Ct., 1965, *JD*, 411.

- Ratification of amendments to U. N. Charter. Chinese statement, 372; Soviet statement, 371.
- China, Republic of -United States. Treaty for Relinquishment of Extraterritorial Rights in China, 1943. Art. 6 on arrest of nationals. 385.
- Chinese People's Institute of Foreign Affairs. 263.
- Chinese Society of International Law. H. Chiu, *CN*, 557; Annals, *BN*, 437.
- Chiu, Hungdah. The Chinese Society of International Law, *CN*, 557; Communist China's attitude toward international law, *LA*, 245; *BN*: Annals, Chinese Society of International Law, 437; Chang, 438.
- Ch'iu Jih-ch'ing. Cited on nature of international law, 256; quoted, 253.
- Chorzów Factory (Indemnity) case, P.C.I.J., Series A, No. 9. Quoted. 489.
- Chou En-lai. Quoted on the United Nations. 708.
- Chou Fu-lun. Quoted on nature of international law. 248, 254, 255.
- Chou Keng-sheng. Cited on treaties as source of international law, 258, on universality of international law, 254; quoted on U. N. decisions as source of international law, 259.
- Chou Tzu-ya. Cited on modern international law. 255.
- Christy, Francis T., Jr., and A. Scott. The Common Wealth in Ocean Fisheries. *BR*. 605.
- Chu Ch'i-wu. Quoted on modern international law. 255.
- Chu Li-lu. Quoted on rôle of international law. 248.
- Ciprari v. Servicos Aereos Cruzeiro do Sul, S. A., 245 F. Supp. 819. *JD*. 409.
- Civil rights. Equality of. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.
- Civil strife:
- Fomenting. Before U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. 14, 22, 24; Mexican proposal, 22; United Kingdom proposal, 8; Yugoslav proposal, 21.
- International Aspects of. J. N. Rosenau. *BN*. 147.
- Intervention in. Havana Convention on Duties and Rights of States in, 1928, cited, 64, 66; U. N. Declaration on Inadmissibility of Intervention in the Domestic Affairs of States, 1965, 663; U. N. Special Conference on Friendly Relations and Co-operation among States, 1964, E. McWhinney, *LA*, 21; Czechoslovak proposal, 21; Ghana-India-Yugoslav proposal, 21; Mexican proposal, 22; Yugoslav proposal, 21.
- See also Civil war.
- Civil war:
- Collective intervention in. The Dominican Republic. C. G. Fenwick. *Ed*. 64; R. T. Bohan, *CN*, 809.
- Legal aspects of Viet-Nam situation. Q. Wright. *LA*. 753, 755, 753, 762, 764.
- Civilized states. International law as law between. Communist Chinese views, 250; L. Oppenheim cited, 251, quoted, 250.
- Clagett, Brice M. *BR*: Wolfrom, 424.
- Claims against foreign governments. Nationality of. Institute of International Law resolution, 1965. 521; H. W. Briggs, *CN*, 519.
- World War II. Scheidt v. Federal Republic of Germany, Arb. Comm. on Property, Rights and Interests in Germany, 1965. *JD*. 129.
- Coast line. Defined. United States v. California, 382 U. S. 448. *JD*. 588.
- Coastal states. Jurisdiction over high-seas broadcasting stations. Netherlands position. H. F. van Panhuys and M. J. van Emde Boas, *LA*, 303; North Sea Installations Act, 1964, 326, 340.
- Codification and development of international law. C. G. Fenwick. *LA*. 480.
- By the United Nations. Survey of. U. N. Resolution on Technical Assistance to Promote the Teaching, Study, Dissemination and Wider Appreciation of International Law, 1965. 667; *CN*, 528; J. N. Hazard, *Ed*, 343.

- Law of treaties. Form of. I.L.C. Report, 1965. 159.
- United Nations resolutions on principles concerning friendly relations and co-operation among states. E. McWhinney, *CN*, 357, *LA*, 3, 5.
- United Nations Special Committee on Friendly Relations and Co-operation among States. Mexico City Conference, 1964. E. McWhinney, *LA*, 1, 20, 29; Report before Sixth Committee of U. N. General Assembly, E. McWhinney, *CN*, 356.
- Collective security:
- Dominican civil strife and. C. G. Fenwick. *Ed.* 64.
- League of Nations and. C. G. Fenwick. *LA*. 477.
- Southeast Asia Collective Defense Treaty, 1954. 646; Protocol, 649; U. S. Understanding, 649.
- United Nations and. C. G. Fenwick. *LA*. 479.
- Colombia. Foreign Enterprise in. S. W. Wurfel. *BN*. 624.
- Colonial Airlines. Hearings on Canadian air route. Invocation of Logan Act. 276, 290.
- Colonial conferences of British Empire. R. R. Wilson. *Ed.* 775.
- Colonialism. Elimination of:
- U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 650.
- U. N. Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 1965. 664.
- U. N. Special Committee on Friendly Relations and Co-operation among States. Mexico City Conference, 1964. E. McWhinney, *LA*, 12, 24, 26; Czechoslovak proposal, 8, 26; Ghana-India-Yugoslav proposal, 9, 12; Yugoslav proposal, 9; Report before U. N. Sixth Committee, 360.
- Commercial relations within British Commonwealth. 773.
- Commercial samples. Convention regarding ECS carnets, Brussels, 1956, as amended 1960. Report of Secretary of State. 827.
- Communication, freedom of. I.L.C. draft articles and commentary on special missions. 213, 214.
- Communism. Intervention to defeat. R. T. Bohan. *CN*. 810.
- Communist aggression. U. S. Understanding regarding Southeast Asia Collective Defense Treaty, 1954. 649; Q. Wright, *LA*, 769.
- Companies in private international law. Institute of International Law resolution, 1965. 523; H. W. Briggs, *CN*, 519.
- Comparative law. Inter-American Academy of International and. E. H. Finch. *CN*. 83.
- Concession agreements. Kuwait-Saudi Arabia Agreement for Partition of Neutral Zone, 1965. 747, 748; S. M. Hosni, *LA*, 743, 744.
- Conciliation, international. Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965. 892, 900.
- Conciliation Commission. Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965, 900; U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 657.
- Conciliators, panel of. Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965. 893, 896, 907.
- Condominium. Kuwait-Saudi Arabia Neutral Zone. S. M. Hosni, *LA*, 740; El Erian quoted, 740; Issam Abdul Rahman Azzam quoted, 740; Middle East Research and Publishing Center quoted, 740; Oppenheim quoted, 740.
- Confiscation of alien private property. American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary and Djakarta Lloyd Lines, U. S. Dist. Ct., N. J., 1966. *JD*. 858.
- Confiscatory decrees, foreign. Recognition and enforcement of:
- Banco Nacional de Cuba v. Farr, 243 F. Supp. 957. *JD*. 107.
- Republic of Iraq v. First National City Bank, 241 F. Supp. 567, *JD*, 120; 353 F. 2d 47, *JD*, 592.

Conflict of laws:

Administration of estates. In re Estate of Prince, 267 N.Y.S. 2d 138. *JD.* 595.

Choice of law. In re Estate of Prince, 267 N.Y.S. 2d 133. *JD.* 595.

Companies. Institute of International Law resolution, 1965. 523.

Distribution of estates. In re Harris' Will, 263 N.Y.S. 2d 393. *Cited.* 411.

Divores. Recognition of foreign decrees. *Rosenstiel v. Rosenstiel*, 254 N.Y.S. 2d 527. *Cited.* 129.

Foreign corporations, jurisdiction of. *See* Corporations, foreign.

Guardianship of children. *Republic of Iraq v. First National Bank of Chicago*, 350 F. 2d 645. *JD.* 407.

Intestate succession. In re Utassi's Will, 261 N.Y.S. 2d 4. *JD.* 127.

Renvoi. Institute of International Law resolution, 1965. 518.

Tort liability limitation. *Ciprari v. Servicos Aereos Cruzeiro do Sul*, S. A., 245 F. Supp. 819, *JD.* 409; *Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense*, 350 F. 2d 468, *JD.* 408.

See also Private international law

Congo, Republic of (Brazzaville). U. S. withdrawal of diplomatic and consular representatives from. Note of Secretary of State, 1965. 91.

Consensus as basis of international obligation. 785.

Consent as basis of international obligation. 784.

Consular officers. Notification of arrest of nationals. U. S. treaty provisions. 385.

Containers. Convention on temporary duty-free importation, Geneva, 1956, Report of Secretary of State, 828; convention on temporary duty-free importation of goods in, Geneva, 1959, Report of Secretary of State, 827.

Contiguity, title by. Jurisdiction over pirate broadcasting stations. H. F. van Panhuys and M. J. van Emde Boas. *LA.* 334, 337.

Contiguous zone. Geneva Convention on Territorial Sea and, 1958. Art. 24. *Cited*, 322; quoted, 317.

Continental shelf:

Geneva Convention, 1958. *Cited.* 320, 321, 331.

Installations on. Jurisdiction over. Netherlands position. H. F. van Panhuys and M. J. van Emde Boas, *LA.* 303, 337; North Sea Installations Act, 1964, 326, 340. Truman proclamation, 1945. *Cited.* 317.

United States v. California, 382 U. S. 448. *JD.* 588.

Contracts. Between aliens and governments. Arbitration clauses. S. M. Schwebel and J. G. Wetter. *LA.* 484.

Contracts, commercial. Arbitration clauses. *Oregon-Pacific Forest Products Corp. v. Welsh Panel Co.*, 248 F. Supp. 903. *JD.* 594.

Controversies, international. Definition of. Logan Act. 268; D. F. Vagts, *LA.* 268, 285.

Controversies, justiciable. Definition of. U. S. Constitution cited, 285; *Republic of Iraq v. First National Bank of Chicago*, 350 F. 2d 645, *JD.* 407.

Corfu Channel case, I.C.J. Judgment cited. 59.

Corfu Incident, 1923, Greece-Italy. J. Barros. *BE.* 870.

Corporations. Application of Logan Act to. D. F. Vagts. *LA.* 281.

Corporations, foreign. Jurisdiction over:

Bryant v. Finnish National Airline, 260 N.Y.S. 2d 625. *JD.* 126.

Hoffman Motors Corp. v. Alfa Romeo, S. p.A., 244 F. Supp. 70. *JD.* 405.

Turner v. Jack Tar Grand Bahamas Ltd., 353 F. 2d 954. *JD.* 596.

Correspondence. Inviolability of. I.L.C. draft articles and commentary on special missions. 214.

Correspondence with foreign governments. U. S. Logan Act. 268; D. F. Vagts, *LA.* 268, 281, 284.

Costa Rica-United States. Consular convention, 1948. Art. 7 on arrest of nationals. 386.

Courts. Equal treatment before. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 653.

Criminal jurisdiction:

Nationals in embassy abroad. *Public Prosecutor v. Wang Min-yao and Sung Chen-wu*, Taipei Dist. Ct., 1965. *JD.* 411.

U. S. Courts of Ryukyu Islands. *Rose v. McNamara*, 252 F. Supp. 111. *JD.* 866.

Cruzeiro do Sul, Servicos Aereos, S. A., Ciprari v., 245 F. Supp. 819. *JD.* 409.

Cuba:

Expropriation of American property. *Sardino v. Federal Reserve Bank of New York and U. S. Secretary of the Treasury*, Ct. App., 2nd Cir., 1966. *JD.* 862.

Political refugees from. Asylum for. Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965. 457.

Soviet missiles in. *Gelberg, L. Kryzys Karaibski 1962 Roku*. *BN.* 149.

Travel to. U. S. passport regulations. *United States v. Laub*, 253 F. Supp. 433. *JD.* 865.

Cuba-United States:

Application of Trading with the Enemy Act to property of Cuban nationals in United States. *Sardino v. Federal Reserve Bank of New York and U. S. Secretary of the Treasury*, Ct. App., 2nd Cir., 1966. *JD.* 862.

Tractors for Freedom Committee. Logan Act and. 278, 287, 288, 290; Attorney General Robert Kennedy quoted, 279; President John F. Kennedy quoted, 279; U. S. Memorandum cited, 279, 285; *Voorhees v. Morrison*, Miami Div., S. D. Florida, *cited*, 279.

Cuba, Banco Nacional de, *v. Farr*, 243 F. Supp. 957. *JD.* 107.

Cultural activities. Equal participation in. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.

Cultural agreements and ententes, France-Quebec. *G. F. FitzGerald*. *CN.* 529.

Currie, David P. Federalism and the New Nations of Africa. *BE.* 140.

Custom as source of international law. Communist Chinese view, 257; Soviet doctrine, 258.

Customary international law. *Jus cogens* and, *A. Verdross*, *LA*, 61; *K. Wolfke*, Custom in Present International Law, *BE*, 133.

Customs conventions. *See* Customs duties and Imports.

Customs duties, exemption from:

Concessionaires. Kuwait-Saudi Arabia Agreement for Partition of Neutral Zone, 1965. 747; *S. M. Hosni*, *LA*, 744.

Conventions: ATA carnet for temporary admission of goods, Brussels, 1961, Report of Secretary of State, 827; ECS carnets for commercial samples, Brussels, 1956, as amended 1960, Report of Secretary of State, 827; international transport of goods under TIR carnets, Geneva, 1959, as modified 1963, Report of Secretary of State, 827; temporary entry of containers, Geneva, 1956, Report of Secretary of State, 828; temporary importation of professional equipment, Brussels, 1961, Report of Secretary of State, 827.

I.L.C. draft articles and commentary on special missions, 220, 221; draft rules on high-level missions submitted by special rapporteur, 234, 235, 236.

Cyprus. U.K.-U.S. Consular Convention, 1951. Art. 16 on arrest of nationals. 386, 394.

Czechoslovakia:

Municipal property rights in Bavaria. Decision of Sup. State Ct. of Bavaria, 1965. *JD.* 597.

Proposals at U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964. 7, 16, 21, 26.

Damages, measure of. Application of foreign law. *Ciprari v. Servicos Aereos Cruzeiro do Sul, S. A.*, 245 F. Supp. 819, *JD*, 409; *Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense*, 350 F. 2d 468, *JD*, 408.

Danby, Earl of. Impeachment of. Quoted. 298.

Danube River. International legal status, *E. Kamenov and P. Radoinov*, *BN*, 441; Law and Politics of, *S. Gorove*, *BE*, 616.

- Dar es Salaam University College of Law. Seminar on problems of international law and economic development. W. Friedmann. *CN*. 367.
- Deak, Francis. *BE*: Gál, 882.
- Decolonization. U. N. activities. Communist Chinese attitude. 711.
- See Colonialism, elimination of.
- De facto governments. Recognition of. Resolution of Second Special Inter-American Conference, Rio de Janeiro, 1965. 398, 460.
- Degan, V. D. L'Interprétation des Accords en Droit International. *BE*. 135.
- de Gaulle, General Charles. News conference, July 23, 1964. *Cited*, 756; quoted, 759.
- Demilitarized zone. Viet-Nam Armistice Agreement, 1954. 629, 638.
- Democracy and Human Rights. The Foundations of Freedom. D. V. Sandifer and R. L. Scheman. *BN*. 888.
- Denmark-United States. Treaty of Friendship, Commerce and Navigation, 1951. Art. 3 on arrest of nationals. 386.
- Deserters. Foreign naval. United States ex rel. Martinez-Angosto v. Mason, 344 F. 2d 673. *JD*. 125.
- Developing countries:
- Assistance to, in promotion of teaching, study, dissemination and wider appreciation of international law. U. N. Resolution, 1965. 664; *CN*, 526; J. N. Hazard, *Ed*, 342.
- International activities. Law in. 74.
- Law and. ASIL conference on, H. C. L. Merillat, *CN*, 71; Dar es Salaam seminar on, W. Friedmann, *CN*, 367.
- Legal training and research in. 76.
- Devillers, Philippe. The Struggle for Unification of Vietnam. *Cited*, 753; quoted, 756.
- Dickinson, Edwin Dewitt, Professorship of Law, University of Michigan. Appointment of W. W. Bishop, Jr., to. B. MacChesney. *CN*. 384.
- Dickson, H.R.P. Kuwait and Her Neighbours. Cited on establishment of Kuwait-Saudi Arabian Neutral Zone. 737; quoted, 738, 739.
- Diplomacy, ad hoc. I.L.C. draft articles and commentary on special missions, 1965, 176, report, 173; draft rules on high-level special missions submitted by special rapporteur, 233, I.L.C. report, 232.
- Diplomacy and law. World Peace through. R. Regala. *BE*. 609.
- Diplomatic premises. Crimes committed on. Jurisdiction of. Public Prosecutor v. Wang Min-yao and Sung Chen-wu, Taipei Dist. Ct., 1965. *JD*. 41.
- Diplomatic privileges and immunities:
- Myslil, S. Diplomatické Styky a Imunity. *BN*. 150.
- Special missions. I.L.C. draft articles and commentary, 176, 209, report, 173; draft rules on high-level missions submitted by special rapporteur, 233, I.L.C. report, 232.
- Diplomatic protection of citizens abroad. Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965. 899.
- Diplomatic relations. Myslil, S. Diplomatické Styky a Imunity. *BN*. 150.
- Disarmament. And International Law, A. Gotlieb, *BN*, 621; Communist Chinese attitude, 712, proposals, 713; Security in, R. A. Falk and R. J. Barnett, *BE*, 612.
- Divorce. Recognition of foreign decrees. Rosenstiel v. Rosenstiel, 254 N.Y.S. 2d 527. *Cited*. 129.
- Domestic jurisdiction of states. Intervention in. Consideration by U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. E. McWhinney, *LA*, 23; Czechoslovak proposal, 21; Ghana-India-Yugoslav proposal, 21; Mexican proposal, 22; United Kingdom proposal, 22; United States proposal, 23; Yugoslav proposal, 21.
- Dominican Republic. U. S. military action in. Intervention or collective self-defense, C. G. Fenwick, *Ed*, 64; unilateral intervention, R. T. Bohan, *CN*, 809.
- Domke, Martin. Commercial Arbitration. *BN*. 436.

- Dong, Premier Pham Van, of North Viet-Nam. Statement regarding peace in Viet-Nam. *Cited*, 758; quoted, 753.
- Douglas, Justice William O. Quoted on free speech and foreign policy. 298.
- Due process of law. U. S. Cuban Assets Control Regulations. *Sardino v. Federal Reserve Bank of New York and U. S. Secretary of the Treasury*, Ct. App., 2d Cir., 1966. *JD*. 862.
- Dunshee de Abranches, C. A. Proscrição das Armas Nucleares, *BN*, 146; Proteção Internacional dos Direitos Humanos, *BN*, 146.
- East African Unity Through Law. T. M. Franek. *BE*. 140.
- East-West Trade Conference, Stanford University. J. I. Laun. *CN*. 817.
- East-West trade relations. Summary report, ASIL Board of Review and Development. *CN*. 542.
- Eaton, Cyrus. Meetings with N. Khrushchev. Logan Act and. 278.
- Eck v. United Arab Airlines, SAA, 241 F. Supp. 804. *JD*. 125.
- Economic and Social Act, Rio de Janeiro, 1965. 447.
- Economic coercion:
- U. N. Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 1965. 663.
 - U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. E. McWhinney, *LA*, 9; Czechoslovak proposal, 8, 21; Ghana-India-Yugoslav proposal, 9; Mexican proposal, 22; Yugoslav proposal, 9, 21.
- Economic development of less developed countries. Law and, ASIL conference, H. C. L. Merillat, *CN*, 71; international law and, Dar es Salaam Seminar on, W. Friedmann, *CN*, 367.
- Economic sanctions. U. N. Security Council resolutions on Southern Rhodesia. 924, 925.
- Economic, social and cultural rights. Equality of. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.
- Eden, Sir Anthony. Quoted on Geneva agreements, 1954, 761; on Vietnamese reservation to Final Act of Geneva Conference, 1954, 757.
- Education. Equal right to, U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 654; to combat racial discrimination, U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 654.
- Educational and cultural agreements and ententes, France-Canada-Quebec. G. F. FitzGerald. *CN*. 529.
- Eger, City of. Legal identity. Decision of Sup. State Ct. of Bavaria, 1965. *JD*. 597.
- Ehrenzweig, Albert A. *BN*: Lombard, 887; Nial, 439.
- Eichelberger, Clark M. UN: The First Twenty Years. *BE*. 611.
- Eisenhower, President Dwight D. Atoms for Peace address, 1953, *cited*, 36; cited on situation in Viet-Nam, 754, quoted, 752; quoted on Geneva Agreements, 1954, 760.
- Électricité de Beyrouth Co.-Lebanon. Contract. Arbitration clause. 493.
- Électricité de Beyrouth Co. case, France-Lebanon, I.C.J. S. M. Schwebel and J. G. Wetter, *LA*, 493, 498; Pleadings, quoted, 494.
- El Erian, Condominium and Related Situations in International Law. Quoted on Kuwait-Saudi Arabia Neutral Zone. 740.
- Emigration, right of. Equality of. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.
- Employment, free choice of. I.L.O. Convention concerning Policy, 1965, Message of President L. B. Johnson, 833; U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 654.
- Engel, Salo. *Festschriften* and book reviews, *CN*, 822; the new ODECA, *CN*, 806; *BN*: Fernández-Shaw, 885; Touscoz, 888.
- Engel, Salo, and R. A. Métall. Law, State and International Legal Order. Essays in Honor of Hans Kelsen. *BE*. 132.

Entry, freedom of. Kuwait-Saudi Arabia Agreement for Partition of Neutral Zone, 1965. 747; S. M. Hosni, *LA*, 744.

Equality of states:

U. N. resolutions on principles of international law concerning friendly relations and co-operation among states. E. McWhinney. *CN*, 357, *LA*, 5.

U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964. E. McWhinney, *LA*, 25, 32; Czechoslovak proposal, 26; Ghana-India-Mexico-Yugoslav proposal, 26; United Kingdom proposal, 26; Yugoslav proposal, 26.

Ermacora, Felix. Der Minderheitenschutz in der Arbeit der Vereinten Nationen. *BN*. 885.

Estates:

Citizens abroad. Administration of. In re Estate of Prince, 267 N.Y.S. 2d 138. *JD*. 595.

Distribution of. In re Harris' Will, 263 N.Y.S. 2d 393. *Cited*. 411.

To non-resident aliens. In re Greenberg's Estate, 261 N.Y.S. 2d 176, *JD*, 128; In re Estate of Petroff, 267 N.Y.S. 2d 8, *JD*, 596; In re Shefsick's Estate, 270 N.Y.S. 2d 34, *JD*, 866.

Inheritance by non-resident aliens. In re Larkin's Estate, 44 Calif. Reporter 731. *JD*. 128.

Ethiopia. Representation in the League of Nations. F. P. Walters quoted, 695; report of League of Nations Credentials Committee quoted, 694.

Ethiopia-United States. Treaty of Amity and Economic Relations, 1951. Art. 6 on arrest of nationals. 386.

European Atomic Energy Commission. Safety control of nuclear materials. 49, 50, 503.

European Coal and Steel Community. Powers. Kovar, R. Le Pouvoir Réglementaire de la Communauté Européenne du Charbon et de l'Acier. *BR*. 428.

European Communities:

The Court of. New Dimension in International Adjudication. W. Feld. *BN*. 434.

Legal Remedies of Members. R. Bandilla. *BR*. 878.

European Convention for Prevention of Broadcasts from Stations Outside National Territories, 1965. *Cited*, 303, 318; H. F. van Panhuys and M. J. van Emde Boas, *LA*, 324.

European Convention on Human Rights. K. Vasak, *BN*, 145; Yearbook, 1963, *BR*, 613.

European Economic Community. Handbook. G. L. Weil. *BN*. 622.

European integration. Course at Europa Instituut, University of Amsterdam. E. H. Finch. *CN*. 555.

European Nuclear Energy Agency. Security control of nuclear materials. 49, 50.

Evans, Alona E. *BR*: Ronning, 876.

Ex aequo et bono jurisdiction. Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965. 903.

Exit, right of. I.L.C. draft articles and commentary on special missions. 230.

Expropriation of alien property by foreign government. Judicial review of. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957. *JD*. 107.

Extradition. Appeal by declaratory judgment action, Wacker v. Bisson, 348 F. 2d 602, *JD*, 400; Kuwait-Saudia Arabian Neutral Zone, Great Britain-Saudi Arabia Treaty, 1942, 739.

Extraterritorial jurisdiction:

Coastal states over high-seas broadcasting stations. H. F. van Panhuys and M. J. van Emde Boas. *LA*. 303.

U. S. Logan Act. 268; D. F. Vagts, *LA*, 292; American Banana Co. v. United Fruit Co., 213 U. S. 347, *cited*, 292; Blackmer v. United States, 284 U. S. 421, *cited*, 292; Skiriotes v. Florida, 313 U. S. 69, *cited*, 292; Restatement of U. S. Foreign Relations Law, *cited*, 293.

- Faisal, King of Saudi Arabia. Immunity from suit and attachment. Letter of Department of State to U. S. Attorney General, Sept. 14, 1965. 101.
- Falk, Richard A. Quoted on rôle of law, 249; the quasi-legislative competence of the General Assembly, *Ed*, 782; *BN*: Patel, 144; *BR*: Essays in Honor of Hans Kelsen, 132, S. Engel, *CN*, 822; Wolfke, 133.
- Falk, Richard A., and R. J. Barnet. Security in Disarmament. *BR*. 612.
- Farr, Banco Nacional de Cuba v., 243 F. Supp. 957. *JD*. 107.
- Faust, Fritz. Das Potsdamer Abkommen und seine Völkerrechtliche Bedeutung. *BN*. 440.
- Federal Reserve Bank of New York and U. S. Secretary of the Treasury, *Sardino v.*, Ct. App., 2nd Cir., 1966. *JD*. 862.
- Federal states. New treaty-making technique for? G. F. FitzGerald. *CN*. 529.
- Federalism:
- Aden and the Federation of South Arabia. J. Y. Brinton. *BR*. 427.
 - And the New Nations of Africa. D. P. Currie. *BR*. 140.
- Federations in the Middle East. A Documentary Survey. J. Y. Brinton. *BR*. 427.
- Feld, Werner. The Court of the European Communities. New Dimension in International Adjudication. *BN*. 434.
- Fenwick, Charles G.:
- The Dominican Republic: intervention or collective self-defense. *Ed*. 64; R. T. Bohan, *CN*, 809.
- International Law. *BR*, 602; the old and the new, *LA*, 475.
- The Washington World Conference on World Peace through the Rule of Law. *CN*. 68.
- BN*: Dunshee de Abranches, 146; Garcia Arias, 623; Gomez Robledo, 622; Lasala Samper, 437; Orfield and Re, 884; Sandifer and Scheman, 888.
- Fernández-Shaw, Felix. La Integración de Centroamérica. *BN*. 885.
- Festschriften and book reviews. S. Engel. *CN*. 822.
- Finch, Eleanor H. Academy of American and International Law, *CN*, 378; American Society of International Law: 60th annual meeting, *CN*, 546; regional meetings, *CN*, 379, 551; Philip Marshall Brown, *Ed*, 515; Hague Academy of International Law, 1966 sessions, *CN*, 86; Inter-American Academy of International and Comparative Law, *CN*, 83; Inter-American Bar Association, *CN*, 80, 819; International Association of Young Lawyers, *CN*, 556; international course on European integration, University of Amsterdam, *CN*, 555; Law of the Sea Institute, First annual summer conference, *CN*, 820; Procedural Aspects of International Law Institute, *CN*, 816; Scott Prizes in International Law, *CN*, 816; student international law journals, *CN*, 87.
- Finnish National Airline, *Bryant v.*, 260 N. Y. S. 2d 625. *JD*. 126.
- First National Bank of Chicago, Republic of Iraq v., 350 F. 2d 645. *JD*. 407.
- First National City Bank, Republic of Iraq v. 241 F. Supp. 567, *JD*, 120; 353 F. 2d 47, *JD*, 592.
- Fisheries, high seas:
- Christy, F. T., Jr., and A. Scott. The Common Wealth in Ocean Fisheries. *BR*. 605.
 - Freedom of the sea and. E. W. Allen. *CN*. 814.
 - Northwest Atlantic. International Convention, 1949. Protocol relating to Measures of Control, 1965, Message of President L. B. Johnson, 829; Protocol relating to Entry into Force of Proposals adopted by the Commission, 1965, Message of President L. B. Johnson, 829.
 - U. S. proposed 12-mile zone. Letter of Department of State. 831.
- Fissionable materials. IAEA safeguards system, M. Willrich, *LA*, 38; IAEA-Thailand-U. S. Safeguards Agreement, 1964, 912.
- FitzGerald, Gerald F. Educational and cultural agreements and ententes, France, Canada and Quebec. *CN*. 529.

- Fitzmaurice, Sir Gerald G. Chinese Representation in the United Nations. Quoted. 697.
- Flag. Display by special missions. I.L.C. draft articles and commentary, 206; draft rules on high-level missions submitted by special rapporteur, 234.
- Florida, *Skiriotes v.*, 313 U. S. 69. Cited on Logan Act. 292.
- Flournoy, Francis. Indictment under Logan Act. *Cited.* 271, 284.
- Flying Tiger Line, Inc., *Warren v.*, 352 F. 2d 494. *JD.* 593; *cited*, 396.
- Force. Definition of. Before U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. 9; Czechoslovak proposal, 7; Ghana-India-Yugoslav proposal, 9; United Kingdom proposal, 8; Yugoslav proposal, 9.
- Force, use or threat of:
- Jus cogens. A. Verdross. *LA.* 60.
- U. N. Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 1965. 662.
- U. N. resolutions on principles of international law concerning friendly relations and co-operation among states. E. McWhinney. *CN.* 357, *LA.* 5.
- U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964. E. McWhinney, *LA.* 7, 13, 32; Czechoslovak proposal, 7; Ghana-India-Yugoslav proposal, 9, 11; United Kingdom proposal, 8; United States position, 15, 358; Yugoslav proposal, 9.
- U. S. Declaration on Indochina, 1954, 645; Statement in the U. N. Sixth Committee, *cited*, 358, quoted, 359.
- Ford, Henry. Peace Ship, 1915. Logan Act and. 274.
- Foreign Affairs, Ministers of. Special missions by. Draft rules submitted by I.L.C. special rapporteur, 233; I.L.C. report, 232.
- Foreign enterprise. In Colombia: Laws and Policies, S. W. Wurfel, *BN.* 624; in Nigeria: Laws and Policies, P. O. Proehl, *BR.* 608.
- Foreign governments. Communication with agents of, U. S. Logan Act, 268, D. F. Vagts, *LA.* 282; correspondence or intercourse by private citizen with, U. S. Logan Act, 268, D. F. Vagts, *LA.* 268, 281, 284.
- Foreign investment. *See* Investment, foreign.
- Foreign judgments. Recognition and enforcement of. Draft convention. K. H. Nadelmann and A. T. von Mehren. *CN.* 803.
- Foreign laws. Application in U. S. courts. *Ciprari v. Servicos Aereos Cruzeiro do Sul*, S. A., 245 F. Supp. 819, *JD.* 409; *Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense*, 350 F. 2d 468, *JD.* 408.
- Foreign policy. British Empire and. R. R. Wilson. *Ed.* 772.
- France, Senator Joseph. Logan Act incident. 275.
- France-Canada-Quebec. Educational and cultural agreements and ententes. G. F. FitzGerald. *CN.* 529.
- France-Quebec. Entente on Cultural Co-operation, 1965, 533; Entente on Exchange and Co-operation in Field of Education, 1965, G. F. FitzGerald, *CN.* 529.
- France-United States. Convention and Protocol of Establishment, 1958, Sec. 1 on arrest of nationals, 387; relations, 1798, Logan mission, 270, 287.
- Franck, Thomas M. East African Unity Through Law. *BR.* 140.
- François, J. P. A. View on jurisdiction over high-seas broadcasting stations. 315, 322, 335.
- François Advisory Commission on Problems of International Law. Report on North Sea Installations Bill. *Cited.* 307, 314, 315, 331, 332, 333, 334, 335, 336.
- Freedom, Foundations of. D. V. Sandifer and L. R. Scheman. *BN.* 883.
- Freedom of the sea. E. W. Allen, *CN.* 814; Geneva Convention on the High Seas, Art. 2, *cited*, 312, 339; H. F. van Panhuys and M. J. van Emde Boas, *LA.* 312; Netherlands position on, 313.
- Freedom of speech. U. S. Logan Act and. D. F. Vagts. *LA.* 293.
- Freeman, Alwyn V. *BR.* Fenwick, 602.

- French Union Forces in Indo-China, Commander-in-Chief,—People's Army of Viet-Nam, Commander in Chief, Agreement on Cessation of Hostilities in Viet-Nam, 1954. 629; Declaration of Geneva Conference on Restoring Peace in Indo-China, 1954, 643; U. S. Declaration on Indochina, 645.
- Friedmann, Wolfgang. The Changing Structure of International Law, *BR*, 130; Dar es Salaam seminar on problems of international law and economic development, *CN*, 367; *BR*: Adam, 606.
- Friendly Relations and Co-operation among States, U. N. Special Committee on. Mexico City Conference, 1964. E. McWhinney, *LA*, 1; Report before Sixth Committee of U. N. General Assembly; E. McWhinney, *CN*, 356.
- Gál, Gyula. Világűrjog. *BR*. 882.
- Gallatin, Albert. Cited on Logan Act. 270, 284, 292, 293.
- Gambia. U.K.-U.S. Consular Convention and Protocol, 1951. Art. 16 on arrest of nationals. 387, 394.
- Garcia Arias, Luis. Estudios de Historia y Doctrina del Derecho Internacional. *BN*. 623.
- Gardner, Richard N. Quoted on proposed U. N. High Commissioner for Human Rights. 795.
- Gelberg, Ludwik L. Kryzys Karaibski 1962 Roku. *BN*. 149.
- Geneva Conference on Disarmament. Communist Chinese attitude. 712.
- Geneva Conference on Problem of Restoring Peace in Indo-China, 1954. Final Declaration, 643, quoted, 761; Q. Wright, *LA*, 757, 760; United States Declaration, 645, quoted, 759, 769.
- Geneva Convention on Continental Shelf, 1958. *Cited*. 320, 321, 331.
- Geneva Convention on the High Seas, 1958. Art. 2 cited, 312, 313, 339; Art. 5 cited, 318; Art. 22 cited, 318, 320; H. F. van Panhuys and M. J. van Emde Boas, *LA*, 312.
- Geneva Conventions for the Protection of War Victims, 1949. Meier, W. Die Bestimmungen über das Kriegsverbrechens- und Besatzungsstrafrecht in den Genfer Abkommen zum Schutze der Kriegsoffer von 1949, *BN*, 887; application to Viet-Nam hostilities, exchange of letters between President of International Red Cross Committee and U. S. Secretary of State, 1965, 92.
- Convention on Prisoners of War. Resolution of 20th International Red Cross Conference on application to armed conflict, 1965. 94.
- Conventions on Sick and Wounded Armies in the Field and Shipwrecked at Sea. F. M. de Lasala Samper. *BN*. 437.
- Genocide Convention. Reservations to. I.C.J. Advisory Opinion. Quoted. 58.
- German Federal Supreme Constitutional Court. Decision on petition by Swiss corporation for review of constitutionality of Fed. Sup. Tax Court decisions, 1965. Quoted, 513; S. A. Riesenfeld, *Ed*, 511.
- Germany. Foreign Policy, 1918-1945, Documents on, *BR*, 143; National Socialist Party seizure of property in occupied territory, *Menzel v. List*, 267 N.Y.S. 2d 804, *JD*, 851.
- Germany, Federal Republic of. Convention on Settlement of Matters Arising out of the War and the Occupation, 1954. *Scheidt v. Federal Republic of Germany*, Arb. Comm. on Property, Rights and Interests in Germany, 1965. *JD*. 129.
- Germany, Federal Republic of, -United States. Convention on Double Taxation of Income, 1954, modification, Statement of Department of State, 102; Treaty of Friendship, Commerce and Navigation, 1954, Art. 3 on arrest of nationals, 387.
- Germany, Federal Republic of, *Scheidt v.*, Arb. Comm. on Property, Rights and Interests in Germany, 1965. *JD*. 129.
- Ghana. U.K.-U.S. Consular Convention and Protocol, 1951. Art. 16 on arrest of nationals, 387, 394; Ghana-United States exchange of notes, 1957/1958, 387.
- Ghana-India-Yugoslavia. Proposals at U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. 9, 13, 17, 21.

- Ghana-India-Mexico-Yugoslavia. Proposal at U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. 26.
- Giap, General Nguyen. Quoted on North Vietnamese atrocities. 755.
- Goldberg, Ambassador Arthur J.:
 Letter to U. N. Committee on Peaceful Uses of Outer Space regarding treaty on exploration of celestial bodies. 835.
 Statement in U. N. Special Committee on Peacekeeping Operations on Articles 17 and 19 of Charter. 104.
 Statement regarding U. S. vote for Convention on Elimination of All Forms of Racial Discrimination, 1965. 650.
- Gomez Robledo, Antonio. Mexico y el Arbitraje Internacional. *BN*. 622.
- Goodman, Richard M., and M. S. McDougal. Chinese participation in the United Nations. The legal imperatives of a negotiated solution. *LA*. 67.
- Goodrich, L. M., and E. Hambro, Charter of the United Nations. Quoted on procedure for admission to United Nations. 721.
- Góralczyk, Wojciech. Szerokość Morza Terytorialnego i Jego Delimitacja. *BN*. 440.
- Gordon, Edward. *BR*: Ross, 873.
- Gorove, Stephen. Law and Politics of the Danube. *BR*. 616.
- Gotlieb, Allan. Disarmament and International Law. *BN*. 621.
- Gould, Wesley L. *BN*: Rosenau, 147; *BR*: von Glahn, 131.
- Great Britain. Note of Nov. 3, 1914, recognizing independence of Kuwait under British protection, 736; Statute of Westminster, 1931, *cited*, 774, 776.
- Great Britain-Saudi Arabia. Extradition treaty, 1942. Provisions regarding Kuwait Neutral Zone. 739.
- Great Britain-United States. Clandestine Submarines, 1914-1915, G. Smith, *BR*, 141; Pickering case, 1808, and Logan Act, 272.
- Greece-Italy. Corfu Incident of 1923. J. Barros. *BR*. 870.
- Green, L. C. *BN*: Agrawala, 619.
- Greenberg's Estate, In re, 261 N.Y.S. 2d 176. *JD*. 128.
- Gross, Franz B. The United States and the United Nations. *BN*. 151.
- Grzybowski, Kazimierz. *BN*: Gelberg, 149; Góralczyk, 440; Skubiszewski, 620.
- Guatemala-United Kingdom. British Honduras dispute. U. S. mediation of. Department of State statement, 1965. 396.
- Guerry, Archbishop Emile. The Popes and World Government. *BN*. 436.
- Guggenheim, Paul. Cited on *jus dispositivum*. 56.
- Haas, Ernst B. *BN*: Weil, 622.
- Hague Academy of International Law. 1966 sessions, E. H. Finch, *CN*, 86; teaching and dissemination of international law by, 351, 352, 355.
- Hague Conference on Private International Law:
 Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, 1964. 464.
 Draft Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1966. K. H. Nadelmann and A. T. von Mehren. *CN*. 803.
 Extraordinary session, 1966. K. H. Nadelmann and A. T. von Mehren. *CN*. 803.
 Statute, 1951. 461.
- Hague Peace Conference, 1907. C. G. Fenwick. *LA*. 475.
- Hague Convention, 1907, on laws and customs of war on land. *Menzel v. List*, 267 N.Y.S. 2d 804. *JD*. 851.
- Halperin, Morton H. China and the Bomb. Quoted on Communist China's attitude toward war. 705.
- Hammarskjöld, Dag, U. N. Secretary General. Communist Chinese attitude toward. 710.
- Harding, Warren G. Campaign statement, 1920, and Logan Act. 275.
- Harris' Will, In re, 263 N.Y.S. 2d 393. *Cited*. 411.

- Harvard Research in International Law. Draft Convention on Law of Treaties, *cited*, 62; Draft Convention and Comment on Rights and Duties of States in Case of Aggression, *cited*, 751.
- Hawaii. Jurisdiction of inter-island waters. *Island Airlines Inc. v. Civil Aeronautics Board*, 352 F. 2d 735. *Cited*. 593.
- Hazard, John N. Technical assistance in the new international law, *Ed*, 342; *BE*: Bishop, 419; Soviet Year Book of International Law, 868.
- Heads of governments. Special missions by. Draft rules submitted by I.L.C. special rapporteur. 233; I.L.C. report, 232.
- Heads of state. Special missions by. Draft rules submitted by I.L.C. special rapporteur, 233; I.L.C. report, 232.
- Health services. Equal right to. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.
- Heffter, A. W. Das Europäische Völkerrecht der Gegenwart. Cited on *jus cogens*. 56.
- Hickenlooper amendment to U. S. Foreign Assistance Act. *See* Sabbatino Amendment.
- Higgins, Rosalyn. The Development of International Law through the Political Organs of the United Nations. Quoted on General Assembly resolutions as evidence of international law, 785; on universal membership in international organizations, 683.
- High seas:
- Airspace over. Torts in. *Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874. *JD*. 410.
 - Geneva Convention, 1958. Art. 2 cited, 312, 313, 339; Art. 5 cited, 318; Art. 22 cited, 318, 320; H. F. van Panhuys and M. J. van Emde Boas, *LA*, 312.
 - Navigation on. E. W. Allen, *CN*, 814; distinguished from fishery rights, 815.
 - Radio and television broadcasting stations on. Jurisdiction over. H. F. van Panhuys and M. J. van Emde Boas. *LA*. 303, 309, 318.
- Hinton, Communist China in the World Community. Quoted on Chinese Communist position on unanimity rule for international conferences. 717.
- Historic waters. *Island Airlines Inc. v. Civil Aeronautics Board*, 352 F. 2d 735. *Cited*. 593.
- Ho Wu-shuang, and Ma Chün. Quoted on bourgeois international law, 249; on science of international law, 261.
- Hoffman Motors Corporation v. Alfa Romeo S.p.A., 244 F. Supp. 70. *JD*. 405.
- Hoffmann, Stanley. *BN*: Rosenstiel, 146.
- Holmes v. Jennison, 39 U. S. 540. Quoted on communications between State authorities and foreign governments. 290.
- Hosni, Sayed M. The partition of the Neutral Zone, Kuwait-Saudi Arabia. *LA*. 735.
- Housing. Equal right to. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.
- Hula, Erich. *BN*: Ermacora, 885.
- Human rights:
- Democracy and. The Foundations of Freedom. D. V. Sandifer and L. R. Scheman. *BN*. 888.
 - European Convention on. K. Vasak, *BN*, 145; Yearbook, 1963, *BE*, 613.
 - Inter-American Commission on. Expanded functions. Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965. 458.
 - International protection of. C. A. Dunshee de Abranches. *BN*. 146.
 - New international law and. C. G. Fenwick. *LA*. 482.
 - U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 650; Art. 15 quoted, 800; J. Carey, *CN*, 799.
 - Violation of. U. N. double standard on complaints concerning. J. Carey. *CN*. 792.
- Humanitarian principles, international. *Jus cogens*. A. Verdross. *LA*. 59.
- Humphrey, John P. Quoted on proposed High Commissioner for Human Rights. 802.
- Hunnings, N. March. Pirate Broadcasting in European Waters. *Cited*. 304, 306, 308, 309, 310, 311, 313, 323, 331.

- Immigration. British Commonwealth members and. 772, 781.
- Immunities and privileges. International Center for Settlement of Investment Disputes. Convention, 1965. 897.
- Imperial conferences of British Empire. R. R. Wilson. *Ed.* 776.
- Imports. Temporary entry free of duties. Convention on ATA Carnet, Brussels, 1961, Report of Secretary of State, 827; Convention on Containers, Geneva, 1956, Report of Secretary of State, 828; Convention on ECS Carnets for commercial samples, Brussels, 1956, as amended, 1960, Report of Secretary of State, 827; Convention on international transport of goods under TIR Carnets, Geneva, 1959, as modified, 1963, Report of Secretary of State, 827; Convention on professional equipment, Brussels, 1961, Report of Secretary of State, 827.
- Income taxes. Germany-U. S. Convention, 1954, modification of, Statement by Department of State, 1965, 102; Netherlands-U. S. convention modifying convention of 1948, message of President L. B. Johnson, 562; U.K.-U.S. Convention for Avoidance of Double Taxation, 1945, Supplementary protocol amending, 1966, message of President L. B. Johnson, 837.
- Exemption from. I.L.C. draft articles and commentary on special missions. 219, 221, 222, 223.
- Independence of states:
- U. N. Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 1935. 662.
 - U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. E. McWhinney, *LA*, 7; Czechoslovak proposal, 7; Ghana-India-Yugoslav proposal, 9; United Kingdom proposal, 22; Yugoslav proposal, 9.
- India. Foreign Policy and the Border Dispute with China, W. F. Van Eekelen, *BR*, 431; practice of international law, S. K. Agrawala, *BN*, 619.
- India-Pakistan. Kashmir dispute. Communist Chinese attitude. 715.
- Individuals. Complaints of human rights violations before the United Nations, J. Carey, *CN*, 792; U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 658, J. Carey, *CN*, 799; protection of rights in European Communities, R. Bandilla, *BE*, 878.
- Indo-China. French Union Forces, Commander-in-Chief—People's Army of Viet-Nam, Commander-in-Chief, Agreement on Cessation of Hostilities in Viet-Nam, 1954. 629, quoted, 761, Q. Wright, *LA*, 756; Declaration of Geneva Conference on Restoring Peace, 1954, 643, quoted, 761, Q. Wright, *LA*, 757, 760; U. S. Declaration, 645, quoted, 759, 769.
- Geneva Conference on Problem of Restoring Peace in, 1954. *See* Geneva Conference.
- Industrial Property. International Convention for Protection of, Paris, 1883. Eli Lilly and Company v. Brenner, 248 F. Supp. 402. *JD*. 590.
- Industrial secrets. Protection of. IAEA Safeguards Document. 41.
- Inland waters. Jurisdiction of. United States v. California, 382 U. S. 448. *JD*. 588.
- Inspection. Under Antarctic Treaty, J. Simsarian, *LA*, 502, 507; under International Atomic Energy Agency, J. Simsarian, *LA*, 502, M. Willrich, *LA*, 38, 45; Safeguards Agreement, IAEA-Thailand-U. S., 1964, 917.
- Inspection teams. Viet-Nam Armistice Agreement, 1954. 630, 636, 638, 640.
- Inspectors Document, IAEA. M. Willrich. *LA*. 41, 45, 46.
- Institut de Droit International. Warsaw Session, 1965. H. W. Briggs, *CN*, 517; resolutions, 518, 521, 523.
- Integrationist multiracial organizations and movements, encouragement of. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 652.
- Inter-American Academy of International and Comparative Law. E. H. Finch. *CN*. 83.
- Inter-American Armed Force. Establishment in Dominican Republic. C. G. Fenwick, *Ed*, 65; Resolution of Meeting of Foreign Ministers, 1965, quoted, 66.
- Inter-American Bar Association. E. H. Finch. *CN*. 80, 819.

- Inter-American Commission on Human Rights. Expanded functions. Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965. 458.
- Inter-American Conference, Second Special, Rio de Janeiro, 1965. Resolutions and Declarations: Amendments of Charter of Bogotá, 445; Annual Meetings of Ministers of Foreign Affairs, 454; Asylum for Cuban Political Refugees, 457; Coordination of Activities of International and Inter-American Organizations, 455; Convocation of a Specialized Conference, 456; Economic and Social Act, 447; Inter-American Commission on Human Rights, Expanded Functions, 458; Inter-American Peace Committee, 457; Peaceful Settlement, Strengthening Means for, 456; Recognition of *de facto* Governments, Informal Procedure on, 398, 460.
- Inter-American Conference, Tenth, Caracas, 1954. Convention on Territorial Asylum, ratification of, Resolution of 2nd Special Inter-American Conference, 1965, 458; Resolution on international Communism as threat to peace, *cited*, 64, 66.
- Inter-American Council of Jurists. Act of Rio de Janeiro, 1965, 447; I.L.C. co-operation with, report, 1965, 238.
- Inter-American Development Bank, *Lutcher S. A. Celulose e Papel v.*, U. S. Dist. Ct., Dist. of Columbia, 1966. *JD.* 586.
- Inter-American Economic and Social Council. Act of Rio de Janeiro, 1965. 447.
- Inter-American Educational, Scientific and Cultural Council. Act of Rio de Janeiro, 1965. 447.
- Inter-American Juridical Committee. Act of Rio de Janeiro, 1965. 447.
- Inter-American organizations. Coordination of activities of international and. Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965. 455.
- Inter-American Peace Committee. Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965. 457.
- Intercourse with foreign governments. U. S. Logan Act. 268; D. F. Vagts, *LA*, 268, 284.
- Interhandel case, Switzerland-United States, [1959] I.C.J. Rep. 6. Cited on definition of dispute, 286; quoted on exhaustion of local remedies, 500; Judge Spender quoted, 287.
- International adjudication. The Court of the European Communities. W. Feld. *BN*. 434. *See also* Arbitration, international, and Judicial settlement of international disputes.
- International Association of Young Lawyers. E. H. Finch. *CN*. 556.
- International Atomic Energy Agency. Establishment of, 36; inspection under, J. Simsarian, *LA*, 502, M. Willrich, *LA*, 45; Inspectors Document, 41, 45, 46, privileges and immunities, Safeguards Agreement, IAEA-Thailand-U.S., 1964, 917; reports to, Safeguards Document, 44; safeguards agreements, 41, 52; Safeguards Document, 40; safeguards system, M. Willrich, *LA*, 34; Statute, Art. III A, 38, Art. VI, 39, Art. XII, 38, 39, 51, Art. XIV, 51.
- International Atomic Energy Agency-Thailand-United States. Agreement for the Application of Safeguards, 1964. 912.
- International Bank for Reconstruction and Development. Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965. 892; Art. 26, 484, 899; S. M. Schwebel and J. G. Wetter, *LA*, 484; Report of Acting Secretary of State, 560; Report of Executive Directors, quoted, 484, 499.
- International Center for Settlement of Investment Disputes. Convention establishing, 1965. 892; approval by Washington Conference on World Peace through Law, 1965, 362; international legal status, immunities and privileges, Convention, 1965, 897; jurisdiction, Convention, 1965, 898.
- International Civil Aviation, Chicago Convention on. Art. 5, 412; Public Prosecutor *v.* Matsumoto, Taipei Dist. Ct., 1965, *JD*, 412.
- International Commission for Supervision and Control. Viet-Nam Armistice Agreement, 1954. 630, 633, 635, 636, 637, 638; co-operation with International Control Commissions in Cambodia and Laos, Armistice Agreement, 1954, 642; Reports, *cited*, 751, 753, 760, 765, 767, quoted, 763, 766.

- International conferences. Adoption of treaty texts by, I.L.C. draft articles, 166; Communist Chinese attitude at, 717; decisions, status in international law, E. McWhinney, *LA*, 31; unanimity rule at, Communist Chinese position, 717. Special U. N. Conference on Friendly Relations and Co-operation among States, 1964, E. McWhinney, *CN*, 357.
- International co-operation. U. N. resolutions on principles of international law concerning, E. McWhinney, *CN*, 357, 360, *LA*, 6; U. N. Special Committee on Friendly Relations and, Mexico City Conference, 1964, E. McWhinney, *LA*, 1, 20, 29, Report before U. N. Sixth Committee, E. McWhinney, *CN*, 356, 360.
- International Council for the Exploration of the Sea. Convention for, 1964. Message of President Lyndon B. Johnson. 836.
- International Court of Justice:
- Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations, 1948. Quoted. 690.
 - Compulsory jurisdiction. Before U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. 18, 31; Japanese proposal, 16.
 - Election of judges to. Before Mexico City Conference on Friendly Relations and Co-operation among States, 1964. 19, 31; Ghana-India-Yugoslav proposal, 17.
 - Reference of disputes to. Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965, 909; Kuwait-Saudi Arabia Agreement for Partition of Neutral Zone, 1965, 749, S. M. Hosni, *LA*, 742; U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 661.
- International disputes:
- Definition of. Interhandel case, Switzerland-United States, I.C.J., *cited*, 286; Logan Act, D. F. Vagts, *LA*, 285; Mavrommatis Palestine Concessions case, P.C.I.J., quoted, 286; John Bassett Moore quoted, 286; South West Africa Cases, [1962] I.C.J. Rep. 319, quoted, 286, 287; Judge Sir Percy Spender quoted, 287; U. N. Charter, Art. 34 cited, 286.
 - Peaceful settlement of. C. G. Fenwick. *LA*, 475.
 - Investment Disputes between States and Nationals of Other States. Convention on, 1965. 892.
 - Kuwait-Saudi Arabia Agreement for Partition of Neutral Zone, 1965. 749; S. M. Hosni, *LA*, 742.
 - Safeguards Agreement, IAEA-Thailand-U.S., 1964. 918.
 - Southeast Asia Collective Defense Treaty, 1954. 646.
 - Strengthening the means for. Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965. 456.
 - U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 659, 661.
 - U. N. resolutions on principles of international law concerning friendly relations and co-operation among states. E. McWhinney. *CN*, 357; *LA*, 5.
 - U. N. Security Council. Handling of Legal Questions involved in International Disputes and Situations. T. J. Kahng. *BN*. 438.
 - U. N. Special Conference on Friendly Relations and Co-Operation among States, Mexico City, 1964. E. McWhinney, *LA*, 16, 31; Czechoslovak proposal, 16; Ghana-India-Yugoslav proposal, 17; Japanese proposal, 16; United Kingdom proposal, 16.
- International economic organization. H. G. Johnson quoted on. 537.
- International Faculty for Teaching of Comparative Law. 351, 352, 354.
- International Labor Conference. Convention concerning Employment Policy, 1965. Message of President L. B. Johnson. 833.
- International law. C. G. Fenwick. *BR*, 602; *LA*, 475.
- Academy of, The Hague. 1966 sessions. E. H. Finch. *CN*. 86.
 - Academy of American and. E. H. Finch. *CN*. 378.
 - Agrawala, S. K. Indian Courts and Legislature. *BN*. 619.
 - As Interpreted and Applied in Canada. J.-G. Castel. *BR*. 874.

- Basis of obligation in. R. A. Falk. *Ed.* 782.
- British Cases. C. Parry. *BN.* 618.
- British Commonwealth and, 1907-1967. R. R. Wilson. *Ed.* 770.
- British Year Book, 1963. *BN.* 618.
- Canadian Yearbook, 1964. *BR.* 421.
- Carnegie-Harvard Seminar for legal officers. R. R. Baxter. *CN.* 554.
- Cases and Materials. L. B. Orfield and E. D. Re. *BN.* 884.
- Changing Structure of. W. Friedmann. *BR.* 130.
- Chinese Society of. H. Chiu. *CN.* 557.
- Codification and development of. *See* Codification and development of international law.
- Communist China. Attitude toward, H. Chiu, *LA.* 245; publications on, 264.
- Custom in. K. Wolfke, *BR.* 133; Communist Chinese view, 257; Soviet doctrine, 258; jus cogens and, A. Verdross, *LA.* 61.
- Definition of. Communist Chinese view, 250; Kozhevnikov quoted, 251; L. Oppenheim cited, 251, quoted, 250; G. Schwarzenberger quoted, 250.
- Degan, V. D. L'Interprétation des Accords en Droit International. *BR.* 135.
- Disarmament and. A. Gotlieb. *BN.* 621.
- Economic development and. Dar es Salaam Seminar on. W. Friedmann. *CN.* 367.
- Effectiveness in. J. Toussez. *BN.* 888.
- Garcia Arias, Luis. Estudios de Historia y Doctrina del Derecho Internacional. *BN.* 623.
- General principles of. Legal aspects of pirate broadcasting. H. F. van Panhuys and M. J. Emde Boas. *LA.* 303.
- Inter-American Academy. E. H. Finch. *CN.* 83.
- Judicial decisions involving. J. R. Stevenson. *JD.* 107, 400, 586, 838.
- Jus dispositivum and jus cogens in. A. Verdross, *LA.* 55, *cited*, 511; in the light of a recent decision of the German Supreme Constitutional Court, S. H. Riesenfeld, *Ed.* 511; I.L.C. discussion, 57; statement by V. Pechota before U. N. Sixth Committee, 358; G. Schwarzenberger cited, 55, 60, 61, 62.
- Methods for analysis of war-peace issues. K. S. Carlston. *LA.* 732.
- Municipal law and. Kashini v. United Arab Republic, Sup. Ct. India, 1965, *JD.* 861; F. I. Kozhevnikov quoted, 259; Ying T'ao cited, 260.
- Nature of. Communist Chinese views, 252; Ch'iu Jih-ch'ing quoted, 253, *cited*, 256; Chou Ch'i-wu quoted, 255; Chou Fu-lun quoted, 248, 254, 255; Chou Tzu-ya cited, 255; E. A. Korovin quoted, 252; Kozhevnikov, International Law, quoted, 252; Lin Hsin cited, 253; Liu Chia-chi cited, 255; Soviet view, 252.
- New. C. G. Fenwick, *LA.* 475; new countries and, E. McWhinney, *LA.* 1, 29; technical assistance in, J. N. Hazard, *Ed.* 342.
- Nuclear Energy and. M. Šahović. *BR.* 433.
- Patel, S. R. A Textbook of. *BN.* 144.
- The Potsdam Agreement in. F. Faust. *BN.* 440.
- Procedural Aspects Institute. E. H. Finch. *CN.* 816.
- Regala, Roberto. World Peace through Diplomacy and Law. *BR.* 609.
- Reprisals in. Q. Wright. *LA.* 755, 764, 767.
- Restitution in. I. Vásárhelyi. *BN.* 623.
- Rôle of. Communist Chinese views, H. Chiu, *LA.* 246; Soviet view, 246.
- Science of. Communist Chinese view, 260; Ho Wu-shuang and Ma Chün quoted, 249, 261; F. I. Kozhevnikov quoted, 261; Ying T'ao quoted, 261, 262, 263.
- Scott prizes in. E. H. Finch. *CN.* 816.
- Self-defense in. Legal aspects of Viet-Nam situation. Q. Wright. *LA.* 750, 755, 764.
- Sources and Evidences of. C. Parry, *BN.* 617; E. McWhinney, *LA.* 30; Communist Chinese view, 257; Chao Yüeh quoted, 258; Chou Keng-sheng cited, 258, 259, quoted, 259; Wei Liang quoted, 258; Ying T'ao quoted, 257; Soviet doctrine, 7, 258.

- Sovereignty and. U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964. E. McWhinney. *LA.* 25, 28, 32.
- Soviet Year-Book, 1962, 1963. *BR.* 868.
- Student journals of. E. H. Finch. *CN.* 87.
- Study of. United Nations program of assistance. U. N. Resolution, 664; *CN.* 526; J. N. Hazard, *Ed.* 342.
- In Communist China. H. Chiu, *LA.* 263; Professor Wang Tieh-yeh quoted, 267.
- Teaching of. United Nations program of assistance. U. N. Resolution, 1965, 664; *CN.* 526; J. N. Hazard, *Ed.* 342; UNESCO survey of, 345, 527.
- Unilateral acts in. Suy, Eric. *Les Actes Juridiques Unilatéraux en Droit International Public.* *BR.* 426.
- United Nations Program of Assistance and Exchange in Field of. *CN.* 526; J. N. Hazard, *Ed.* 342; U. N. Resolution, 1965, 664.
- United Nations Seminar on, Geneva, 1965. I.L.C. Report. 241.
- United States contemporary practice. 91, 385, 559, 824.
- von Glahn, Gerhard. *Law among Nations.* *BR.* 131.
- International Law Association. Committee on State Succession to Treaties. The Effect of Independence on Treaties. *BR.* 880.
- International Law Commission:
- Co-operation with other bodies. Report, 1965. 238.
 - Documents. Exchange and distribution. Report, 1965. 239.
 - Draft articles and commentaries: law of treaties, 164, report, 157; Art. 37, quoted, 57, 511, and jus cogens, A. Verdross, *LA.* 55; Art. 45, quoted, 511; special missions, 176, report, 173.
 - Future sessions. Organization of. Report, 1965. 237, 240.
 - Report on Work of 17th Session, 1965. 155.
 - Work program. Report, 1965. 237.
 - Yearbook. Report, 1965. 241.
- International law journals, Student. E. H. Finch. *CN.* 87.
- International Legal Materials. Current Documents. List of. 242, 472, 668, 926.
- International legal order. Law, State, and. S. Engel and R. A. Métal. *BR.* 132; S. Engel, *CN.* 822.
- International legal personality. International Center for Settlement of Investment Disputes. Convention, 1965. 897.
- International legislation. The quasi-legislative competence of the U. N. General Assembly. R. A. Falk. *Ed.* 782.
- International Monetary Fund. H. Aufrecht. *BN.* 435.
- International organizations:
- Adam, H. T. *Les Organismes Internationaux Spécialisés.* *BR.* 606.
 - Adoption of treaty texts by organs of. I.L.C. draft articles. 166.
 - Co-ordination of activities of inter-American and. Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965. 455.
 - Immunity from suit. Luteher S.A. *Celulose e Papel v. Inter-American Development Bank*, U. S. Dist. Ct., D. C., 1966. *JD.* 586.
 - Law-making resolutions. K. Skubiszewski. *BN.* 620.
 - Membership in. Before U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964. E. McWhinney. *LA.* 28.
 - Rôle in promoting peace. K. S. Carlston. *LA.* 732.
 - Rosenstiel, F. *Le Principe de "Supranationalité."* *BN.* 146.
 - Treaties by and with. I.L.C. draft articles, 165; report, 160.
- International Products Corp. v. Koons*, 325 F. 2d 403. Quoted. 297.
- International relations. United Nations Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964. E. McWhinney. *LA.* 1.
- International rivers and lakes. Convocation of Specialized Conference on. Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965. 456.
- International security. Falk, R. A., and R. J. Barnett. *Security in Disarmament.* *BR.* 612.

- International Telecommunications Union. Functions of. 305.
- International transportation of goods under TIR carnets. Customs convention, Geneva, 1959, as modified 1963. Report of Secretary of State. 827.
- International tribunals. Interpretation of treaties. Bernhardt, R. *Die Auslegung Völkerrechtlicher Verträge insbesondere in der Neueren Rechtsprechung Internationaler Gerichte*. *BR*. 137.
- Internationalism, proletarian. Communist Chinese view, 256; Chen Yi quoted, 257; Chiang Yang quoted, 257; G. I. Tunkin quoted, 256.
- Internees, civilian. Viet-Nam Armistice Agreement, 1954. 637.
- Intervention:
- American Support of Free Elections Abroad. T. P. Wright. *BR*. 432.
 - Essays on. R. J. Stanger. *BN*. 148.
 - Protection of nationals abroad. R. T. Bohan. *CN*. 809.
 - U. N. Declaration on Inadmissibility of, and the Protection of Independence and Sovereignty of States, 1965. 662.
 - U. N. resolutions on principles of international law concerning friendly relations and co-operation among states. E. McWhinney. *CN*, 357; *LA*, 5.
 - U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. E. McWhinney, *LA*, 21, 32; Czechoslovak proposal, 21; Ghana-India-Yugoslav proposal, 21; Mexican proposal, 22; United Kingdom proposal, 22; United States proposal, 23; Yugoslav proposal, 21.
 - U. S. military action in the Dominican Republic, C. G. Fenwick, *Ed*, 64, R. T. Bohan, *CN*, 809; in Viet-Nam, Q. Wright, *LA*, 754, 760.
- Investment, foreign. Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965, 892; laws and policies: Colombia, S. W. Wurfel, *BN*, 624; Nigeria, P. O. Proehl, *BR*, 608.
- Investment disputes. Convention on Settlement of Disputes between States and Nationals of Other States, 1965. 892; Art. 26, 484, 899; S. M. Schwebel and J. G. Wetter, *LA*, 484; Report of Acting Secretary of State, 560; Report of Executive Directors of World Bank, quoted, 484, 499.
- Iran-United States. Treaty of Amity, Economic Relations and Consular Rights, 1955. Art. 2 on arrest of nationals. 388.
- Iraq, Republic of. Change of government by revolution and membership in U. N. 693.
- Iraq, Republic of, *v.* First National Bank of Chicago, 350 F. 2d 654. *JD*. 407.
- Iraq, Republic of, *v.* First National City Bank. 241 F. Supp. 567, *JD*, 120; 353 F. 2d 47, *JD*, 592.
- Ireland-United States. Consular Convention, 1950, Art. 16 on arrest of nationals, 388; Treaty of Friendship, Commerce and Navigation, 1950: Art. 2 on arrest of nationals, 388; Art. 3 on compulsory military service exemption, *In re* Petition for Naturalization of Regan, 244 F. Supp. 664, *JD*, 405.
- Island Airlines, Inc. *v.* Civil Aeronautics Board, 352 F. 2d 735. *Cited*. 593.
- Israel-United States. Treaty of Friendship, Commerce and Navigation, 1951. Art. 3 on arrest of nationals. 388.
- Italy. Participation as non-Member in meetings of U. N. Trusteeship Council. 726.
- Italy-United States. Air Transport Agreement, 1948. Interpretation of. Advisory Opinion of Arbitral Tribunal, 1965. *JD*. 413.
- Jack Tar Grand Bahamas, Ltd., *Turner v.*, 353 F. 2d 954. *JD*. 596.
- Jamaica. U.K.-U.S. Consular Convention and Protocol, 1951. Art. 16 on arrest of nationals, 389, 394; Jamaica-U. K. exchange of notes, 1962, 389.
- Japan. Proposal at U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964. 16.
- Japan-United States. Consular Convention and Protocol, 1963, Art. 16 on arrest of nationals, 389; Treaty of Friendship, Commerce and Navigation, 1953: *Oregon-Pacific Forest Products Corp. v. Welsh Panel Co.*, 248 F. Supp. 903, *JD*, 594; Art. 2 on arrest of nationals, 389.

- Jennison, *Holmes v.*, 39 U. S. 540. Quoted on communications between State authorities and foreign governments. 290.
- Jessup, Philip C. Quoted on rôle of international law. 249.
- Johnson, David H. N. Rights in Air Space. *BN*. 886.
- Johnson, Harry G. The World Economy at the Crossroads. Quoted on international economic organization. 537.
- Johnson, President Lyndon B. Quoted on Dominican revolution, 65, on law and peace, 363.
- Messages: Employment Policy, I.L.O. Convention, 1965, 833; International Council for Exploration of the Sea, Convention, 1964, 836; Northwest Atlantic Fisheries Convention, Protocols amending, 1965, 829; U.K.-U.S. Convention for Avoidance of Double Taxation on Income, 1945, supplementary protocol amending, 1966, 837.
- Statements: Netherlands-U. S. Income Tax Convention, 1948, supplementary convention, 1965, 562; Panama-U. S. negotiations of new treaty governing Panama Canal, 397; treaty on exploration of celestial bodies, 834.
- Joint Commission. Viet-Nam Armistice Agreement, 1954. 629, 630, 632, 633, 635, 636, 637, 638.
- Judgments, foreign. Recognition and enforcement. Draft convention on, K. H. Nadelmann and A. T. von Mehren, *CN*, 803; Republic of Iraq *v.* First National Bank of Chicago, 350 F. 2d 645, *JD*, 407; Plugmay Ltd. *v.* National Dynamics Corp., 266 N.Y.S. 2d 240, *JD*, 595.
- Judicial and Extra-Judicial Documents. Service Abroad in Civil or Commercial Matters. Convention on, 1964, 464; Plugmay Ltd. *v.* National Dynamics Corp., 266 N.Y.S. 2d 240, *JD*, 595.
- Judicial documents. Service on agency of foreign government. Petrol Shipping Corporation, 360 F. 2d 103. *JD*. 859.
- Judicial remedies. Acts of racial discrimination. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.
- Judicial settlement of international disputes. U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. E. McWhinney, *LA*, 18, 32; Czechoslovak proposal, 16; Ghana-India-Yugoslav proposal, 17; United Kingdom proposal, 16.
- Junn, Sungjook. *BN*: Kahng, 438.
- Jus cogens in international law. Discussion in International Law Commission, 57; V. Pechota statement before U. N. Sixth Committee, 358; G. Schwarzenberger cited, 55, 60, 61, 62; jus dispositivum and, A. Verdross, *LA*, 55, cited, 511; in the light of a recent decision of the German Supreme Constitutional Court, S. A. Riesenfeld, *Ed*, 511.
- Justiciable controversy. Republic of Iraq *v.* First National Bank of Chicago, 350 F. 2d 645. *JD*. 407.
- Kahng, Tae Jin. Law, Politics and the Security Council. *BN*. 438.
- Kamenov, E., and P. Radoinov. Mezhdunarodnopraven režim na Dunava. *BN*. 441.
- Kashini *v.* United Arab Republic, Sup. Ct. India, 1965. *JD*. 861.
- Kashmir dispute, India-Pakistan. Communist Chinese attitude. 715.
- Kelley *v.* Société Anonyme Belge d'Exploitation de la Navigation Aérienne, 242 F. Supp. 129. *JD*. 124.
- Kellogg-Briand Pact for Renunciation of War. C. G. Fenwick. *LA*. 477.
- Kelsen, Hans. Essays in Honor of. *BE*. 132; S. Engel, *CN*, 822.
- Kendall, Thomas W., et al. *v.* The Kingdom of Saudi Arabia, U. S. Dist. Ct., S.D.N.Y., 1965. Cited. 100.
- Kennedy, President John F. Quoted on Logan Act. 279.
- Kennedy, Robert, Attorney General. Quoted on Logan Act. 279.
- Kent *v.* Dulles, 357 U. S. 116. Cited. 294.
- Kenya. U.K.-U.S. Consular Convention and Protocol, 1951. Art. 16 on arrest of nationals, 389, 394; Declaration of Kenya Government, 389.

- Kommunist. Quoted on Chinese Communists and international Communist movement. 709.
- Koons, International Products Corp. v., 325 F. 2d 403. Quoted. 297.
- Korea-United States. Consular Convention, 1963, Art. 5 on arrest of nationals, 390; Treaty and Protocol of Friendship, Commerce and Navigation, 1956, Art. 3 on arrest of nationals, 389.
- Korovin, E. A. Quoted on nature of international law. 252.
- Kovar, Robert. Le Pouvoir Réglementaire de la Communauté Européenne du Charbon et de l'Acier. *BE*. 428.
- Kozhevnikov, F. I. International Law. Quoted on international law and municipal law, 259; on rôle of international law, 248, 252; on science of international law, 261.
- K'ung Meng. Quoted on bourgeois international law. 250, 251.
- Kuwait. Rights in Neutral Zone with Saudi Arabia, S. M. Hosni, *LA*, 741; U.K.-U.S. Consular Convention and Protocol, 1951, Art. 16 on arrest of nationals, 390, 394, Declaration by Kuwait Government, 390.
- Kuwait-Great Britain. Treaty of 1899. *Cited*. 735.
- Kuwait-Saudi Arabia. Agreement for partition of Neutral Zone, 1965. 744; S. M. Hosni, *LA*, 735, 741; Joint Permanent Committee, 744, 748.
- Laing, Lionel. Admission of Indian States to the United Nations. Quoted on admission of Pakistan. 691.
- Lakes, international. Convocation of Specialized Conference on; Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965, 456; Wolfrom, Marc, L'Utilisation à des Fins Autres que la Navigation des Eaux des Fleuves, Lacs et Canaux Internationaux, *BE*, 424.
- Lamont v. Postmaster General, 381 U. S. 301. *Cited*. 295.
- Lancaster, Donald. Power Politics at the Geneva Conference, 1954. *Cited*, 761; quoted, 756.
- Laos:
- Armed attack against. Southeast Asia Collective Defense Treaty, 1954. 647; Protocol, 649; U. S. Understanding, 649.
 - Armistice Agreement, 1954. Declaration of Geneva Conference on Restoring Peace in Indo-China, 643; U. S. Declaration, 645.
 - Declaration regarding free general elections. Geneva Conference Declaration on Restoring Peace in Indo-China. 643.
- Larkin's Estate, In re, 44 Calif. Reporter 731. *JD*. 128.
- Lasala Samper, Fernando M. La Protección a los Heridos, Enfermos y Naufragos de las Fuerzas Armadas en Campaña. *BN*. 437.
- Latin America. Diplomatic Asylum in. C. N. Ronning. *BE*. 876.
- Latuhary, M.V.J., and Djakarta Lloyd Lines, American Hawaiian Ventures, Inc. v., U. S. Dist. Ct., N. J., 1966. *JD*. 858.
- Laub, United States v., 253 F. Supp. 433. *JD*. 865.
- Laun, John I. East-West Trade Conference, Stanford University. *CN*. 817.
- Law:
- Among Nations. G. von Glahn. *BE*. 131.
 - And developing countries. ASIL conference on, Summary report, H. C. L. Merillat, *CN*, 71; Dar es Salaam University Seminar on, W. Friedmann, *CN*, 367.
 - And Politics of the Danube. S. Gorove. *BE*. 616.
 - East African Unity through. T. M. Franck. *BE*. 140.
 - Politics, and the Security Council. T. J. Kahng. *BN*. 438.
 - Rule of. U. S. Chief Justice Warren quoted, 362; President Lyndon B. Johnson quoted, 363; The Washington World Conference on World Peace through, C. G. Fenwick, *CN*, 68; C. S. Rhyne, *CN*, 361.
 - State, and International Legal Order. S. Engel and R. A. Metall. *BE*. 132; S. Engel, *CN*, 822.
 - World Peace through Diplomacy and. R. Regala. *BE*. 609.

- Law of the Sea Institute. First annual summer conference. E. H. Finch. *CN.* 820.
- Law-making in international society. R. A. Falk. *Ed.* 782.
- Lawyers, young. International Association of. E. H. Finch. *CN.* 556.
- League of Nations. Communist Chinese attitude, 703, 711; Credentials Committee report on representation of Ethiopia, quoted, 694; maintenance of peace, C. G. Fenwick, *LA*, 477; membership in, *cited*, 725; Mussolini and, The Corfu Incident of 1923, J. Barros, *BE*, 870.
- League of Nations Council. Membership on. *Cited.* 725.
- Legal interests, national. High seas jurisdiction to protect. Legal aspects of pirate broadcasting. H. F. van Panhuys and M. C. van Emde Boas. *LA*. 333.
- Legal publications. U. N. Program of technical assistance in field of international law. U. N. Resolution, 1965, 665; *CN*, 526; J. N. Hazard, *Ed*, 342.
- Legal questions. Handling by U. N. Security Council. T. J. Kahng. *BN.* 438.
- Less developed countries. Trade relations with and within. Summary report, ASIL Board of Review and Development. *CN.* 543.
- Li Hao-pei. Cited on resolutions of United Nations as source of international law. 259.
- Liao Cheng-chih. Quoted on U. N. decolonization activities, 712; on U. N. peace-keeping operations, 714.
- Libraries, law. U. N. program of technical assistance in field of international law. U. N. Resolution, 1965, 665; *CN*, 526; J. N. Hazard, *Ed*, 342.
- Lie, Trygve, U. N. Secretary General. Communist Chinese attitude toward, 710; efforts to seat Communist China in U. N., 677.
- Lilly, Ely, and Company, v. Brenner, 248 F. Supp. 402. *JD.* 590.
- Lin Hsin. Quoted on nature of international law. 253.
- Lin Piao. Quoted on world revolution. 703.
- List, Menzel v., 267 N.Y.S. 2d 804. *JD.* 851.
- Liu Chia-chi. Cited on Socialist international law. 255.
- Liu Shao-chi. Quoted on United Nations, 710, and Kashmir question, 738.
- Lo Jui-ching. Quoted on Chinese attitude on war and the atom bomb. 705.
- Local remedies, exhaustion of. Arbitration and, S. M. Schwebel and J. G. Wetter, *LA*, 484; Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965, 899; U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 656, 658.
- Logan, Dr. George. Private mission to France, 1798. 270, 287.
- Logan Act. 268; D. F. Vagts, *LA*, 268; interpretation of, 281, Waldron v. British Petroleum Co., 231 F. Supp. 72, *cited*, 280.
- Lombard, Richard S. American-Venezuelan Private International Law. *BN.* 887.
- Losinger & Co.-Yugoslavia. Contract, 1929. Arbitration clause. 488.
- Losinger & Co. case, Switzerland v. Yugoslavia, P.C.I.J., Ser. C, No. 78. Quoted, 489, 490; S. M. Schwebel and J. G. Wetter, *LA*, 487, 496.
- Lotus case, P.C.I.J., Series A, No. 10. *Cited*, 316, 326; quoted on nature of international law, 784.
- Lucky Star, M. V. Radio broadcasts by. Danish action against. 310, 319.
- Lutcher S. A. Celulose e Papel v. Inter-American Development Bank, U. S. Dist. Ct., Dist. of Columbia, 1966. *JD.* 586.
- Luxembourg-United States. Treaty and Protocol of Friendship, Establishment and Navigation, 1962. Art. 3 on arrest of nationals. 390.
- MacChesney, Brunson. Professor Bishop's appointment to Edwin D. Dickinson Professorship of Law. *CN.* 384.
- Malawi. U.K.-U. S. Consular Convention and Protocol, 1951. Art. 16 on arrest of nationals, 390, 394; Declaration of Malawi Government, 390.
- Malaysia. U.K.-U.S. Consular Convention and Protocol, 1951. Art. 16 on arrest of nationals. 390, 394; Malaya Federation-U.K. exchange of notes, 1957, 391; Malaya Federation-U.S. exchange of notes, 1960, 391; Malaysia-U. S. exchange of notes, 1964, 390.

- Malta. U.K.-U.S. Consular Convention and Protocol, 1951. Art. 16 on arrest of nationals. 391, 394; U.K.-Malta exchange of letters, 1964, 391.
- Mao Tse-tung. Quoted on the League of Nations and China, 703, 711; on rôle of law, 247.
- Maritime law:
- Brussels Convention Relating to Immunity of State-owned Vessels, 1926. Nicholas E. Vernicos Shipping Co. v. United States, 349 F. 2d 465. *JD.* 403.
 - Brussels Salvage Convention, 1910. I. H. Wildeboer. *BE.* 881.
- Marriage. Equal right to. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.
- Martinez-Angosto, U. S. ex rel., v. Mason, 344 F. 2d 673. *JD.* 125.
- Mason, U. S. ex rel. Martinez-Angosto v., 344 F. 2d 673. *JD.* 125.
- Matsumoto, Public Prosecutor v., Taipei Dist. Ct., 1965. *JD.* 412.
- Mavrommatis Palestine Concessions case, P.C.I.J., Series A, No. 2. Quoted on definition of international disputes. 286.
- McCabe, David A. Tibet's declarations of independence. *CN.* 369.
- McDougal, Myres S., and W. T. Burke. The Public Order of the Oceans. Cited on international legislation. 790.
- McDougal, Myres S., and R. M. Goodman. Chinese participation in the United Nations. The legal imperatives of a negotiated solution. *LA.* 671.
- McMahon, Sir Henry. Quoted on independence of Tibet. 370.
- McNamara, Rose v., 252 F. Supp. 111. *JD.* 866.
- McWhinney, Edward. Friendly relations and co-operation among states. *CN.* 356; United Nations Special Conference, Mexico City, 1964, *LA.* 1.
- Meier, Walter. Die Bestimmungen über das Kriegsverbrechens- und Besatzungsstrafrecht in den Genfer Abkommen zum Schutze der Kriegsoffer von 1949. *BN.* 887.
- Menzel v. List, 267 N.Y.S. 2d 804. *JD.* 851.
- Merillat, H. C. L. Law and developing countries. *CN.* 71.
- Métall, R. A., and S. Engel. Law, State, and International Legal Order. *BE.* 132; S. Engel, *CN.* 822.
- Metzger, Stanley D. Regulation of international trade. Summary report; ASIL Board of Review and Development. *CN.* 537.
- Mexico. And international arbitration, A. Gomez Robledo, *BN.* 622; proposal at U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964, 22.
- Mexico-United States. Chamizal and Pious Fund Arbitrations. A. Gomez Robledo. *BN.* 622.
- Middle East. Federations in. A Documentary Survey. J. Y. Brinton. *BE.* 427.
- Middle East Research and Publishing Center. Quoted on Kuwait-Saudi Arabia Neutral Zone. 740.
- Military alliances. Cambodian and Laotian Declarations, Declaration of Geneva Conference on Restoring Peace in Indo-China, 1954, 643; Viet-Nam Armistice Agreement, 1954, 636, Declaration of Geneva Conference on Restoring Peace in Indo-China, 643.
- Military bases, foreign. Declarations of Cambodia and Laos. Geneva Conference Declaration on Restoring Peace in Indo-China, 1954. 643.
- Military bases, new. Viet-Nam Armistice Agreement, 1954. 636; Declaration of Geneva Conference on Restoring Peace in Indo-China, 643.
- Military demarcation line. Viet-Nam Armistice Agreement, 1954. 629; Declaration of Geneva Conference on Restoring Peace in Indo-China, 644.
- Military occupation. Territory under. Jurisdiction of crimes. Rose v. McNamara, 252 F. Supp. 111. *JD.* 866.
- See also* Belligerent occupation and Occupied territory
- Military personnel. Foreign, Cambodian and Laotian declarations, Geneva Conference Declaration on Restoring Peace in Indo-China, 1954, 643; increase prohibited, Viet-Nam Armistice Agreement, 1954, 634, Declaration of Geneva Conference on Restoring Peace in Indo-China, 643.

- Military service. Exemption of aliens by treaty and U. S. nationality law. In re Petition for Naturalization of Regan, 244 F. Supp. 664. *JD.* 405.
- Minorities, protection of. Ermacora, F. Der Minderheitenschutz in der Arbeit der Vereinten Nationen. *BN.* 885.
- Molván v. Attorney-General for Palestine, [1948] A. C. 531. *Cited.* 319.
- Mongolia-Tibet. Treaty of Urga, 1912. A. P. Rubin, *CN.* 812; quoted on recognition of Tibet's independence, 370.
- Moore, Judge John Bassett. Quoted on definition of international dispute. 286.
- Morelli, Gaetano. Cited on *jus dispositivum*. 56.
- Morrison, Voorhees v., Miami Div., S.D. Florida, 1963. Cited on Logan Act and Tractors for Freedom Committee, 279; U. S. Memorandum cited, 279, 285.
- Mostecký, Václav. Index to Multilateral Treaties. *BN.* 620.
- Movement, freedom of. Convention on Elimination of All Forms of Racial Discrimination, 1965, 654; I.L.C. draft articles and commentary on special missions, 213, draft rules on high-level missions submitted by special rapporteur, 234.
- Multilateral treaties. Creation of binding international rules by, A. Verdross, *LA.* 61; Index to, V. Mostecký, *BN.* 620; participation in, I.L.C. report, 1965, 163; reservations to: I.L.C. draft articles, 1965, 168, report, 163; submission to U. S. Senate, statement by Department of State, 563.
- Multiracial organizations and movements, encouragement of. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 652.
- Munich Pact, 1938. Transfer of territory under. Decision of Sup. State Court of Bavaria concerning City of Eger, 1965. *JD.* 597.
- Municipal law. International law and. Kashini v. United Arab Republic, Sup. Ct. India, 1965, *JD.* 861; F. I. Kozhevnikov quoted, 259; Ying T'ao cited, 260.
- Municipalities. Succession of states and property rights of. Decision of Sup. State Court of Bavaria concerning City of Eger, 1965. *JD.* 597.
- Murchison correspondence, Sackville case. Logan Act and. 273.
- Muscato-United States. Treaty of Amity, Economic Relations and Consular Rights, 1958. Art. 2 on arrest of nationals. 391.
- Myers, Denys P. *BN.* Mostecký, 620; *BR.* Documents on German Foreign Policy, 1918-1945, 143.
- Myslík, Stanislav. Diplomatieké Styky a Imunity. *BN.* 150.
- Nadelmann, Kurt H., and A. T. von Mehren. Extraordinary session of the Hague Conference on Private International Law, 1966. *CN.* 803.
- Najd-Kuwait Convention, 1922, establishing Neutral Zone. 737.
- Nan Han-chen. Quoted on U. N. specialized agencies and aid to Afro-Asian countries. 711.
- National courts. Access to, for protection against racial discrimination. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.
- National Dynamics Corporation, Plugmay Limited v., 266 N.Y.S. 2d 240. *JD.* 595.
- National Iranian Oil Co., Sapphire International Petroleum, Ltd. v., Arbitration, 1963. *Cited.* 500.
- National Iranian Oil Co.-Bataafse Petroleum Maatschappij N.V. Joint Structure Agreement, 1965. Arbitration clause. 486.
- Nationality:
- British Commonwealth members, 771, 775, 781; citizens of British Empire members, 771.
 - Equal right to. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.
 - IAEA safeguards inspectors. M. Willrich. *LA.* 46.
 - Laws. Arab States, Oppermann, T., and A. Yousry, Das Staatsangehörigkeitsrecht der Arabischen Staaten, *BN.* 149; U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 652.

Natural resources:

Rights in. Kuwait-Saudi Arabia Agreement for Partition of Neutral Zone, 1965. 745, 746, 748; S. M. Hosni, *LA*, 742, 744.

Sovereignty over. Before U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964, E. McWhinney, *LA*, 27; Yugoslav proposal, 21; U. N. General Assembly resolution, *cited*, 789.

Naturalization. Exemption from compulsory military service and. In re Petition for Naturalization of Regan, 244 F. Supp. 664. *JD*. 405.

Netherlands. Legal status of radio and television broadcasting in, 308; North Sea Installations Act, 1964, 326, 340; pirate broadcasting off coast, attitude toward, H. F. van Panhuys and M. J. van Emde Boas, *LA*, 303.

Netherlands-United States. Income Tax Convention, 1948, supplementary convention, 1965, Message of President L. B. Johnson, 562; Treaty and Protocol of Friendship, Commerce and Navigation, 1956, Art. 3 on arrest of nationals, 391.

Netherlands Universities Foundation for International Cooperation. International course on European integration at Amsterdam University. E. H. Finch. *CN*. 555.

Neutral rights and duties. United States in World War I. Smith, G. Britain's Clandestine Submarines, 1914-1915. *BE*. 141.

Neutral Zone, Kuwait-Saudi Arabia. Agreement for partition of. 744; S. M. Hosni, *LA*, 735.

Neutrality. In World Wars I and II. C. G. Fenwick. *LA*. 476, 478.

New states. Admission to membership in United Nations, M. S. McDougal and R. M. Goodman, *LA*, 680, 682, 683, 687; and new international law, E. McWhinney, *LA*, 1, 29.

Nial, Håkan. American-Swedish Private International Law. *BN*. 439.

Nicaragua-United States. Treaty and Protocol of Friendship, Commerce and Navigation, 1956. Art. 3 on arrest of nationals. 392.

Nicholas, The United Nations as a Political Institution. Quoted on U. N. practice regarding admission of new members. 689.

Nicholson, Francis J., S.J. *BN*: Vászrhelyi, 623.

Nigeria. Foreign Enterprise in, Laws and Policies, P. O. Proehl, *BR*, 608; U.K.-U.S. Consular Convention and Protocol, 1951, Art. 16 on arrest of nationals, 392, 394, Nigeria-U.K. exchange of notes, 1960, 392.

Non-intervention:

Before U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964. E. McWhinney, *LA*, 21, 32; Czechoslovak proposal, 21; Ghana-India-Yugoslav proposal, 21; Mexican proposal, 22; United Kingdom proposal, 22; United States proposal, 23; Yugoslav proposal, 21.

U. N. resolutions on principles of international law concerning friendly relations and co-operation among states. E. McWhinney. *CN*, 357; *LA*, 5.

Non-self-governing territories, peoples of. Petitions from. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 659.

Non liquet. Arbitration of investment disputes. Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965. 903.

North Sea Installations Act, The Netherlands, 1964. 340; H. F. van Panhuys and M. J. van Emde Boas, *LA*, 326.

Northwest Atlantic Fisheries Convention, 1949. Protocol relating to Measures of Control, 1965, message of President L. B. Johnson, 829; Protocol relating to Entry into force of Proposals adopted by the Commission, 1965, message of President L. B. Johnson, 829.

Norway. Legislation on pirate broadcasting. 323.

Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874. *JD*. 410.

Nuclear energy:

International law and. M. Šahović. *BR*. 433.

Peaceful uses of. Bilateral agreements, J. Simsarian, *LA*, 503, M. Willrich, *LA*, 37, 50, 54; Euratom arrangements, J. Simsarian, *LA*, 503, M. Willrich, *LA*, 49, 50; International Atomic Energy Agency arrangements, J. Simsarian, *LA*, 502, 509; M. Willrich, *LA*, 34, 41, 52.

See Atomic energy.

Nuclear materials. Safeguards Agreement, IAEA-Thailand-U.S., 1964. 912.

Nuclear warfare. Chinese Communist attitude. 705, 706.

Nuclear weapons. Collective security and, C. G. Fenwick, *LA*, 479; Communist Chinese disarmament proposals, 713; in outer space, U. N. General Assembly resolution, *cited*, 789; increase of, Communist Chinese attitude, 714; prohibition of, C. A. Dunshee de Abranches, *BN*, 146; U. S. aide-memoire to Soviet Government regarding military air accident in Spain, 559; use of, U. N. General Assembly resolution, *cited*, 787.

O'Brien, William V. *BN*: Guerry, 436.

Occupied territory. Jurisdiction over crimes in, *Rose v. McNamara*, 252 F. Supp. 111, *JD*, 866; private property in, *Menzel v. List*, 267 N.Y.S. 2d 804, *JD*, 851.

Oil and petroleum products. Embargo on. U. N. Security Council resolutions on Southern Rhodesia. 924, 925.

Oil concessions. Kuwait-Saudi Arabia Agreement for Partition of Neutral Zone, 1965. 747; S. M. Hosni, *LA*, 743.

O'Konski, Congressman. Letter to President Syngman Rhee of South Korea. Logan Act and. 277.

Opinion, freedom of. Equal right to. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654; statement of U. S. representative in General Assembly, 650.

Oppenheim, L. International Law. Definition of international law, *cited*, 251, quoted, 250; quoted on condominium, 740.

Oppermann, Thomas, and A. Yousry. Das Staatsangehörigkeitsrecht der Arabischen Staaten. *BN*. 149.

Oregon-Pacific Forest Products Corp. v. Welsh Panel Co., 248 F. Supp. 903. *JD*. 594.

Orfield, Lester B., and E. D. Re. International Law. Cases and Materials. *BN*. 884.

Organization of American States:

Admission of new members. Act of Rio de Janeiro, 1965. 447.

British Commonwealth members and. 779.

Charter. Amendments, Act of Rio de Janeiro, 1965, 445; Art. 15 quoted, 810; Art. 17 quoted, 810.

Council. Act of Rio de Janeiro, 1965. 446.

Economic and social development. Act of Rio de Janeiro, 1965. 449, 450.

Inter-American Council of Jurists. Act of Rio de Janeiro, 1965. 447.

Inter-American Economic and Social Council. Act of Rio de Janeiro, 1965. 447.

Inter-American Educational, Scientific and Cultural Council. Act of Rio de Janeiro, 1965. 447.

Inter-American Juridical Committee. Act of Rio de Janeiro, 1965. 447.

Intervention in Dominican Republic. C. G. Fenwick. *Ed*. 65; R. T. Bohan, *CN*, 809.

Ministers of Foreign Affairs. Meetings of Consultation. Act of Rio de Janeiro, 1965, 446; Resolution, 454.

Pan American Union. Act of Rio de Janeiro, 1965. 447.

Political security. Act of Rio de Janeiro, 1965. 449.

Special committee on amendments to Charter. Act of Rio de Janeiro, 1965. 446.

The United States and. Y. Chang. *BN*. 438.

Organization of Central American States (ODECA). New charter. S. Engel. *CN*. 806.

Organizations promoting racial discrimination. Prohibition of. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 653.

Outer space:

Gál, G. Világűrjog. *BR.* 882.

Nuclear weapons in. U. N. General Assembly resolution. *Cited.* 789.

Proposed treaty for exploration of the moon and other celestial bodies. Letter of Ambassador Arthur J. Goldberg to U. N. Committee on Peaceful Uses, 835; statement by President Lyndon B. Johnson, 834.

Padelford, Norman J. *BR.*: Eichelberger, 611; Falk and Barnet, 612.

Pakistan. Admission to U. N. 690; L. H. Laing quoted on, 691.

Pakistan-United States. Treaty and Protocol of Friendship and Commerce, 1959. Art. 3 on arrest of nationals. 392.

Palmas Island arbitration. *Cited.* 325.

Panama. Statement of Foreign Minister regarding relations with ODECA. 808.

Panama Canal. Statement of Panamanian Foreign Minister regarding. 808.

Panama Canal Zone. Sovereignty of Panama over. Statement of President Lyndon B. Johnson, Sept. 24, 1965. 397.

Panama-United States. Treaty of 1903. Abrogation of. Statement of President Lyndon B. Johnson, Sept. 24, 1965. 397.

Pan American Union. Act of Rio de Janeiro, 1965. 447.

Panevezys-Saldutiskis Railway Case (Preliminary Objections), *Estonia v. Lithuania*, P.C.I.J., Series A/B, No. 76. Quoted. 519.

Parry, Clive. British International Law Cases, *BN*, 618; The Sources and Evidences of International Law, *BN*, 617.

Passports. Travel to Cuba. United States *v.* Laub, 253 F. Supp. 433. *JD.* 865.

Patel, Satyavrata R. A Textbook of International Law. *BN.* 144.

Patents, foreign. Eli Lilly and Company *v.* Brenner, 248 F. Supp. 402. *JD.* 590.

Peace, international:

Atoms for. Safeguarding. M. Willrich. *LA.* 34.

League of Nations and maintenance of. C. G. Fenwick. *LA.* 477.

Steps to. K. S. Carlston. *LA.* 732.

Through Diplomacy and Law. R. Regala. *BR.* 609.

Through Law. Washington World Conference, 1965. C. G. Fenwick, *CN*, 68; C. S. Rhyne, *CN*, 861.

Western approach to. E. McWhinney. *LA.* 29, 31.

Peace Information Center, United States *v.*, 97 F. Supp. 255. *Cited*, 295; quoted, 296.

Peaceful change. Communist Chinese attitude. 707.

Peaceful coexistence:

International law as law of. Tê-feng Wu quoted. 245.

U. N. Special Committee on Friendly Relations and Co-operation among States. Mexico City Conference, 1964. E. McWhinney, *LA*, 1, 29; Report before U. N. Sixth Committee, E. McWhinney, *CN*, 358.

Peaceful settlement of international disputes. C. G. Fenwick. *LA.* 475.

Belize dispute, Guatemala-United Kingdom. U. S. mediation of. U. S. statement. 396.

Communist Chinese attitude. 714.

Investment Disputes between States and Nationals of Other States. Convention on Settlement of, 1965. 892.

Kuwait-Saudi Arabia Agreement for Partition of Neutral Zone, 1965. 749; S. M. Hosni, *LA*, 742.

Safeguards Agreement, IAEA-Thailand-U.S., 1964. 918.

Southeast Asia Collective Defense Treaty, 1954. 646.

Strengthening the means for. Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965. 456.

U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 659, 661.

- U. N. resolutions on principles of international law concerning friendly relations and co-operation among states. E. McWhinney. *CN*, 357; *LA*, 5.
- U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964. E. McWhinney, *LA*, 16, 31; Czechoslovak proposal, 16; Ghana-India-Yugoslav proposal, 17; Japanese proposal, 16; United Kingdom proposal, 16.
- Peaceful uses of atomic energy:
- Bilateral agreements. J. Simsarian, *LA*, 503; M. Willrich, *LA*, 37, 50, 54.
- Canada-United Kingdom-United States. Joint Declaration, 1945. Quoted. 36.
- EURATOM arrangements. J. Simsarian, *LA*, 503; M. Willrich, *LA*, 49, 50.
- International Atomic Energy Agency arrangements. J. Simsarian, *LA*, 502, 509; M. Willrich, *LA*, 34, 41, 52.
- International Atomic Energy Agency-Thailand-United States. Agreement for Application of Safeguards, 1964. 912.
- Peacekeeping. Communist Chinese attitude, 714; U. N. expenses of, Statement by U. S. Ambassador Goldberg on financing, 104.
- Pechota, Vratislav. Statement before U. N. Sixth Committee on international law and peaceful coexistence. 358.
- Peking Review. Publication of international law articles, 264; quoted, 703, 705, 708, 709, 710, 711, 712, 713, 714, 715, 716, 727.
- Perez v. Brownell, 356 U. S. 44. *Cited*. 298.
- Person. Inviolability of, I.L.C. draft articles and commentary on special missions, 216, draft rules on high-level missions submitted by special rapporteur, 324, 235, 236; security of, equal rights to, U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 653.
- Persona non grata. I.L.C. draft articles and commentary on special missions, 182, draft rules on high-level missions submitted by special rapporteur, 233, 234, 235.
- Personal services. Exemption from. I.L.C. draft articles and commentary on special missions. 219, 220.
- Petroff, In re Estate of, 267 N.Y.S. 2d 8. *JD*. 596.
- Petrol Shipping Corporation, 360 F. 2d 103. *JD*. 859.
- Philippines. Proposal at San Francisco Conference, 1945, on legislative competence of U. N. General Assembly. 783.
- Philippines-United States. Consular Convention, 1947. Art. 7 on arrest of nationals. 392.
- Pickering case, Great Britain-United States, 1808. Logan Act and. 272.
- Pillage by belligerent occupant. Menzel v. List, 267 N.Y.S. 2d 804. *JD*. 851.
- Pink, United States v., 315 U. S. 203. *Cited*. 269.
- Pious Fund Arbitration, Mexico-United States. A. Gomez Robledo. *BN*. 622.
- Pirate broadcasting. Legal aspects of. H. F. van Panhuys and M. J. van Emde Boas. *LA*. 303.
- Plugmay Limited v. National Dynamics Corporation, 266 N. Y. S. 2d 240. *JD*. 595.
- Political coercion. U. N. Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 1965. 663.
- Political rights. Equality of. U. N. Convention on Elimination of All forms of Racial Discrimination, 1965. 653.
- Popes, The, and World Government. Archbishop Emile Guerry. *BN*. 436.
- Population, expulsion of, and legal identity of municipalities. Decision of Sup. State Court of Bavaria regarding City of Eger, 1965. *JD*. 597.
- Potsdam Agreement, 1945. Faust, F. Das Potsdamer Abkommen und seine Völkerrechtliche Bedeutung. *BN*. 440.
- Potter, Pitman B. *BE*: Friedmann, 130.
- Precedence, rules of. I.L.C. draft articles and commentary on special missions, 192, 196; draft rules on high-level missions submitted by special rapporteur, 233.
- Prince, In re Estate of, 267 N.Y.S. 2d 138. *JD*. 595.

Prisoners of war. Resolution of 20th International Red Cross Conference on application of Geneva Convention, 1949, to armed conflict, 94; Viet-Nam Armistice Agreement, 1954, 637.

Private international air law:

Jurisdiction over torts in airspace over high seas. *Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874. *JD*, 410.

Warsaw Convention: U. S. denunciation, 395, withdrawal of, 826; U. S. reservation to, *Warren et al. v. Flying Tiger Line, Inc.*, 352 F. 2d 494, *JD*, 593, *cited*, 396.

See also Air transportation, international, *and* Warsaw Convention.

Private international law:

American-Swedish. H. Nial. *BN*, 439.

American-Venezuelan. R. S. Lombard. *BN*, 887.

Companies in. Institute of International Law resolution, 1965. 523; H. W. Briggs, *CN*, 519.

Corporations, foreign. Jurisdiction over. *Bryant v. Finnish National Airline*, 260 N.Y.S. 2d 625, *JD*, 126; *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F. Supp. 70, *JD*, 405; *Turner v. Jack Tar Grand Bahamas Ltd.*, 353 F. 2d 954, *JD*, 596.

Damages, measure of. *Ciprari v. Servicos Aereos Cruzeiro do Sul, S. A.*, 245 F. Supp. 819, *JD*, 409; *Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense*, 350 F. 2d 468, *JD*, 408.

Distribution of estates. In re Harris' Will, 263 N.Y.S. 2d 393. *Cited*, 411.

Divorce. Recognition of foreign decrees. *Rosenstiel v. Rosenstiel*, 254 N.Y.S. 2d 527. *Cited*, 129.

Guardianship decrees, foreign. Recognition and enforcement of. Republic of Iraq v. First National Bank of Chicago, 350 F. 2d 645. *JD*, 407.

Hague Conference. Convention on Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, 1964, 464; Draft Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1966, K. H. Nadelmann and A. T. von Mehren, *CN*, 803; Statute, 1951, 461.

Intestate succession. In re Utassi's Will, 261 N. Y. S. 2d 4. *JD*, 127.

Renvoi in. Institute of International Law resolution, 1965. 518; H. W. Briggs, *CN*, 518.

Private property. Abandonment of, *Menzel v. List*, 267 N.Y.S. 2d 804, *JD*, 851; equal right to ownership, U. N. Convention on Elimination of All forms of Racial Discrimination, 1965, 654; seizure and confiscation by belligerent occupant, *Menzel v. List*, 267 N.Y.S. 2d 804, *JD*, 851; taking without due process, application of Hickenlooper amendment, *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, *JD*, 107.

Proehl, Paul O. Foreign Enterprise in Nigeria. Laws and Policies. *BE*, 608.

Professional equipment. Convention on temporary importation free of duty, Brussels, 1961. Report of Secretary of State. 827.

Propaganda promoting racial discrimination. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 653.

Property rights. U. S. treaty provisions concerning. 94.

See also Private property.

Public accommodations. Equal access to. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.

Racial discrimination:

Committee on Elimination of. U. N. Convention, 1965. 655.

Incitement prohibited. U. N. Convention, 1965. 653.

U. N. Convention on Elimination of all Forms of, 1965. 650.

U. N. Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 1965. 664.

U. N. resolutions on Southern Rhodesia. 922, 924.

- Racial groups, special measures for development and protection of. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 652, 653.
- Radio broadcasting. International regulation of, 305; pirate, legal aspects of, H. F. van Panhuys and M. J. van Emde Boas, *LA*, 303.
- Radio Conference, Geneva, 1959. Radio Regulations. Cited on harmful interference, 305; quoted on broadcasting stations outside territorial waters, 307, 311, 312.
- Radoinov, P., and E. Kamenov. *Mezhdunarodnopraven Rezhim na Dunava*. *BN*. 441.
- Re, Edward D., and L. B. Orfield. *International Law. Cases and Materials*. *BN*. 884.
- Reciprocity. Extraterritorial service of process. *Plugmay Ltd. v. National Dynamics Corp.*, 266 N.Y.S. 2d 240. *JD*. 595.
- Reclame Exploitatie Maatschappij (R.E.M.). Radio and TV broadcasting installation off Dutch coast. Netherlands legal position. H. F. van Panhuys. and M. J. van Emde Boas. *LA*. 303, 311, 320, 326, 330, 332, 335, 336, 339.
- Recognition of states and governments:
- De facto governments. Informal procedure on. Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965. 398, 460.
 - Diplomatic measures affecting. Before U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. 21, 24; Czechoslovak proposal, 21; Mexican proposal, 22.
 - U. N. resolutions on independence of Southern Rhodesia. 921, 922, 924.
 - U. N. Secretariat Memorandum on Legal Aspects of Problems of Representation in the United Nations. Quoted. 678.
 - U. S. recognition of Singapore. U. S. note, Aug. 11, 1965. 96.
- Red Cross, International Committee of. Letter of President to U. S. Secretary of State on application of Geneva Conventions to Viet-Nam hostilities, 1965. 92.
- Red Cross, International Conference, 1965. Resolution on application of Geneva Prisoners of War Convention, 1949, to armed conflict. 94.
- Red Cross Conventions. Lasala Samper, F. M. de. *La Proteccion a los Heridos, Enfermos y Naufragos de las Fuerzas Armadas en Campaña*. *BN*. 437.
- See Geneva Conventions for Protection of Victims of War, 1949.*
- Regala, Roberto. *World Peace through Diplomacy and Law*. *BE*. 6C9.
- Regan, In re Petition for Naturalization of, 244 F. Supp. 664. *JD*. 405.
- Religion, freedom of. Equal right to. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.
- Renvoi in private international law. Resolution of Institute of International Law, 1965. 518; H. W. Briggs, *CN*, 518.
- Reprisals. U. S. action in Gulf of Tonkin, Q. Wright, *LA*, 755, 764, 767; U. S. bombing of North Viet-Nam, Q. Wright, *LA*, 764, 766, 767.
- Reprisals against individuals. Viet-Nam Armistice Agreement, 1954. 633; Declaration of Geneva Conference on Restoring Peace in Indo-China, 1954, 644.
- Reservations to multilateral treaties. Submission to U. S. Senate. Statement by Department of State. 563.
- See Treaties, reservations to.*
- Residence, freedom of. Equal rights to. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 654.
- Responsibility. Membership in U. N. and. M. S. McDougal and R. M. Goodman. *LA*. 682, 727.
- Restitution in International Law. I. Vásárhelyi. *BN*. 623.
- Retaliation in international law. Decision of Sup. State Court of Bavaria regarding City of Eger, 1965, *JD*, 597; *Sardino v. Federal Reserve Bank of New York and the U. S. Secretary of the Treasury*, Ct. App., 2nd Cir., 1966, *JD*, 862.
- Rhode Island University. Law of the Sea Institute. First annual summer conference. E. H. Finch. *CN*. 820.

- Rhyne, Charles S. Washington World Conference on World Peace through Law. *CN*. 361.
- Rice, William G. Proposed resolution on U. S. military force in Viet-Nam. 549.
- Riesenfeld, Stefan A. Jus dispositivum and jus cogens in international law: in the light of a recent decision of the German Supreme Constitutional Court. *Ed*. 511.
- Rio de Janeiro, Act of, 1965. Amendments of Charter of Bogotá, 445; Economic and Social Act, 447.
- See Inter-American Conference, 2nd Special.
- Rio Treaty of Reciprocal Assistance, 1947. Military intervention in Dominican Republic and. C. G. Fenwick. *Ed*. 64.
- Rivers, international. Use of. Convocation of Specialized Conference on. Resolution of 2nd Special Inter-American Conference, Rio de Janeiro, 1965, 456; M. Wolfrom, *BE*, 424.
- Road Traffic Convention, 1949. Application in the United States. Statement of Department of State, Aug. 31, 1965, 96; list of countries where in force, 99.
- Rode, Zvonko R. *BR*: Šahović, 433.
- Rogers, William P. Statement in U. N. Sixth Committee regarding use of force across boundaries. *Cited*, 358; quoted, 359.
- Romashkin, S. Quoted on Soviet law. 247.
- Ronning, C. Neale. Diplomatic Asylum. Legal Norms and Political Reality in Latin American Relations. *BR*. 876.
- Roosevelt-Litvinov Agreements. The American View. D. G. Bishop. *BR*. 419.
- Rose v. McNamara, 252 F. Supp. 111. *JD*. 866.
- Rosenau, James N. International Aspects of Civil Strife. *BN*. 147.
- Rosenstiel, Francis. Le Principe de "Supranationalité." *BN*. 146.
- Rosenstiel v. Rosenstiel, 254 N.Y.S. 2d 527. *Cited*. 129.
- Ross, Alf. The United Nations: Peace and Progress. *BR*. 873.
- Rousseau, Charles. Cited on jus dispositivum. 56.
- Royalties. Imposition upon concessionaires. Kuwait-Saudi Arabia Agreement for Partition of Neutral Zone, 1965. 747.
- Rubin, Alfred P. Tibet's declarations of independence? *CN*, 812; quoted on Tibetan declaration of 1912, 370; *BR*: Van Eekelen, 431.
- Rusk, Dean, Secretary of State. Statement regarding use of tear gas in Viet-Nam hostilities, 1965. 102.
- Ryukyu Islands. Jurisdiction of courts over U. S. citizens. *Rose v. McNamara*, 252 F. Supp. 111. *JD*. 866.
- S. A. Empresa de Viacao Aerea Rio Grandense, *Tramontana v.*, 350 F. 2d 468. *JD*. 408.
- Sabbatino, Banco Nacional de Cuba v., 376 U. S. 398. Cited on validity of international law rules, 785; application of Congressional legislation to, Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, *JD*, 107.
- Sabbatino amendment to U. S. Foreign Assistance Act. American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary and Djakarta Lloyd Lines, U. S. Dist. Ct., N. J., 1966, *JD*, 858; Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, *JD*, 107.
- Sackville case, U. S.-Great Britain. Logan Act and. 273.
- Safeguards for peaceful uses of atomic energy:
- Bilateral agreements. J. Simsarian, *LA*, 503; M. Willrich, *LA*, 50.
 - EURATOM arrangements. J. Simsarian, *LA*, 503; M. Willrich, *LA*, 49, 50.
 - International Atomic Energy Agency arrangements. J. Simsarian, *LA*, 502, 509; M. Willrich, *LA*, 34, 41; termination of, 48.
 - International Atomic Energy Agency-Thailand-United States. Agreement, 1964. 912.
- Safeguards Document, IAEA. M. Willrich. *LA*. 40.
- Šahović, Milan. Nuklearna Energija i Medjunarodno Pravo. *BR*. 433.

- Salvage claims. *Nicholas E. Vernicos Shipping Company v. United States*, 349 F. 2d 465. *JD.* 403.
- Sanctions. Non-compliance with safeguards provisions of IAEA. 39.
- Sandifer, Durward V., and R. L. Scheman. *The Foundations of Freedom*. *BN.* 888.
- Sapphire International Petroleum Ltd. v. National Iranian Oil Co., Arbitration, 1963. *Cited.* 500.
- Sardino v. Federal Reserve Bank of New York and the U. S. Secretary of the Treasury, Ct. App., 2nd Cir., 1966. *JD.* 862.
- Saudi Arabia, Kingdom of. Immunity from suit, letter of Department of State, Sept. 15, 1965, 100; rights in Neutral Zone with Kuwait, S. M. Hosni, *LA*, 741.
- Saudi Arabia, Kingdom of, v. Arabian American Oil Co., Arbitration, 1958. *Cited.* 501.
- Saudi Arabia, Kingdom of, Thomas W. Kendall et al. v., U. S. Dist. Ct., S.D. N. Y., 1965. *Cited.* 100.
- Scandinavia. Legislation on pirate broadcasting. 323.
- Scheer, Robert. How the United States Got Involved in Vietnam. Quoted. 756.
- Scheidt v. Federal Republic of Germany, Arb. Comm. on Property, Rights and Interests in Germany, 1965. *JD.* 129.
- Scheman, L. Ronald, and D. V. Sandifer. *The Foundations of Freedom*. *BN.* 888.
- Schneider v. Rusk, 377 U. S. 163. *Cited.* 298.
- Schoch, M. Magdalena. *BN: Oppermann and Yousry*, 149.
- Scholten, Y., Dutch Minister of Justice. Quoted on sovereignty over continental shelf. 330.
- Schücking, Judge Walter. Dissenting opinion in Chinn case, P.C.I.J. *Cited.* 59.
- Schwarzenberger, Georg. Cited on *jus cogens* in international law, 55, 60, 61, 62; definition of international law, 250.
- Schwebel, Stephen M., and J. G. Wetter. Arbitration and exhaustion of local remedies. *LA.* 484.
- Schwelb, Egon. The 1963/1965 amendments to the Charter of the United Nations, *CN*, 371; *BN: Vasak*, 145; *BR: Yearbook*, European Convention on Human Rights, 1963, 613.
- Scott, Anthony, and F. T. Christy, Jr. *The Common Wealth in Ocean Fisheries*. *BR.* 605.
- Scott, James Brown. Prizes in memory of his mother and sister Jeannette Scott. E. H. Finch. *CN.* 816.
- Sea, exploration of. Convention for International Council for. Message of President Lyndon B. Johnson. 836.
- Sea bed, resources of. Exploitation. Kuwait-Saudi Arabia Agreement for Partition of Neutral Zone, 1965. 746; S. M. Hosni, *LA*, 743.
- Sea, law of. Institute. First annual summer conference. E. H. Finch. *CN.* 820.
- Seamen, foreign. Deserters. U. S. immigration laws. *United States ex rel. Martinez-Angosto v. Mason*, 344 F. 2d 673. *JD.* 125.
- Security, international. *See* International security.
- Segregation, racial. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965. 653.
- Self-defense:
- Before U. N. Special Conference on Friendly Relations among States, 1964. 11; Czechoslovak proposal, 8; United Kingdom proposal, 8; Yugoslav proposal, 9.
- Collective. Legal aspects of Viet-Nam situation, Q. Wright, *LA*, 750, 755, 764, 769; Southeast Asia Collective Defense Treaty, 1954, 646, Protocol, 649, U. S. Understanding, 649, Q. Wright, *LA*, 769; U. S. military action in Dominican Republic, C. G. Fenwick, *Ed*, 64, R. T. Bohan, *CN*, 809.
- Self-determination:
- Declaration of Geneva Conference on Restoring Peace in Indo-China, 1954. 643, 644.
- Southeast Asia Collective Defense Treaty, 1954. 646.

- U. N. Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 1965. 662.
- U. N. resolutions: principles of international law concerning friendly relations and co-operation among states, E. McWhinney, *CN*, 357, 360, *LA*, 6; on Southern Rhodesia, 921, 922, 924.
- U. N. Special Committee on Friendly Relations and Co-operation among States. Mexico City Conference, 1964. E. McWhinney, *LA*, 12; Czechoslovak proposal, 8; Ghana-India-Yugoslav proposal, 9; Yugoslav proposal, 9; Report before U. N. Sixth Committee, E. McWhinney, *CN*, 360.
- U. S. Declaration on Indochina, 1954. 645, 646.
- Service of process. On agency of foreign government. Petrol Shipping Corporation, 360 F. 2d 103. *JD*. 859.
- Service of process abroad. Hague Convention on Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, 1964, 464; Hoffman Motors Corp. v. Alfa Romeo S.p.A., 244 F. Supp. 70, *JD*, 405; Plugmay Ltd. v. National Dynamics Corp., 266 N.Y.S. 2d 240, *JD*, 595.
- Shefsick's Estate, In re, 270 N.Y.S. 2d 34. *JD*. 866.
- Shen Chiin-ju. Quoted on rôle of law. 247.
- Shih, et al. Quoted on rôle of international law. 248.
- Shimoda and others v. Japan. Cited on binding rules of international law. 783.
- Ships. Broadcasting stations on, legal aspects of pirate broadcasting, H. F. van Panhuys and M. J. van Emde Boas, *LA*, 303, 310, 318; nationality, 303.
- Sick, wounded and shipwrecked of armed forces in the field. Red Cross conventions. F. M. de Lasala Samper. *BN*. 437.
- Sierra Leone. U.K.-U.S. Consular Convention and Protocol, 1951. Art. 16 on arrest of nationals, 393, 394; Sierra Leone-U. K. exchange of notes, 1961, 393.
- Simla Conference, 1913. Tibetan statement at. Quoted. 371.
- Simsarian, James. Inspection experience under the Antarctic Treaty and the International Atomic Energy Agency. *LA*. 502.
- Singapore. U.K.-U.S. Consular Convention and Protocol, 1951, Art. 16 on arrest of nationals, 393, 394; Constitution and Malaysia (Singapore Amendment) Act, 1965, Art. 13, 393; Malaysia-U.S. exchange of notes, 1964, 393; U. S. recognition, note of Aug. 11, 1965, 96.
- Sipkov, Ivan. *BN*: Kamenov and Radoinov, 441.
- Skiriotes v. Florida, 313 U. S. 69. Cited on Logan Act. 292.
- Skubiszewski, Krzysztof. Uchwały Prawotwórcze Organizacji Międzynarodowych. *BN*. 620.
- Small Soviet Encyclopedia. Quoted on rôle of law. 247.
- Smith, Gaddis. Britain's Clandestine Submarines, 1914-1915. *BR*. 141.
- Social security. Equal right to, U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 654; exemption from laws, I.L.C. draft articles and commentary on special missions, 218.
- Société Anonyme Belge d'Exploitation de la Navigation Aérienne, Kelley v., 242 F. Supp. 129. *JD*. 124.
- Société Commerciale de Belgique, P.C.I.J., Ser. A/B, No. 78. *Cited*. 496.
- Société Européenne d'Études et d'Entreprises v. Government of Yugoslavia (1956), [1957] I.L.R. 761. *Cited*. 487.
- Sohn, Louis B. *BN*: Aufricht, 435; *BR*: Regala, 609.
- Sohn, Louis B., and R. R. Baxter. Convention on International Responsibility of States for Injuries to Aliens. Explanatory notes. Quoted. 497, 499, 500.
- South Africa, Union of. Apartheid policy. U. N. General Assembly resolutions cited. 790.
- South Arabia, Federation of. Aden and. J. Y. Brinton. *BR*. 427.
- South West Africa Cases. [1962] I.C.J. Rep. 319, quoted on definition of international dispute, 286, 287; [1966] I.C.J. Rep. 6, *cited*, 790.

- Southeast Asia Collective Defense Treaty, 1954. 646; Protocol, 649; Q. Wright, *LA*, 769; U. S. Congressional resolution on military assistance under, 738, Q. Wright, *LA*, 755, 768; U. S. Understanding concerning, 649, Q. Wright, *LA*, 769.
- Southern Rhodesia. Independence of. United Nations resolutions: General Assembly, 921; Security Council, 924.
- Sovereign immunity. American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary and Djakarta Lloyd Lines, U.S. Dist. Ct., N. J., 1966, *JD*, 858; Chemical Natural Resources, Inc. v. Republic of Venezuela, 215 At. 2d 864, *JD*, 838; Kashini v. United Arab Republic, Sup. Ct. India, 1965, *JD*, 861; Lutchter S. A. Celulose e Papel v. Inter-American Development Bank, U. S. Dist. Ct., Dist. of Columbia, 1966, *JD*, 586; Petrol Shipping Corporation, 360 F. 2d 103, *JD*, 859; Kingdom of Saudi Arabia, letter of Department of State, Sept. 15, 1965, 100, King Faisal, letter of Department of State to U. S. Attorney General, Sept. 14, 1965, 101.
- Attachment of funds. King and Kingdom of Saudi Arabia. Letters of Department of State, Sept. 14 and 15, 1965. 100, 101.
- Waiver of. Nicholas E. Vernicos Shipping Company v. United States, 349 F. 2d 465, *JD*, 403; Wacker v. Bisson, 348 F. 2d 602, *JD*, 400.
- Sovereignty. Rosenstiel, F., La Principe de "Supranationalité," *BN*, 146; international law and, U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964, E. McWhinney, *LA*, 25, 28, 32; U. N. Declaration on Inadmissibility of Intervention in Domestic Affairs of States and the Protection of Their Independence, 1965, 662.
- Soviet-Western relations. U. N. Special Conference on Friendly Relations and Co-operation, Mexico City, 1964. E. McWhinney. *LA*. 1, 29.
- Soviet Year-Book of International Law, 1962, 1963. *BR*. 868.
- Space law. Gál, G. Világűrjog. *BR*. 882.
- See Outer space.
- Spain. U. S. military air accident in. U. S. Aide Memoire to Soviet Government. 559.
- Spain-United States. Logan Act incidents, 1802, 271, 287; Treaty of General Relations and Friendship, 1903, United States ex rel. Martinez-Angosto v. Mason, 344 F. 2d 673, *JD*, 125.
- Special missions:
- Administrative and technical staff. Privileges and immunities. I.L.C. draft articles and commentary. 221.
 - Archives. Inviolability of. I.L.C. draft articles and commentary. 212.
 - Commencement of functions. I.L.C. draft articles and commentary, 199; draft rules on high-level missions submitted by special rapporteur, 233, 234, 235, 236.
 - Correspondence. Inviolability of. I.L.C. draft articles and commentary. 214.
 - High-level. Draft rules submitted by special rapporteur, I.L.C. 233; I.L.C. report, 232.
 - I.L.C. draft articles and commentary, 176; report, 173.
 - Members of: Appointment, I.L.C. draft articles and commentary, 130; exemption from social security laws, I.L.C. draft articles and commentary, 218, 219, from taxation, I.L.C. draft articles and commentary, 215, 219; immunity from criminal and civil jurisdiction: I.L.C. draft articles and commentary, 217, 221, 222, 223, 224, 225, draft rules on high-level missions submitted by special rapporteur, 234, 235, 236, waiver of, I.L.C. draft articles and commentary, 218; inviolability of person, I.L.C. draft articles and commentary, 216; nationality, I.L.C. draft articles and commentary, 204.
 - Premises. Inviolability of. I.L.C. draft articles and commentary, 211; draft rules on high-level missions submitted by special rapporteur, 234, 235, 236.
 - Seat of. I.L.C. draft articles and commentary. 203.
 - Tasks of. I.L.C. draft article and commentary, 179; draft rules on high-level missions submitted by special rapporteur, 233, 234, 235.
 - Termination of functions. I.L.C. draft articles and commentary, 202, 231; draft rules on high-level missions submitted by special rapporteur, 233, 234, 235, 236.

- Specialized international agencies. H. T. Adam, *Les Organismes Internationaux Spécialisés*. *BE*. 606.
- Speech, freedom of. Equal right to, U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 654, statement of U. S. representative in General Assembly, 650; Logan Act and, D. F. Vagts, *LA*, 293.
- Spellman, Cardinal. Quoted on Geneva agreements on Indo-China. 756.
- Spencer, John H. *BE*: Currie, 140; Franck, 140; Proehl, 608.
- Spender, Judge Sir Percy. Opinion in Interhandel case. Quoted on definition of international dispute. 287.
- Stanford University. East-West Trade Conference. J. I. Laun. *CN*. 817.
- Stanger, Roland J. Essays on Intervention. *BN*. 148.
- Starke, J. G. Quoted on rôle of international law. 249.
- Stassen, Harold. Letter to Stalin. Quoted, 277; Logan Act and, Secretary of State Acheson quoted, 277.
- State. Law, and International Legal Order. S. Engel and R. A. Métall. *BE*. 132.
See also States.
- State-owned vessels. Immunity of. Brussels Convention, 1926. Nicholas E. Vernicos Shipping Co. v. United States, 349 F. 2d 465. *JD*. 403.
- State responsibility. Injuries to aliens. Arbitration clauses in contracts and exhaustion of local remedies, S. M. Schwebel and J. G. Wetter, *LA*, 484; seizure of enemy property, Restitution in International Law, I. Vásárhelyi, *BN*, 623.
- States:
- Continuity of. Chinese participation in the United Nations. M. S. McDougal and R. M. Goodman. *LA*. 698, 718.
 - Foreign. Suits against: Nicholas E. Vernicos Shipping Co. v. United States, 349 F. 2d 465, *JD*, 403; Wacker v. Bisson, 348 F. 2d 602, *JD*, 400; suits by, Republic of Iraq v. First National Bank of Chicago, 350 F. 2d 645, *JD*, 407.
 - Immunity from jurisdiction. *See* Sovereign immunity
 - Investment disputes with nationals of other states. Convention on Settlement of, 1965. 892.
- Stein, Eric. *BE*: Bandilla, 878.
- Stevenson, John R. Judicial decisions involving international law. 107, 400, 586, 838.
- Stone, Victor J. *BN*: Feld, 434.
- Student international law journals. E. H. Finch. *CN*. 87.
- Submarines, belligerent. Britain's Clandestine Submarines, 1914-1915. G. Smith. *BR*. 141.
- Submerged lands, jurisdiction of. United States v. California, 382 U. S. 448. *JD*. 588.
- Subversive activities. U. N. Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 1965. 663.
- Succession of states. Chinese participation in the United Nations, M. S. McDougal and R. M. Goodman, *LA*, 671, 680, 683, 699; property rights of municipalities, Decision of Sup. State Ct. of Bavaria regarding City of Eger, 1965, *JD*, 597.
- Sudeten Germans. Effect of expulsion from Eger, Czechoslovakia. Decision of Sup. State Ct. of Bavaria, 1965. *JD*. 597.
- Sumberg, Theodore A. *BN*: Aufrecht, 625.
- Sung Chen-Wu, and Wang Min-yao, Public Prosecutor v., Taipei Dist. Ct., 1965. *JD*. 411.
- Supranationality. Rosenstiel, F. Le Principe de "Supranationalité." *BN*. 146.
- Suslov, Mikhail. Quoted on Chinese Communist attitude toward war and nuclear warfare. 705, 706.
- Suy, Eric. Les Actes Juridiques Unilatéraux en Droit International Public. *BE*. 426.
- Swift, Richard N. *BE*: Wright, 432.
- Switzerland. Law of intestate succession. In re Utassi's Will, 261 N.Y.S. 2d 4. *JD*. 127.

Syracuse University College of Law. Procedural Aspects of International Law Institute. E. H. Finch. *CN*. 816.

Syria. Participation in United Nations. 691, 723.

Szilard, Leo. Letter to Stalin and Logan Act. 276, 285; Department of Justice letter quoted, 276; Department of State letter quoted, 276.

Tammes, A. J. P. Cited on new uses of high seas. 315.

Tanzania. U.K.-U.S. Consular Convention and Protocol, 1951. Art. 16 on arrest of nationals. 393, 394.

Taubenfeld, Howard J. *BN*: Johnson, 886.

Taxation:

Double. Germany-U. S. Protocol modifying 1954 Income Tax Convention, Department of State Statement, 102; Kuwait-Saudi Arabia Agreement for Partition of Neutral Zone, 1965, 747, S. M. Hosni, *LA*, 744; U. K.-U. S. Income Tax Convention, 1945, Supplementary protocol amending, 1966, message of President L. B. Johnson, 837.

Exemption from. International Center for Settlement of Investment Disputes, Convention, 1965, 898; I.L.C. draft articles and commentary on special missions, 215, 219.

Netherlands-U. S. Convention modifying 1948 Income Tax Convention. Message of President L. B. Johnson. 562.

Tear gas. Use in Viet-Nam hostilities. Statement by Secretary of State, 1965. 102.

Technical assistance. In the new international law. J. N. Hazard. *Ed*. 342.

See Developing countries.

Television broadcasting, pirate. Legal aspects of. H. F. van Panhuys and M. J. van Emde Boas. *LA*. 303.

Territorial disputes. Use of force in. Before U. N. Special Conference on Friendly Relations among States, Mexico City, 1964. 10, 14; Czechoslovak proposal, 7; Ghana-India-Yugoslav proposal, 9; Yugoslav proposal, 9.

Territorial waters:

Delimitation of: Góralezyk, W. Szerokość Morza Terytorialnego i Jego Delimitacja. *BN*, 440; Hawaii, Island Airlines Inc. v. Civil Aeronautics Board, 352 F. 2d 735, *cited*, 593.

Jurisdiction over. Kuwait-Saudi Arabia Agreement for Partition of Neutral Zone, 1965. 746; S. M. Hosni, *LA*, 742.

Territory. Transfer as a result of war. Decision of Sup. State Court of Bavaria concerning City of Eger, 1965. *JD*. 597.

Third states. Activities of special missions in, I.L.C. draft articles and commentary, 207; cession of rights to, Kuwait-Saudi Arabia Agreement for Partition of Neutral Zone, 1965, 746, S. M. Hosni, *LA*, 742; transit through, I.L.C. draft articles and commentary on special missions, 227.

Thornhill v. Alabama, 310 U. S. 88. *Cited*. 294.

Tibet. Declarations of independence. D. A. McCabe, *CN*, 369; A. P. Rubin, *CN*, 812.

Tidelands. Jurisdiction of. United States v. California, 382 U. S. 448. *JD*. 588.

Togo, Republic of, -United States. Treaty of Amity and Economic Relations, 1966. Report of Secretary of State. 824.

Tousscoz, Jean. Le Principe d'Effectivité dans l'Ordre International. *BN*. 888.

Trade, international. East-West Trade Conference, Stanford University, J. I. Laun, *CN*, 817; Economic and Social Act of Rio de Janeiro, 1965, 452; regulation of, Summary Report, ASIL Board of Review and Development, *CN*, 527.

Trade preferences. British Commonwealth. 780.

Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense, 350 F. 2d 468. *JD*. 408.

Trans World Airlines, Inc., Notarian v., 244 F. Supp. 874. *JD*. 410.

Treaties:

- Acceptance and approval. I.L.C. draft articles, 1965, 164, 167, 168; report, 162.
- Application of: *Eli Lilly and Company v. Brenner*, 248 F. Supp. 402, *JD*, 590; *Oregon-Pacific Forest Products Corp. v. Welsh Panel Co.*, 248 F. Supp. 903, *JD*, 594.
- Authentication of texts. I.L.C. draft articles, 1965. 166.
- Conflicting with peremptory norm of international law. S. A. Riesenfeld, *Ed*, 511; A. Verdross, *LA*, 55; Decision of German Fed. Sup. Constitutional Court, 1965, quoted, 513.
- Congressional legislation and. In re Petition for Naturalization of Regan, 244 F. Supp. 664. *JD*. 405.
- Definition. I.L.C. draft articles, 164; report, 160.
- Depositaries. Functions of. I.L.C. draft articles, 1965, 172; report, 158.
- Effect of Independence on. International Law Association. *BR*. 880.
- Entry into force. I.L.C. draft articles, 1965. 170.
- Errors in. Correction of. I.L.C. draft articles, 1965. 171.
- Interpretation of. R. Bernhardt, *BR*, 137; V. D. Degan, *BR*, 135; Convention on Settlement of Matters Arising out of the War and the Occupation of Germany, 1954, Scheidt v. Federal Republic of Germany, Arb. Comm. on Property, Rights and Interests in Germany, 1965, *JD*, 129; In re Estate of Prince, 267 N.Y.S. 2d 138, *JD*, 595; Italy-United States Air Transport Agreement, 1948, Arbitration, 1965, *JD*, 413; United States ex rel. Martinez-Angosto v. Mason, 344 F. 2d 673, *JD*, 125; Warsaw Convention on International Air Transportation: *Eck v. United Arab Airlines*, SAA, 241 F. Supp. 804, *JD*, 125; *Kelley v. Société Anonyme Belge d'Exploitation de la Navigation Aérienne*, 242 F. Supp. 129, *JD*, 124.
- Jus dispositivum and jus cogens in international law. S. A. Riesenfeld, *Ed*, 511; A. Verdross, *LA*, 55; Decision of German Supreme Constitutional Court quoted, 513.
- Law of. Form of codification, I.L.C. report, 1965, 159, 161; I.L.C. draft articles, 1965, 164; report, 157.
- Multilateral. Creation of binding international rules by, A. Verdross, *LA*, 61; Index to, V. Mostecky, *BN*, 620; participation in, I.L.C. report, 1965, 163; reservations to: I.L.C. draft articles, 1965, 168, report, 163; submission to U. S. Senate, statement by Department of State, 563.
- Observance of. Bynkershoek quoted, 63; U. N. resolutions on principles of international law concerning friendly relations and co-operation among states, E. McWhinney, *CN*, 357, 361, *LA*, 6; U. N. Special Committee on Friendly Relations, Report before U. N. Sixth Committee, E. McWhinney, *CN*, 361.
- Parties to. I.L.C. draft articles, 1965, 164; report, 160.
- Publication and registration. I.L.C. draft articles, 1965. 171.
- Ratification of. I.L.C. draft articles, 164, 167, 168, report, 162; *Kelley v. Société Anonyme Belge d'Exploitation de la Navigation Aérienne*, 242 F. Supp. 129, *JD*, 124.
- Reservations. I.L.C. draft articles, 1965, 164, 168, report, 158, 163; legal effects, I.L.C. draft articles, 1965, 170; withdrawal of, I.L.C. draft articles, 1965, 170.
- Signature. I.L.C. draft articles, 1965, 167; report, 162.
- Sources of international law. Chinese Communist view, 257; Chao Yüeh quoted, 258; Chou Keng-sheng cited, 258; Wei Liang quoted, 258; Soviet doctrine, 258.
- Treaty-making power. A. Verdross, *LA*, 55; I.L.C. draft articles, 1965, 165, report, 160; new technique for federal states? G. F. FitzGerald, *CN*, 529.
- Trinidad and Tobago. U.K.-U.S. Consular Convention and Protocol, 1951. Art. 16 on arrest of nationals. 393, 394.
- Triska, Jan F. *BN*: Mysli, 150.
- Triska, Jan F., and R. M. Slusser. Cited on Soviet view of international law. 251.

- Trung Gia Military Commission. Viet-Nam Armistice Agreement, 1954. 630, 631, 632, 633.
- Trust territories, peoples of. Petitions from. U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 659; U. N. double standard on human rights complaints, J. Carey, *CN*, 792.
- Tunkin, G. I. Quoted on proletarian internationalism, 256; on universality of international law, 254.
- Turner v. Jack Tar Grand Bahamas Ltd., 353 F. 2d 954. *JD*. 596.
- Uganda. U.K.-U.S. Consular Convention and Protocol, 1951. Art. 16 on arrest of nationals. 394.
- Unequal rights for racial groups, maintenance of. U. N. Convention on Elimination of Racial Discrimination, 1965. 652, 653.
- Unilateral acts. Suy, E. Les Actes Juridiques Unilatéraux en Droit International Public. *BE*. 426.
- Union of Soviet Socialist Republics. Concept of international law, Wu Tê-feng quoted on, 245; missiles in Cuba, Gelberg, L., Kryzys Karaibski 1962 Roku, *BN*, 149; statement concerning Nationalist China ratification of amendments to U. N. Charter, 371, statement by Nationalist China, 372.
- Union of Soviet Socialist Republics-United States. Cuban crisis, Gelberg, L., Kryzys Karaibski 1962 Roku, *BN*, 149; Roosevelt-Litvinov Agreements, The American View, D. G. Bishop, *BE*, 419; U. S. Aide-Memoire regarding military air accident in Spain, 559.
- United Arab Airlines, *SAA*, Eck v., 241 F. Supp. 804. *JD*. 125.
- United Arab Republic, Kashini v., Sup. Ct. India, 1965. *JD*. 861.
- United Fruit Co., American Banana Co. v., 213 U. S. 347. Cited on Logan Act. 292.
- United Kingdom. Proposals at U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964. 8, 16, 22.
- United Kingdom-United States. Consular Convention and Protocol, 1951, Art. 16 on arrest of nationals, 394; Convention for Avoidance of Double Taxation on Income, 1945, Supplementary protocol amending, 1966, message of President L. B. Johnson, 837.
- United Nations:
- Advisory Committee on Technical Assistance to Promote the Teaching, Study, Dissemination and Wider Appreciation of International Law. U. N. Resolution, 1965, 666; J. N. Hazard, *Ed*, 343.
- British Commonwealth members and. R. R. Wilson. *Ed*. 778.
- Chinese participation in. M. S. McDougal and R. M. Goodman, *LA*, 671; criteria and procedures for determining, 718.
- Communist China and. M. S. McDougal and R. M. Goodman. *LA*. 703, 708.
- Conditions for admission to membership. M. S. McDougal and R. M. Goodman, *LA*, 683, 685; I.C.J. advisory opinion quoted, 690.
- Convention on the Elimination of All Forms of Racial Discrimination, 1965. 650; J. Carey, *CN*, 799; Art. 15 quoted, 800.
- Credentials procedure. 695; the Chinese question, M. S. McDougal and R. M. Goodman, *LA*, 674, 677.
- Declaration by, 1942, C. G. Fenwick, *LA*, 478; Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 1965, 662.
- Double standard on human rights complaints. J. Carey. *CN*. 792.
- Eichelberger, C. M. The First Twenty Years. *BE*. 611.
- High Commissioner for Human Rights. Proposed establishment of. 794, 802; J. P. Humphrey quoted, 802.
- International Law Commission. See International Law Commission.
- Membership in. Chinese question. M. S. McDougal and R. M. Goodman. *LA*. 671.
- Peace and Progress. A. Ross. *BE*. 873.

- Peacekeeping. C. G. Fenwick, *LA*, 479; forces for, Communist Chinese attitude, 716; financing of, statement of U. S. Ambassador Goldberg on application of Arts. 17 and 19 of Charter, 104.
- Practice with regard to admission of states to membership. 686.
- Program of Assistance and Exchange in Field of International Law. Resolution, 1965. 664; *CN*, 526; J. N. Hazard, *Ed*, 342.
- Protection of minorities. F. Ermacora, *Der Minderheitenschutz in der Arbeit der Vereinten Nationen*. *BN*. 885.
- Representation in. Chinese question. M. S. McDougal and R. M. Goodman, *LA*, 671, 675; U. N. practice, 693; U. N. Secretariat Memorandum on Legal Aspects, quoted, 678.
- Seminar on International Law, Geneva, 1965. I.L.C. Report, 1965. 241.
- Specialized Agencies. Communist attitude toward. 711.
- The United States and. F. B. Gross. *BN*. 151.
- United Nations Charter:
- Amendments 1963/1965. E. Schwelb. *CN*. 371.
 - Arts. 4, 5, 6 on membership. Quoted, 673, 723; M. S. McDougal and R. M. Goodman, *LA*, 685, 692, 721, 722.
 - Arts. 17 and 19. Application of. Statement of U. S. Ambassador Goldberg. 104.
 - Art. 18 on voting procedure. *Cited*. 680, 722.
 - Art. 51. Collective self-defense under. Q. Wright. *LA*. 751, 764.
 - Art. 109. Amendments of. E. Schwelb. *CN*. 374.
- Friendly relations and co-operation among states in accordance with. United Nations resolutions, E. McWhinney, *CN*, 357, *LA*, 3, 5; United Nations Special Committee, Mexico City Conference, 1964, E. McWhinney, *LA*, 1; Report before U. N. Sixth Committee, E. McWhinney, *CN*, 356.
- Obligations of. Southeast Asia Collective Defense Treaty, 1954. 647.
- Use of force in accordance with. Before U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. 11, 14; Czechoslovak proposal, 8; Ghana-India-Yugoslav proposal, 11; United Kingdom proposal, 8, 11; U. S. proposal, 23; Yugoslav proposal, 11.
- United Nations Educational, Scientific and Cultural Organization. Technical assistance in field of international law. U. N. Resolution, 1965, 665; *CN*, 526; J. N. Hazard, *Ed*, 344, 345, 347.
- United Nations Emergency Force. Communist Chinese Government statement. 716.
- United Nations General Assembly:
- Ad hoc Political Committee. Discussion of U. N. recognition of the representation of a member state. 679.
 - Chinese participation in. Criteria and procedures for determining. 719, 721, 722, 723.
 - Competence to determine participation of China in U. N. 720; criteria and procedures, 722.
 - Practice regarding changes in government of member states. 692.
 - Quasi-legislative competence. R. A. Falk. *Ed*. 782.
- Resolutions. Legal effect, 720; quasi-legislative force. R. A. Falk, *Ed*, 782; status in international law, E. McWhinney, *LA*, 31.
- Resolutions: Chinese representation in the United Nations (1668 (XVI)), 675, 680; nuclear weapons in outer space (1884 (XVIII)), *cited*, 789, use of (1653 (XVI)), *cited*, 787, 789; permanent sovereignty over natural resources (1803 (XVII)), *cited*, 789; principles of international law concerning friendly relations and co-operation among states in accordance with the U. N. Charter (1815 (XVII), 1966 (XVIII)), E. McWhinney, *CN*, 357, *LA*, 3, 5, 6; representation of members in the United Nations (396 (V)), 675, 679, 697, 720; Southern Rhodesian independence, 921; technical assistance to promote the teaching, study, dissemination and wider appreciation of international law (2099 (XX)), 664, *CN*, 526, J. N. Hazard, *Ed*, 342; Uniting for Peace (377 (V)), 378.

- Rules of procedure. Amendment of, E. Schwelb, *CN*, 378; on credentials of representatives, 674.
- Sixth Committee. Consideration of report of Special Committee on Principles of International Law on Friendly Relations and Co-operation among States, E. McWhinney, *CN*, 356; discussion of technical assistance to promote teaching and study of international law, J. N. Hazard, *Ed*, 342.
- Special Committee on Apartheid Policy of South Africa. Petitions before, 796, 798.
- Special Committee on Chinese participation in U. N. 679.
- Special Committee on Colonialism. Individual petitions before, 796, 803; South West Africa petitions before, 797.
- Special Committee on Peace-Keeping Operations. Communist Chinese attitude, 714, 715.
- Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States. E. McWhinney, *CN*, 356, *LA*, 3; Mexico City Conference, 1964, E. McWhinney, *LA*, 1; Report before U. N. Sixth Committee, E. McWhinney, *CN*, 356.
- Special Committee on South West Africa. 797.
- Special Committee on Technical Assistance to Promote the Teaching, Study, Dissemination and Wider Appreciation of International Law. Report, *CN*, 526; J. N. Hazard, *Ed*, 344; U. N. Resolution, 1965, 664, 665.
- United Nations Institute for Training and Research. U. N. Resolution on Technical Assistance to Promote the Teaching, Study, Dissemination and Wider Appreciation of International Law, 1965. 666; *CN*, 528; J. N. Hazard, *Ed*, 343, 347, 349, 354.
- United Nations Secretariat. Memorandum on Legal Aspects of Problems of Representation in the United Nations. Quoted. 678.
- United Nations Secretary General. Communist Chinese attitude toward, 710; statement on amendments to U. N. Charter and elections to Security Council and Economic and Social Council, 372.
- United Nations Security Council:
- Communist Chinese participation in. Criteria and procedures for determining. 718, 723.
 - Competence to determine participation of China in U. N. 720; criteria and procedures, 721, 722.
 - Law, Politics and. T. J. Kahng. *BN*. 438.
 - Nationalist Chinese participation in. Criteria for determining. 718, 724.
 - Practice with regard to changes in government of member states. 693.
 - Resolutions concerning independence of Southern Rhodesia. 924.
 - Rules of Procedure regarding credentials of representatives. 674.
- United States:
- And the Organization of American States. Y. Chang. *BN*. 438.
 - And the United Nations. F. B. Gross. *BN*. 151.
 - Application of International Road Traffic Convention, 1949, in. Statement of Department of State, Aug. 31, 1965. 96.
 - Bilateral agreements on peaceful uses of atomic energy. M. Willrich. *LA*. 37, 51.
 - Citizens. Claims against foreign governments: Logan Act and, 268, D. F. Vagts, *LA*, 291; Scheidt v. Federal Republic of Germany, Arb. Comm. on Property, Rights and Interests in Germany, 1965, *JD*, 129; unauthorized communication with foreign governments, Logan Act, D. F. Vagts, *LA*, 268, 281.
 - Civil Aeronautics Board, Island Airlines, Inc., v., 352 F. 2d 735. *Cited*. 593.
 - Constitution. The Logan Act and. D. F. Vagts. *LA*. 292.
 - Contemporary practice relating to international law. 91, 385, 559, 824.
 - Courts in Ryukyu Islands. Jurisdiction of. *Rose v. McNamara*, 252 F. Supp. 111. *JD*. 866.
 - Criminal Code. Cited on definition of foreign government. 283.
 - Cuban Assets Control Regulations. *Sardino v. Federal Reserve Bank of New York and the U. S. Secretary of the Treasury*, Ct. App., 2nd Cir., 1966. *JD*. 862.

- Declaration on Indochina, 1954. 645; quoted, 759, 769.
- Fishery zone. Proposed 12-mile. Letter of Department of State. 831.
- Foreign Agents Registration Act. *Cited*. 295, 300.
- Foreign Assistance Act. Sabbatino Amendment. American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary and Djakarta Lloyd Lines, U. S. Dist. Ct., N. J., 1966, *JD*, 858; application to Sabbatino case, Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, *JD*, 107.
- Foreign relations. Congressional role in, Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, *JD*, 107; interference by private citizens, the Logan Act, D. F. Vagts, *LA*, 268, 281.
- Foreign Relations Law of the United States. Restatement. Cited on extraterritorial jurisdiction of criminal statute. 293.
- Immigration and Nationality Act, 1952. Jurisdiction over foreign naval deserter. United States ex rel. Martinez-Angosto v. Mason, 344 F. 2d 673. *JD*. 125.
- Logan Act. 268; D. F. Vagts, *LA*, 268; interpretation of, 281; Wharton, Criminal Law, cited on, 293.
- Mediation of British Honduras dispute, Guatemala-United Kingdom. Department of State statement, 1965. 396.
- Military action in Dominican Republic. Intervention or collective self-defense, C. G. Fenwick, *Ed*, 64; unilateral intervention, R. T. Bohan, *ON*, 809.
- Military air accident in Spain. Aide memoire to Soviet Government. 559.
- Nationality law and treaty exemption of aliens from compulsory military service. In re Petition for Naturalization of Regan, 244 F. Supp. 664. *JD*. 405.
- Neutrality policy, 1914-1940. C. G. Fenwick, *LA*, 476, 478; World War I, Smith, G., Britain's O clandestine Submarines, 1914-1915, *BE*, 141.
- Position at U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964. 15, 23, 27, 358; statement by W. P. Rogers in U. N. Sixth Committee, 359; position regarding Communist China and the United Nations, 676, 720, regarding financing of U. N. peacekeeping operations, statement of Ambassador Goldberg, 104.
- Public Vessels Act. Nicholas E. Vernicos Shipping Co. v. United States, 349 F. 2d 465. *JD*. 403.
- Recognition of state of Singapore. Note of Aug. 11, 1965. 96.
- Support of Free Elections Abroad. T. P. Wright. *BE*. 432.
- Trading with the Enemy Act. Sardino v. Federal Reserve Bank of New York and U. S. Secretary of the Treasury, Ct. App., 2d Cir., 1966. *JD*. 862.
- Treaty provisions relating to acquisition and ownership of property and rights of inheritance, 94; regarding notification of consular officers of arrest of nationals, 385.
- Understanding regarding Southeast Asia Collective Defense Treaty, 1954. 649.
- Viet-Nam, defense of. As intervention, Q. Wright, *LA*, 754, 760, 762; legality of participation in, Memorandum of Legal Adviser, Department of State, 565, *cited*, 750, 753, 755, 759, 762, 765; quoted, 753, 757, 758, 761, 762, 763, 766, Q. Wright, *LA*, 750; proposed ASIL resolution by W. G. Rice, 549; use of tear gas in, Statement of Secretary of State Rusk, 102. *See also* Viet-Nam below.
- Warsaw Convention on International Transportation by Air. Denunciation, Statement of Department of State, Nov. 15, 1965, 395, withdrawal of, 826; reservation to, Warren et al. v. Flying Tiger Line, Inc., 352 F. 2d 494, *JD*, 593, *cited*, 396.
- Withdrawal of diplomatic and consular representatives from Republic of Congo (Brazzaville). Note of Secretary of State, 1965. 91.
- United States Congress. Legislative competence with regard to act of state doctrine, Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, *JD*, 107; Resolution of Aug. 7, 1964, on repelling armed attack and preventing aggression, quoted, 768, Q. Wright, *LA*, 755, 768; role in foreign relations, Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, *JD*, 107.

United States Department of State:

Legal Adviser. Memorandum on legality of U. S. participation in defense of Viet-Nam. 565; *cited*, 750, 753, 755, 759, 762, 765; *quoted*, 753, 757, 758, 761, 762, 763, 766; Q. Wright, *LA*, 750.

Letters regarding immunity from suit of King and Kingdom of Saudi Arabia, Sept. 14, 15, 1965, 100, 101; regarding proposed U. S. 12-mile fishery zone, 831.

Statements: application of International Road Traffic Convention, 1949, in the United States, 96; submission to Senate of reservations to multilateral treaties, 563; U. S. denunciation of Warsaw Convention on International Transportation by Air, 395, plan concerning continued U. S. adherence, 824; U. S. mediation of Guatemala-U. K. dispute over Belize, 396.

United States Secretary of State:

Letter to President of International Red Cross Committee on application of Geneva Conventions to Viet-Nam hostilities. 93.

Note to Ambassador of Congo Republic (Brazzaville) on withdrawal of U. S. diplomatic and consular representatives. 91.

Report of Acting Secretary on Convention on Settlement of Investment Disputes between States and Nationals of Other States. 560.

Report on Togo-U. S. Treaty of Amity and Economic Relations, 1966. 824.

Reports on customs conventions: temporary duty-free entry of commercial samples, 827; containers, 828; goods, 827; professional equipment, 827.

Universalism. Y. Chiang *quoted on*. 262.

Universality. Membership in U. N. and. M. S. McDougal and R. M. Goodman. *LA*. 684, 727.

U Thant, U. N. Secretary General. Communist Chinese attitude toward, 710; *quoted on* Chinese participation in U.N., 696.

Utassi's Will, *In re*, 261 N.Y.S. 2d 4. *JD*. 127.

Vagts, Detlev F. The Logan Act. *LA*. 268.

Váli, Ferenc A. *BN*: Faust, 440; *BE*: Gorove, 616.

Van Eekelen, W. F. Indian Foreign Policy and the Border Dispute with China. *BR*. 431.

van Emde Boas, Menno J., and H. F. van Panhuys. Legal aspects of pirate broadcasting. *LA*. 303.

van Panhuys, H. F., and M. J. van Emde Boas. Legal aspects of pirate broadcasting. *LA*. 303.

Vasak, Karel. La Convention Européenne des Droits de l'Homme. *BN*. 145.

Vásárhelyi, István. Restitution in International Law. *BN*. 623.

Vattel, Emeric de. Le Droit des Gens. *Cited on* jus cogens. 56.

Venezuela, Republic of, Chemical Natural Resources Inc. v., 215 At. 2d 864. *JD*. 838.

Verbit, Gilbert. *BR*: International Law Association, 880.

Verdross, Alfred. Jus dispositivum and jus cogens in international law. *LA*. 55; *cited*, 511.

Vernicos, Nicholas E., Shipping Company v. United States, 349 F. 2d 465. *JD*. 403.

Veronica, The. Radio broadcasting off Dutch coast. Netherlands legal position.

H. F. van Panhuys and M. J. van Emde Boas. *LA*. 303, 319, 324, 326, 339.

Verosta, Stephen. Statement regarding technical assistance in teaching and study of international law. 349, 353.

Verzijl, J. H. W. *Cited on* nationality of ships and genuine link theory. 319.

Viacao Aerea Rio Grandense, S. A. Empresa, Tramontana v., 350 F. 2d 468. *JD*. 408.

Vienna Convention on Diplomatic Relations, 1961. Myslil, S. Diplomatieké Styky a Imunity. *BN*. 150.

Viet-Nam:

British Commonwealth mission to re-establish peace in. Report *quoted*. 780.

Civil administration. Armistice Agreement, 1954. 632.

Communist attitude toward. 715.

- Demilitarized Zone. Armistice Agreement, 1954. 629, 638.
- Free general elections. Q. Wright, *LA*, 759; Armistice Agreement, 1954, 632, quoted, 761; Dwight D. Eisenhower cited, 754, quoted, 752; Geneva Conference Declaration on Restoring Peace in Indo-China, 1954, 644, quoted, 761, Q. Wright, *LA*, 755, 760; U. S. Declaration on Indochina, 1954, 645, quoted, 759.
- Free territory of. Armed attack against. Southeast Asia Collective Defense Treaty, 1954. 647; Protocol, 649; U. S. Understanding, 649; Q. Wright, *LA*, 769.
- Hostilities in:
- Application of Geneva Conventions for Protection of War Victims, 1949. Exchange of letters between President of International Red Cross Committee and Secretary of State, 1965. 92.
 - Cessation of. Armistice Agreement, Commander-in-Chief, French Union Forces in Indo-China—Commander-in-Chief, People's Army of Viet-Nam, 1954. 629, quoted, 761, Q. Wright, *LA*, 756, 760, 764; Geneva Conference Declaration on Restoring Peace in Indo-China, 643, quoted, 761, Q. Wright, *LA*, 757, 760; North Viet-Nam position, 752, 753; U. S. Declaration on Indochina, 645, quoted, 759, 769; U. S. position, 750, 753, 761, 762, 765, 769.
 - Legal aspects of. Q. Wright. *LA*. 750.
 - Use of tear gas in. Statement by Secretary of State, 1965. 102.
 - Wright, Q. Escalation of International Conflicts. Quoted. 769.
- International Commission for Supervision and Control. Armistice Agreement, 1954, 630, 633, 635, 636, 637, 638; co-operation with International Control Commissions in Cambodia and Laos, Armistice Agreement, 1954, 642.
- Provisional Military Demarcation Line. Armistice Agreement, 1954. 629; Declaration of Geneva Conference on Restoring Peace in Indo-China, 644.
- Unification of. Armistice Agreement, 1954. 632; Declaration of Geneva Conference on Restoring Peace in Indo-China, 644; United States Declaration on Indochina, 645.
- United States participation in defense of. Legality. Memorandum of Legal Adviser, Department of State, 565, Q. Wright, *LA*, 750; proposed ASIL resolution, 549.
- Viet-Nam-United States. Treaty of Amity and Economic Relations, 1961. Art. 1 on arrest of nationals. 394.
- Viet-Nam, Democratic Republic of. Position regarding hostilities in Viet-Nam, 752, 753; transfer of civil administration to, Armistice Agreement, 1954, 633.
- von Glahn, Gerhard. Law Among Nations. *BE*. 131.
- von Mehren, Arthur T., and K. H. Nadelmann. The extraordinary session of the Hague Conference on Private International Law, 1966. *CN*. 803.
- Voorhees v. Morrison, Miami Div., S. D. Florida, 1963. Cited on Logan Act and Tractors for Freedom Committee, 279; U. S. Memorandum cited, 279, 285.
- Wacker v. Bisson, 348 F. 2d 602. *JD*. 400.
- Waldron v. British Petroleum Co., 231 F. Supp. 72. Logan Act interpretation. *Cited*. 280, 288, 289, 299, 301.
- Wallace, Henry. European tour and Logan Act. 276, 289.
- Wamsley, Gary L. *BN*: Stanger, 148.
- Wang Min-yao and Sung Chen-yu, Public Prosecutor v., Taipei Dist. Ct., 1965. *JD*. 411.
- Wang Tieh-yeh. Quoted on study of international law in Communist China. 267.
- War:
- Communist Chinese attitude. 703.
 - Laws of. C. G. Fenwick, *LA*, 475; F. M. de Lasala Samper, La Protección a los Heridos, Enfermos y Naufragos de las Fuerzas Armadas en Campaña, *BN*, 437; Menzel v. List, 267 N.Y.S. 2d 804, *JD*, 851.
 - Munitions. Introduction of. Cambodian and Laotian declarations, Geneva Conference Declaration on Restoring Peace in Indo-China, 643; Viet-Nam Armistice Agreement, 1954, 635, Geneva Conference Declaration on Restoring Peace in Indo-China, 643.

- Nature of. K. S. Carlston. *LA.* 728.
- Steps toward elimination. K. S. Carlston. *LA.* 731.
- War booty. *Menzel v. List*, 267 N.Y.S. 2d 804. *JD.* 851.
- War crimes. Jus cogens and, A. Verdross, *LA.* 60; W. Meier, Die Bestimmungen über das Kriegsverbrechens- und Besatzungsstrafrecht in den Genfer Abkommen zum Schutze der Kriegsoffer von 1949, *BN.* 887.
- War-peace issues. A framework for the legal analysis of. K. S. Carlston. *LA.* 728.
- War propaganda. Before U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. 10; Czechoslovak proposal, 8.
- War victims. Geneva Conventions for Protection of, 1949. W. Meier, Die Bestimmungen über das Kriegsverbrechens- und Besatzungsstrafrecht in den Genfer Abkommen zum Schutze der Kriegsoffer von 1949. *BN.* 837.
- Warren, Charles. History of Logan Act. *Cited.* 274.
- Warren, Earl, Chief Justice. Quoted on world rule of law. 362.
- Warren v. Flying Tiger Line, Inc.*, 352 F. 2d 494. *JD.* 593; *cited.* 396.
- Warsaw Convention on International Air Transportation:
- Art. 3. Quoted, 593; *Warren v. Flying Tiger Line, Inc.*, 352 F. 2d 494, *JD.* 593, *cited.* 396.
- Belgian ratification of. *Kelley v. Société Anonyme Belge d'Exploitation de la Navigation Aérienne*, 242 F. Supp. 129. *JD.* 124.
- Determination of forum under. *Eck v. United Arab Airlines, SAA*, 241 F. Supp. 804, *JD.* 125; *Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874, *JD.* 410.
- United States denunciation of. Statement of Department of State, Nov. 15, 1965, 395; withdrawal of, 826; Department of State statement and plan for continued adherence, 824.
- United States reservation. *Warren et al. v. Flying Tiger Line, Inc.*, 352 F. 2d 494. *JD.* 593; *cited.* 396.
- Washington, Act of, 1964, on admission of new members to O.A.S. Act of Rio de Janeiro, 1965. 447.
- Washington World Conference on World Peace through the Rule of Law, 1965. C. G. Fenwick, *CN.* 68; C. S. Rhyne, *CN.* 361; Declaration of Faith in World Order under Law, 366.
- Wei Liang. Quoted on treaties as a source of international law. 258.
- Weil, Gordon L. Handbook on the European Economic Community. *BN.* 622.
- Welsh Panel Co., Oregon-Pacific Forest Products Corp. v., 248 F. Supp. 903. *JD.* 594.
- Western industrial world. Trade relations within. Summary report, ASIL Board of Review and Development. *CN.* 539.
- Wetter, J. Gillis, and S. M. Schwebel. Arbitration and exhaustion of local remedies. *LA.* 484.
- Wharton, Criminal Law. Cited on Logan Act. 293.
- White House Statement, Oct. 2, 1965, on Viet-Nam. *Cited.* 750; quoted, 754.
- Wildeboer, Ina H. The Brussels Salvage Convention. *BR.* 881.
- Wilk, Kurt. Quoted on universality of international law. 254.
- Willrich, Mason. Safeguarding atoms for peace. *LA.* 34.
- Wills, execution of. In re Harris' Will, 263 N.Y.S. 2d 393. *Cited.* 411.
- Wilson, Robert R. International law and the Commonwealth, 1907-1967. *Ed.* 770; *BR.* Canadian Yearbook of International Law, 1964, 421; Castel, 874.
- Woetzel, Robert K. *BN.* Meier, 887.
- Wolff, Christian. Jus Gentium. Cited on jus cogens. 56.
- Wolfke, Karol. Custom in Present International Law. *BR.* 133.
- Wolfson, Marc. L'Utilisation à des Fins Autres que la Navigation des Eaux des Fleuves, Lacs et Canaux Internationaux. *BR.* 424.
- Work. Equal right to. I.L.O. Convention on Employment Policy, message of President L. B. Johnson, 833; U. N. Convention on Elimination of All Forms of Racial Discrimination, 1965, 654.

- World government. The Popes and, E. Guerry, *BN*, 436; before U. N. Special Conference on Friendly Relations and Co-operation among States, E. McWhinney, *LA*, 28, 32.
- World Judicial System. Approval by Washington Conference on World Peace through Law, 1965. 361.
- World law. Before U. N. Special Conference on Friendly Relations and Co-operation among States, 1964. E. McWhinney. *LA*. 28, 31.
- World Law Code. Approval by Washington Conference on World Peace through Law, 1965. 71, 362.
- World Law Day. C. G. Fenwick, *CN*, 71; C. S. Rhyne, *CN*, 362, 364.
- World Peace through Diplomacy and Law. R. Regala. *BE*. 609.
- World peace through law. U. N. Special Conference on Friendly Relations and Co-operation among States, 1964, E. McWhinney, *LA*, 1; Washington Conference, 1965, C. G. Fenwick, *CN*, 68; C. S. Rhyne, *CN*, 361.
- See Peace, international.
- World Peace through Law Center, Geneva. C. G. Fenwick, *CN*, 71; C. S. Rhyne, *CN*, 365.
- World revolution. Communist Chinese attitude. 703.
- World War I. Britain's Clandestine Submarines, 1914-1915, G. Smith, *BE*, 141; laws of war and neutrality in, C. G. Fenwick, *LA*, 476.
- World War II. Damage claims against Germany arising from, Scheidt v. Federal Republic of Germany, Arb. Comm. on Property, Rights and Interests in Germany, 1965, *JD*, 129; Documents on German Foreign Policy, 1918-1945, *BE*, 143.
- Wright, Quincy. The Escalation of International Conflicts, quoted on Viet-Nam hostilities, 769; legal aspects of the Viet-Nam situation, *LA*, 750; *BE*: Barros, 870; Smith, 141.
- Wright, Theodore P. American Support of Free Elections Abroad. *BE*. 432.
- Wu Té-feng. Quoted on international law as law of peaceful coexistence. 245.
- Wurfel, Seymour W. Foreign Enterprise in Colombia: Laws and Policies. *BN*. 624.
- Yemin, Edward. *BE*: Suy, 426.
- Ying T'ao. Cited on municipal law and international law, 260; quoted on bourgeois international law, 250, 257, 261, 262, 263.
- Young, Richard. *BE*: Brinton, 427.
- Yousry, Ahmad, and T. Oppermann. Das Staatsangehörigkeitsrecht der Arabischen Staaten. *BN*. 149.
- Yrujo incident, Spain-United States. Logan Act and. 272, 281.
- Yugoslavia. Proposals at U. N. Special Conference on Friendly Relations and Co-operation among States, Mexico City, 1964. 9, 12, 13, 21, 26.
- Zambia. U.K.-U.S. Consular Convention and Protocol, 1951. Art. 16 on arrest of nationals. 394.
- Zemel v. Rusk, 381 U. S. 1. Cited, 294; quoted, 295.

BACK NUMBERS
of the
**AMERICAN JOURNAL OF
INTERNATIONAL LAW**
and
**PROCEEDINGS OF THE AMERICAN
SOCIETY OF INTERNATIONAL LAW**

THE Society has in stock a limited supply of back numbers of the **Journal** in the original paper bindings for sale at \$4.50 an issue, as follows:

Complete volumes of the **Journal**, that is, four quarterly issues, are available for the years 1951 and 1964. Numbers available for other years are: 1919: *January, April, July*; 1931: *January, April, October*; 1927, 1930, 1963, 1965: *April, July, October*; 1925, 1943: *April, July*; 1918, 1921, 1928, 1936, 1938, 1949, 1959, 1960, 1961: *July, October*; 1922, 1953: *January*; 1926, 1934, 1952, 1957: *July*; 1929, 1937, 1947, 1950, 1955, 1962: *October*.

Supplement, 1935, Part I: Harvard Research Draft Convention and Comment on Extradition.

Special Supplements (paper or cloth): 1917, 1926, 1928.

Single issues of the current volume (1966) may be obtained at \$3.50 a copy.

Proceedings are available for the years 1920-1923, 1943, 1947, 1949, 1951-1963, 1965 at \$5.00 a volume.

Supply of some of the above issues is limited, and their availability is subject to prior sale.

Orders should be sent to the
American Journal of International Law
2223 Massachusetts Avenue, N. W., Washington, D. C. 20008